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REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

TWENTY-FIRST ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Introduction

1. This report is divided into three (3) sections: section one deals with the holding of the 40th Ordinary Session of the African Commission on Human and Peoples' Rights (hereinafter referred to as the ACHPR or the African Commission); section two describes the activities undertaken by members of the Commission during the period covered by the report; and section three deals with Financial and Administrative matters of the Commission. The report has five annexures.

2. The present Report covers the period May - November, 2006.

SECTION I
The 40th Ordinary Session

3. The African Commission held its 40th Ordinary Session in Banjul, The Gambia from 15 – 29 November 2006. The agenda of the session is attached to the present report as ***annexure one (1).***

4. The 40th Ordinary Session was preceded by an NGO Forum organised by the African Centre for Democracy and Human Rights Studies (ACDHRS) in collaboration with the African Commission. The main objective of the NGO Forum, which took place from 12 – 14 November 2006 in Banjul, The Gambia was to provide NGOs working in the field of human rights in Africa with an opportunity to reflect on ways and means of enhancing the promotion and protection of human and peoples' right on the continent in partnership with the African Commission and other relevant stakeholders.

Attendance at the Session

5. The following members of the African Commission attended the 40th Ordinary Session-:

- Commissioner Salamata Sawadogo, Chairperson;
- Commissioner Yassir Sid Ahmed El Hassan, Vice-Chairperson;
- Commissioner Kamel Rezag-Bara;
- Commissioner Musa Ngary Bitaye;
- Commissioner Reine Alapini-Gansou;
- Commissioner Mumba Malila;
- Commissioner Angela Melo;
- Commissioner Sanji Mmasenono Monageng;
- Commissioner Bahame Tom Mukirya Nyanduga; and
- Commissioner Faith Pansy Tlakula.

6. Commissioner Mohammed Abdelahi Ould Babana was absent.

Participation at the 40th Ordinary Session

7. The Session was attended by over three hundred and seventy two participants, representing twenty (20) States Parties,[1] five (5) National Human Rights Institutions[2], numerous African and international Non-governmental Organizations and five (5) Intergovernmental Organizations,[3] including the UN Special Rapporteur on Torture, Prof. Manfred Novak and the Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons, Prof. Walter Kalin. Dr. Abdul Koroma represented the African Union Commission at the session.

8. Welcoming participants to the session, H.E Salamata Sawadogo, Chairperson of the African Commission, spoke on the theme "*it is time for stock taking*". She noted that twenty years after the establishment of the Commission, it was time for the Commission to take stock of the impact it has made in the promotion and protection of human rights on the continent. She challenged all relevant stakeholders in the promotion and the protection of human rights in Africa to evaluate their contribution in the enhancement of human rights on the continent.

9. Other speakers at the opening ceremony included H. E Hosnni Al Wahshi al Saddig, Secretary for Legal and Human Rights Affairs of the Great Libya Jamarahiya, who spoke on behalf of Member States of the African Union, the Chairperson of the Coordinating Committee of African National Human Rights Institutions, Mrs K. F Ajoni and the representative of Non-Governmental Organizations (NGOs), Maitre Mambassa Fall.

10. On behalf of H.E. Dr. Ajaratou Isatou Njie-Saidy, the Vice President and Secretary of State for Women's Affairs of the Republic of The Gambia, Dr. Henry D.R. Carroll, the Acting Solicitor General and Legal Secretary at the Department of State for Justice officially opened the 40th Ordinary Session of the African Commission.

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[1] Algeria, Botswana, Burkina Faso, Cameroon, Central African Republic, Republic of Congo, Egypt, Ethiopia, Gambia, Kenya, Liberia, Libya, Cote d'Ivoire, Mauritania, Nigeria, Senegal, Sudan, Tunisia, Uganda and Zimbabwe.

[2] The National Human Rights Institutions were: the National Human Rights Commission of Burkina Faso, the High Commissioner for Human Rights and Good Governance of Central African Republic, the National Human Rights Commission of Togo, the National Human Rights Commission of Nigeria and the Commission of Human Rights of Zambia.

[3] The following Intergovernmental Organisations were also present at the 40th ordinary session: the Office of the High Commissioner for Human Rights (OHCHR), United Nations High Commissioner for Refugees (UNHCR), Permanent Forum of United Nations on Indigenous issues, the Organisation Internationale de la Francophonie (OIF), the United Nations Children's Fund (UNICEF) and the World Health Organisation (WHO).

Rapporteur of the 40th session

11. Members of the Commission appointed Commissioner Reine Alapini- Gansou to serve as the Rapporteur of the 40th Ordinary Session.

Cooperation between the African Commission and National Human Rights Institutions (NHRIs) and Non-Governmental Organisations (NGOs)

12. During the session, the African Commission considered the applications for affiliate status of the National Human Rights Commission of Uganda and the National Human Rights Commission of Ethiopia and decided to grant such status to these institutions. This brought the number of National Human Rights Institutions with affiliate status before the African Commission to nineteen (19).

13. The African Commission appealed to States Parties that had not yet done so, to establish national human rights institutions and strengthen the capacities of existing ones, in compliance with the Paris Principles and its own resolution on national institutions.

14. During the session, the African Commission also considered the applications of sixteen (16) NGOs seeking observer status before it. In accordance with its Resolution ACHPR /Res.33(XXV)99: Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights adopted in 1999, the African Commission granted observer status to the following NGOs-

- Association des Femmes de Jurists de Côte-d'Ivoire (Côte-d'Ivoire) ;
- Institute of Wildlife, Forestry and Human Development Studies (Zambia);
- Baobab Organization for Women's Rights (Nigeria);
- People Against Injustice (The Gambia);
- Third World Network based (Ghana);
- Centre for Reproductive Rights (USA);
- Freinstein International Centre (USA);
- East and Horn of Africa Human Rights Defenders Project (Uganda);
- Unissons-nous pour la protection des Batwas (Burundi);
- Help Out (Cameroon); and
- Lawyers for Human Rights (Swaziland)

15. This brings the number of NGOs with observer status before the African Commission to three hundred and seventy (370)

SECTION II
Activities of members of the Commission

16. During the period under consideration, members of the Commission undertook several activities aimed at promoting and protecting human and peoples' rights on the continent.

a. Promotion Missions

17. Promotion missions were undertaken to the following countries:

- Commissioner Reine Alapini-Gansou undertook a mission to Cameroon and was assisted by Mrs. Annie Rashidi Mulumba;
- Commissioners Reine Alapini-Gansou and Mumba Malila undertook a joint mission to Uganda assisted by Fiona Adolu;
- Commissioner Sanji Monageng undertook a mission to Mauritius assisted by Fiona Adolu;
- Commissioner Pansy Tlakula undertook a mission to the Kingdom of Swaziland assisted by Mr. Robert Eno.

18. Due to inadequate resources some members of the African Commission were unable to undertake promotion missions earmarked during the period under consideration. However, in collaboration with other partners, some members were able to take part in various other activities, including participating in workshops and seminars.

b. Participation at workshops, seminars and conferences

19. During the period under consideration, the Chairperson, **H.E. Salamata Sawadogo**, participated in the following activities. on 25 May 2006, after the 39th Ordinary Session of the African Commission, paid a courtesy visit to the Secretary of State for Justice of The Gambia during which she expressed thanks to the Government of the Republic of The Gambia for hosting the 39th Ordinary Session of the Commission. On 20 June 2006, the Chairperson addressed the Civil Society Seminar organised by the AU Commission in Banjul, The Gambia. From 20 - 25 June 2006, the Chairperson participated in various civil society activities held parallel to the AU Summit in Banjul, and from 24 -25 June 2006, participated in the Solidarity Forum for Women's Rights (SOAWR) on the acceleration of the ratification and the incorporation of the Protocol on the Rights of Women in Africa in national legislation. The Chairperson also participated in a consultation meeting on the integration of the Gender dimension in the African Union on the theme: "Gender: my Agenda: Campaign on the implementation of the solemn declaration on Gender Equality in Africa".

20. On 25 and 26 June 2006, the Chairperson took part in the meeting of the African Union Permanent Representative Committee (PRC) in preparation for the Executive Council meeting, and from 28-30 June 2006, participated in the deliberations of the Executive Council during which she presented and defended the 20th Activity Report of the ACHPR. On 30 June 2006, the Chairperson participated in a Human Rights Seminar organized by the Department of Political Affairs of the African Union

Commission in partnership with the ACHPR and on 1 and 2 July 2006, took part in the 7th Summit of Heads of State and Government of the African Union. On the occasion of the commemoration of the 25th Anniversary of the adoption of the African Charter on Human and Peoples' Rights, she delivered an important speech before the Assembly of Heads of State and Government of the African Union. On 3 July 2006, the Chairperson participated in the 1st meeting of the African Court on Human and Peoples' Rights and from 10 - 14 July 2006 participated in the 2nd World Human Rights Forum in Nantes, at the invitation of Mr. Jean Marc Eyrault, Deputy Mayor of the said City. She was a member of the jury for the Edit de Nantes Prize.

21. During the intersession, the Chairperson was in contact with the Office of the Chairperson of the African Union Commission and the Department of Political Affairs to discuss issues relating to the functioning of the Secretariat of the ACHPR. She also maintained contact with the Secretariat in a bid to coordinate the activities of the Commission.

22. On 20 October 2006, in Dakar, Senegal, the Chairperson held a meeting with the Director of Programmes of the Open Society Initiative for West Africa (OSIWA), Mr. Godwin Fonye at the request of the International Centre for Ethics, Justice and Public Life to discuss with OSIWA the possibility of funding a project on "Know Your Rights". This project is aimed at translating human rights instruments into African languages. From 6 – 7 November 2006, the Chairperson took part in an international seminar organised by the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, on the theme "Hhuman Rights and the Administration of Justice by military tribunals" From 12 – 14 November, in Banjul, The Gambia, the Chairperson participated at the NGO Forum that preceded the 40th ordinary session of the African Commission, during this period she also visited different workshops that took place parallel to the NGO Forum, in particular, the meeting of the African Commission's Working Group on Indigenous Populations and a workshop on the human rights situation in Darfur.

23. During the period under consideration, the Vice-Chairperson, Commissioner Yassir Mohamed El Hassan, took part in the following activities: On 6 November 2006, he presented a paper on the theme "the African Commission on Human and Peoples' Rights – future plans and challenges" at a meeting organised by the Egyptian Inititive for Personal Rights, Interights, Open Society Initiative and the Faculty of Law of the American University, to mark the 25th anniversary of the adoption and the 20th anniversary of the coming into force, of the African Charter on Human and Peoples' Rights. From 7 – 9 November 2006, the Vice Chairperson participated at the 38th General Assembly of African Airline Association held in Egypt. The meeting discussed among other themes, the contribution of air traffick to the development of the African continent, in particular, the facilitation of the smooth movement of people. The Vice-chairperson, in consultation with the Chairperson, remain constantly in touch with the Secretariat.

24. Other members of the Commission also took part in various activities during the perid covered by the present report. From 18 - 21 May 2006, **Commissioner Rezag Bara**, Chairperson of the Working Group on Indigenous Populations/Communities in

Africa participated in the annual meeting of the United Nations Permanent Forum for Indigenous Populations held at the United Nations Headquarters in New York, USA. From 3 - 10 June 2006, he took part in a training seminar for Magistrates of Headquarters and the Public Prosecutor's Office on human rights at the Higher Institute of Magistracy in Algiers, Algeria. On 13 June 2006, the Commissioner participated in a one-day Parliamentary Studies on NEPAD, Good Governance and the Peer Review Mechanism by the Algerian National Economic and Social Council, in Algiers, Algeria. From 30 June - 2 July 2006, the Commissioner participated in the African Union Summit in Banjul. On 7 September 2006, he participated in the Euro-African Conference of the Chairpersons of the Economic and Social Councils organized in Algiers by the European Union. From 13 - 16 September 2006, Commissioner Rezag Bara participated in a sensitization seminar on the rights of Indigenous Populations in Central Africa, organized by the African Commission in collaboration with the International Working Group on Indigenous Affairs (IWGIA), in Yaoundé, Cameroon, and from 18 - 20 September 2006, participated in a workshop on the study of African legislations relative to Indigenous Populations organized by the African Commission in collaboration with the International Labour Office (Geneva) and the Centre for Human Rights of the University of Pretoria, in Yaoundé, Cameroon.

25. From 4 - 7 October 2006, the Commissioner participated in a seminar on the recommendations of the United Nations Special Rapporteur on Indigenous Populations, in Montreal, Canada and from 5 - 7 November 2006, he participated in an International Conference organized in Algiers by the National Council (SENATE) in collaboration with UNDP on the theme "the Parliament and Civil Society".

26. Commissioner **Angela Melo** undertook the follow activities in her capacity as member of the African Commission. She attended the 9th Ordinary session of the Executive Council of the African Union which took place in Banjul, The Gambia on 30 June 2006 in which the 39th Activity Report of the African Commission was presented. She also attended the opening ceremony of the 7th Summit of Heads of State and Government of the African Union on 1 July 2006 in Banjul, The Gambia. On the same date, she took part in an International Conference to mark the 25th Anniversary of the adoption of the African Charter. Commissioner Melo also developed a draft law on the creation of a national human rights Commission in Mozambique and attended the Council of Minister's Meeting to present the draft law and this law was adopted.

27. Commissioner **Bahame Tom Mukirya Nyanduga** undertook the following activities in his capacity as member of the Commission. On 1 July 2006, he took part in an International Conference to mark the 25th Anniversary of the African Charter on Human and Peoples' Rights, in Banjul, The Gambia. On 31 August 2006, he participated in a Seminar on the theme "Perspectives on the African Commission on the Occasion of the 20th Anniversary of the entry into force of the African Charter on Human and Peoples' Rights" in Addis Ababa, Ethiopia. On 1 September 2006, he participated on a panel of Judges adjudicating the finals of the African Human Rights Moot Court Competition.

28. On 30 June 2006, Commissioner **Sanji Monageng** attended the 9th Ordinary Session of the Executive Council of the African Union, held in Banjul, The Gambia, where the Chairperson of the African Commission presented the 20th Activity Report of the Commission. She also took part in an International Conference that was held in Banjul, the Gambia, to mark the 25th Anniversary of the adoption of the African Charter on Human and Peoples' Rights and on 1 July 2006 she attended the opening ceremony of the 7th Summit of Heads of State and Government of the African Union in Banjul, The Gambia.

29. Commissioner Monageng also attended the Commonwealth Magistrates and Judges Conference from 11 - 15 September 2006 in Toronto, Canada and represented the African Commission at a Seminar for International Parliamentarians in Geneva, Switzerland from 25 - 27 September 2006 organized jointly by the Inter-Parliamentary Union (IPU), the Association for the Prevention of Torture (APT) and the International Commission of Jurists (ICJ), on the theme "Law and justice: the case for parliamentary scrutiny". She presented a paper on "The purposes of sentence – with special emphasis on the sociological, philosophical and human rights perspectives". On 8 November 2006, she delivered a keynote address, at the ECOWAS Consultative Meeting on Networking of National Human Rights Institutions in West Africa held in Banjul, The Gambia from 8 – 10 November 2006 and on 15 November 2006, she delivered a keynote address at the launching of the OMCT Handbook on the Prohibition of Torture and Ill-treatment in the African Human Rights System.

30. From 6 – 7 June 2006, Commissioner **Reine Alapini-Gansou** took part in a Brainstorming workshop on the implementation of the Protocol on the establishment of an African Court on Human and Peoples Rights' in Libreville, Gabon. At the request of the Bureau of the Commission, she represented the Commission at the ECOWAS Meeting on Capacity Building Strategies for National Human Rights Institutions held from 4 - 8 July, 2006. From 16 – 18 October 2006, Commissioner Gansou attended a training for Religious and Traditional Leaders in Donga, Benin and from 24 – 27 October 2006, she took part in a training for Journalists on Women's Rights in Benin. From 30 October – 3 November 2006, she took part in a Seminar on Women and Good Governance organized within the framework of the West African Sub-Regional WILDAF Action Plan, in collaboration with the European Union (EU).

31. Commissioner **Pansy Tlakula** took part in the following activities: on 21 October 2006, she presented a paper at the commemoration of the Africa Human Rights Day in South Africa. The event was jointly organized by the following South African Constitutional bodies - the South African Human Rights Commission; the Electoral Commission of South Africa; the Commission on Gender Equality and the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities. From 10 - 11 November 2006, she attended a Conference on Access to Justice. Organised by the Legal Aid Board of South Africa. She presented a paper on Access to Justice – the African Perspective, with particular reference to the work of the African Commission on Human and Peoples' Rights.

32. Commissioner **Mumba Malila** took part at the 9th Ordinary Session of the Executive Council meeting in Banjul, The Gambia on 30 June 2006 and also attended the opening ceremony of the 7th Summit of Heads of State and Government of the African Union held in Banjul, The Gambia on 1 July 2006. In August 2006, he attended and participated in a Summer School at Katholic University Leuven, Belgium organized by the Universities of Notre Dame, Utrecht and Katholic University and from 18 - 22 September 2006, he attended a Training Workshop on State Party Reporting held in Lusaka, Zambia organized by the Southern African Human Rights Trust (SAHRIT). He also participated at a Course on Indigenous and Tribal Peoples' Rights and Good Practices from 25 - 29 September 2006, organized by the International Labour Organization held in Turin, Italy.

33. Commissioner **Musa Ngary Bittaye** undertook the following activities during the period under review. He worked on a project to promote the knowledge of human rights in African languages. The promotion of Knowledge of Rights in African Languages is a project that aims at promoting the knowledge of human rights in African languages through translating the African Charter on Human and Peoples' Rights as well as its additional Protocols into African languages. The objective is to disseminate as much as possible a better understanding of their content among African peoples. He also undertook a study on possible violations of human rights by Non-state Actors in the African Continent. The Commissioner reported that a draft paper on the subject was available and would be presented at the 41st session.

34. As a Member of the Working Group on Indigenous Populations/Communities, he attended the regional sensitization workshop on the rights of indigenous peoples for Central African States held in Yaoundé, Cameroon between 13 – 16 September, 2006 and also attended a Workshop organized by ILO and the Working Group on Indigenous Populations regarding the methodology and scope of a study and research to identify constitutional, legislative and other measures taken by member states for the protection of the right of indigenous peoples, being piloted by the Centre for Human Rights of the University of Pretoria in South Africa.

35. The Commissioner also joined the Secretariat of the African Commission in celebrations marking Africa Human Rights Day on 21 October 2006. He read the Human Rights Day Message from Her Excellency, Mrs. Julia Joiner.

c. Activities of Special Mechanisms

36. During the period under consideration, these special mechanisms undertook different activities within the competence of the mandate conferred on them by the Commission.

Special Rapporteur on the Rights of Women in Africa, Commissioner Angela Melo

37. From 11 - 12 May 2006, she participated in the final phase of the preparation of the Study of the Secretary General of the United Nations on violence against women in

New York, as a member of the Committee of Experts[4]. On 12 September 2006, in Nairobi, Kenya, she took part in a meeting on the review and planning of the Agenda of the SOAWR Coalition and on 19 September 2006, took part in a seminar on the theme "Implementing Conflict Management through Human Rights Frameworks: Experiences of National Human Rights Institutions", looking experiences of national human rights institutions relating to the management of conflicts, in Cape Town, South Africa. On 22 September 2006, in Maputo, Mozambique, Commissioner Melo participated in a Ministerial Conference of the African Union on sexual and reproductive rights, organized by Bience Gawanas, Commissioner for Social Affairs at the African Union Commission.
38. On 12 October 2006, Commissioner Melo participated in a Seminar organized by the Mozambican Women's NGO Forum pertaining to the new law on inheritance.

39. During the period under consideration, the Special Rapporteur further undertook the following activities: presented the Protocol and the African Commission during a Seminar of Women Jurists of West Africa organized in parallel with the NGO Forum, and met with the representatives of the American Institute Brandeis to discuss a project on the translation of the Protocol into African languages. The Special Rapporteur also met with Mr. Tomalso Falcheta, a representative of Amnesty International about studies on violence and with Mrs. Jacqueline Moudeina, the Chairperson of the Association of Women Jurists of Chad on the Hissen Habré affair and in particular, on the participation of victims in the judicial process. She also met with a representative of the International Francophonie Organization to discuss a project for the dissemination of the Protocol in the francophone countries of the African Union.

40. On 22 and 23 June 2006, the Special Rapporteur took part in the Women's Forum in preparation for the 7th Summit of the African Union. On 23 June 2006 she participated in a meeting on the creation of a Steering Committee on Women, Governance and Development, set up by the Division of Gender and Development of the African Union.

41. On 24 and 25 June 2006, she participated in a public Forum and in a Symposium on the effects of cultural and traditional practices in the implementation of the instruments protecting the rights of women. On 26 and 27 June 2006, she participated in the consultative meeting on Gender organized by *Femme Afrique Solidarité* (FAS).

42. During the 7th African Union Summit in Banjul, The Gambia, she had meetings with several personalities and groups, including the Minister of Foreign Affairs of Niger, the Executive Secretary of SADC and representatives of Women's NGO in Niger. These meetings were aimed at promoting the Protocol on the Rights of Women in Africa.

43. The Special Rapporteur is presently undertaking a comparative study on Gender issues. A study which seeks to compare the protection afforded to women in the Constitutions of the Member States of the African Union.

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[4] The study is available on line on the United Nations website since September 2006

Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons (IDPs), Commissioner Bahame Tom Nyanduga

44. The Special Rapporteur undertook the following activities to discharge his mandate. In June 2006, he attended the 2nd African Ministerial Conference on Refugees, in Ouagadougou, Burkina Faso. The conference reviewed the situation of refugees in Africa since the last Ministerial Conference in Khartoum. Between 15 and 17 September 2006, he attended a meeting of Experts on Internal Displacement and on the Steering Committee on Legislators' IDP Manual, convened by the Boltzmann Institute in Vienna, Austria and the Representative of the United Nations Secretary General on the Human Rights of IDPs, respectively, to discuss the Draft Reports commissioned by the Steering Committee on the Legislators' Manual. On 31 October 2006, he took part in a Roundtable discussions organized jointly by the African Union and the International Committee of the Red Cross (ICRC), to launch the Study on Customary International Humanitarian Law. He presented a paper on the *Interplay between International Humanitarian Law (IHL) and Human Rights: African Perspective*, with particular reference to conflict situation in Africa, and the role played by the African Commission in the promotion of IHL in Africa through its resolutions and decisions, and the applicability of IHL to non-state actors. On 1 November 2006, the Special Rapporteur participated in the 9th AU/ICRC Brainstorming Session held in Addis Ababa, Ethiopia with the Permanent Representatives of AU Member States to the African Union on the role of IHL in the protection of civilians during armed conflicts. He presented a paper on the protection of refugees and IDPs women and children, in particular.

45. In September 2006, he sent a letter to the Government of the Republic of Sudan appealing to the Government to cooperate with the African Union and the UN, in finding an amicable solution to the deployment of the UN peacekeeping force in the Darfur.

Special Rapporteur on human rights defenders, Commissioner Reine Alapini-Gansou

46. In an effort to establish good working relationship with other similar bodies outside Africa, the Special Rapporteur on Human Rights Defenders in Africa on 22 June 2006, through the good offices of the International Society for Human Rights (ISHR), met in Geneva, Switzerland, with Mrs Hina Jilani, UN Special Rapporteur on Human Rights Defenders and Mr. Michael Matthiessen, the European Union Commissioner responsible for Human Rights Defenders. On 17 July 2006, together with her European Union counterpart, called on the Representative of the United Nations Mission in the Democratic Republic of Congo (MONUC) and on the Director of the Human Rights Department MONUC to decide on how to involve the latter in protecting Human Rights Defenders in the DRC.

47. At the invitation of the Carter Centre, she attended a Conference organized by Human Rights First, from 22 - 24 May 2006. The theme of the conference was: "Beyond elections: Human rights defenders at the age of democratization". The objective of the conference was to persuade Human Rights Defenders and their partners to play a more effective role during elections. From 18 – 26 June 2006, she carried out a visit to

Geneva in which she participated in the UN annual meeting of experts on special procedures, and took part in the public session of the Human Rights Council. The primary objective of the working visit was to pursue discussions with Mrs. Hina Jilani and to familiarize herself with the structures of the United Nations Human Rights Bureau.

48. At the invitation of the European Bureau of the Peace Brigade, the Special Rapporteur took part in a seminar on the theme: "Security and Protection of Human Rights Defenders", in Kinshasa in the DRC, from 17 - 18 July 2006. During the Seminar she presented a paper on the protection of human rights defenders within the African human rights system. From 22 July - 1 August 2006, she undertook a joint mission to the Republic of Uganda with Commissioner Mumba Malila, and from 19 - 23 September 2006, participated in a workshop in Bujumbura, Burundi, on the theme, "the role of National Institutions and the Media in the protection of the rights of human rights defenders in Central Africa" organized by the African regional Division of Amnesty International. From 4 - 6 October 2006, the Special Rapporteur participated in a training workshop on the theme "Defence of Human Rights Defenders in the Mano River region" where she presented a paper on her mandate.

49. During the period covered by the present report, the Special Rapporteur also undertook other measures to ensure the protection of human rights defenders on the continent. In this regard, she was in constant contact with States and had fruitful exchanges with them regarding allegations of human rights violations against human rights defenders brought to her attention. On 22 June 2006, for instance, she and her UN counterpart, Mrs. Hina Jilani, discussed with the Nigerian authorities the case regarding the removal of Mr. Bukari Bello as Chief Executive of the Nigerian National Human Rights Commission, and in this context, issued a joint communiqué. The Special Rapporteur also contacted other States on various cases of alleged violations of the rights of human rights defenders, including Tunisia, Algeria, Cameroon, Senegal, Ethiopia, Sudan, Burundi and the Central African Republic.

Special Rapporteur on Freedom of Expression in Africa, Commissioner Pansy Tlakula

50. During the period covered by the present Report, the Special Rapporteur on Freedom of Expression in Africa undertook the following activities: from 13 - 16 August 2006, attended the SABA/MISA/FES Conference on Broadcasting Reforms in Maputo and presented a paper entitled Principles of Freedom of Expression as Basis for Broadcasting Reform on the African Continent. The Special Rapporteur also sent an appeal letter on 2 June 2006, to the Government of the Republic of The Gambia in which she brought to the attention of the Government concerns relating to the arrest and detention of five Gambian journalists. On 9 October 2006, she sent a second appeal to the Government of the Republic of The Gambia, recalling the appeal of 2 June 2006 and welcoming the release of Mr. Lamin Cham, a journalist whose situation was brought to the attention of the Government in the previous appeal, and at the same time, brought nine other cases to the attention of the Government.

Working Group on Indigenous Populations/Communities in Africa (WGIP)

51. During the intersession period, the WGIP undertook numerous activities, including the organization of a regional sensitization seminar, research and information visits, conferences, distribution and dissemination of the Working Group's Report, finalization of a database and an information sheet (folder).

52. The Working Group successfully coordinated the organization of a four day regional sensitization seminar on the rights of indigenous populations/communities in central Africa in Yaoundé, Cameroon, from 13 – 16 of September 2006. Various issues related to the human rights of indigenous populations in Central Africa were discussed by State Delegates, National Human Rights Institutions and resource persons. Based on the positive outcome of the Central African seminar, the Working Group on Indigenous Populations hopes to organize similar seminars in other regions of Africa. The Working Group is undertaking a joint research project with the ILO and the University of Pretoria as the implementing institution. A workshop was held in Cameroon from 18 – 20 September 2006 to discuss the scope, methodology and time frame for this research project. The research will focus on the extent to which African constitutions and legislation protect the rights of indigenous peoples. It will carry out desk reviews of all African countries and in depth studies of 10 selected countries representing the 5 African regions.

53. In May 2006, the Chairperson of the Working Group, Commissioner Rezag Bara participated in the UN Permanent Forum on indigenous issues in New York where he informed participants about the African Commission's work on the rights of indigenous peoples. In October 2006, he and Dr. Naomi Kipuri, a member of the Working Group, participated in a seminar in Montreal Canada organized by Rights and Democracy, a Canadian based NGO, on the work of the UN Special Rapporteur on the Rights of Indigenous Peoples.

Follow-Up Committee on the Implementation of the Robben Island Guidelines (RIG)

54. The Follow-up Committee on the Robben Island Guidelines on prohibition and prevention of torture undertook the following activities during the intersession. The Chairperson of the Committee, Commissioner Justice Sanji Monageng, together with two other members of the Committee had a meeting with Professor Manfred Nowak, United Nations Special Rapporteur on Torture, on 26 September 2006 to discuss ways of cooperation between the two mechanisms. Following this meeting, Prof. Nowak accepted an invitation from the Chairperson of the African Commission to attend the 40th session of the African Commission. During the said session, further discussions were held on how to strengthen cooperation between UN and African human rights mechanisms.

55. Among the issues discussed are cooperation in the area of sharing information and reports, cooperation on follow-up on recommendations issued by the Special Rapporteur and/or the African Commission, joint *in situ* missions,

promotion of the ratification and implementation of the UN Convention against Torture and its Optional Protocol as part of RIG, capacity building and the holding of a joint seminar to sensitize stakeholders on RIGs in order to assess the work of the Follow-up Committee.

56. Due to lack of funds and the lack of response from States Parties, certain activities earmarked by the different mechanisms could not be undertaken.

d. Protection Activities:

57. During the period covered by this report, the African Commission undertook several measures to ensure the protection of human and peoples' rights. This include writing urgent appeals to states in reaction to allegations of human rights violations received from individuals.

58. During the 40th Ordinary Session, the African Commission considered sixty-eight (68) communications, including eleven (11) on seizure, thirty four (34) on admissibility, twenty one (21) on merits and two (2) on review. The Commission finalized decisions on two communications and the decisions are attached to the present report as **annexure two (2).**

59. The Commission also decided to send an urgent appeal to the President of the Republic of Cameroon in accordance with Rule 111(1) of its Rules of Procedure.

60. Following the concern raised by the Republic of Zimbabwe during the presentation of the 20th Activity Report of the African Commission to the 9th Ordinary Session of the Executive Council of the African Union that took place in Banjul, The Gambia from 28 – 30 June 2006, regarding the decision of the African Commission on communication **245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe**, it was decided by the Executive Council that the decision of the Commission on communication 245/2002 be forwarded to the Republic of Zimbabwe, and the latter given three months within which to make its comments thereto. The African Commission was further requested by the Executive Council to submit the response of the Republic of Zimbabwe to it at its next meeting.

61. The African Commission's decision on communication 245/2002 as well as the response of the Republic of Zimbabwe thereto, are attached to the present report as **annexure three (3)**.

Presentation of periodic reports by States Parties

62. In according with the provisions of Article 62 of the African Charter on Human and Peoples' Rights, the Republic of Uganda and the Federal Republic of Nigeria presented their periodic reports.

Status of submission of State Reports

63. The status of submission and presentation of State Reports as at the 40th ordinary session of the Commission stood as follows:

No.	Category	Number of States
1.	States which have submitted and presented all the ir reports	11
2.	States which have not submitted any Report	15
3.	States which have submitted all their Reports and have to present it at the 41st or 42nd Ordinary Session of the African Commission	5
4.	States which have submitted two (2) or more Reports but owe more	8
5.	States which have submitted one (1) Report but owe more	14

The above status of submission of state reports is represented as follows:

No.	State Party	Number of Reports due
States which have submitted and presented all their Reports (11)		
1	Cameroon	-
2	Central Africa Republic	-
3	Egypt	-
4	Libya	-
5	Mauritania	-
6	Nigeria	-
7	Rwanda	-
8	Seychelles	-
9	South Africa	-
10	Sudan	-
11	Uganda	-
States which have submitted all their reports and have to present at		

the 41st Ordinary Session of the ACHPR (5)		
1	Algeria	-
2	Angola	-
3	Kenya	-
4	Zambia	-
5	Zimbabwe	-
States which have submitted two or more reports but owe more (8)		
1	Benin	2 overdue reports
2	Burkina Faso	1 overdue report
3	Gambia	5 overdue reports
4	Ghana	2 overdue reports
5	Namibia	2overdue reports
6	Senegal	1 overdue report
7	Togo	2 overdue reports
8	Tunisia	5 overdue reports
States which have submitted one report but owe more (14)		
1	Burundi	2 overdue reports
2	Cape Verde	4 overdue reports
3	Chad	3 overdue reports
4	Congo (Brazzaville)	1 overdue report
5	Congo(DRC)	1 overdue report
6	Guinea(Rep)	4 overdue reports
7	Lesotho	2 overdue report
8	Mali	3 overdue reports
9	Mauritius	5 overdue reports
10	Mozambique	4 overdue reports
11	Niger	1 overdue report
12	Sahrawi Arab Democratic Republic	1 overdue report
13	Swaziland	2 overdue reports
14	Tanzania	8 overdue reports
States which have not submitted any report (15)		
1	Botswana	10 overdue reports

2	Comoros	10 overdue reports
3	Côte d'Ivoire	7 overdue reports
4	Djibouti	7 overdue reports
5	Equatorial Guinea	11 overdue reports
6	Eritrea	3 overdue reports
7	Ethiopia	4 overdue reports
8	Gabon	10 overdue reports
9	Guinea Bissau	10 overdue reports
10	Liberia	11 overdue reports
11	Madagascar	7 overdue reports
12	Malawi	8 overdue reports
13	Sao Tome and Principe	10 overdue reports
14	Sierra Leone	11 overdue reports
15	Somalia	10 overdue reports

64. The African Commission continues to urge Member States that have not yet done so, to submit their initial and periodic reports. Member States are also reminded that they can combine all the overdue reports into a single report for submission to the African Commission.

Adoption of Reports

65. During the session, the African Commission adopted and transmitted to the respective States Parties, the following reports:

a. Report of Promotion Missions to the Kingdom of Lesotho which took place from 3 – 7 April 2006;
b. Report of Promotion Mission to the Republic of Mauritius which took place from 20 - 25 August 2006;
c. Report of the Mission of the Special Rapporteur on the Rights of Women in Africa to the Republic of Cape Verde which took place from 26 - 30 September 2005; and
d. Report of the Mission of the Working Group on Indigenous Populations/Communities in Africa to the Republic of Niger which took place from 14 – 24 February 2006.

66. The African Commission also took note of the Report of the Expert on the Communication Procedure of the African Commission and of the Information and Research Visit to Libya undertaken by Mr. Mohamed Khattali, Member of the Working Group on Indigenous Populations/Communities in Africa.

67. The Commission also considered and adopted a policy on the recruitment of interns.

68. The Commission adopted its Twenty-First Activity Report to be submitted to the 8th Summit of Heads of State and Government of the African Union.

Adoption of Resolutions

69. The African Commission adopted the following resolutions -:

- Resolution on the establishment of a fund to be financed by voluntary contributions for the African Human Rights system;
- Resolution on the importance of the implementation of the recommendations of the African Commission on Human and Peoples' Rights;
- Resolution on the appointment of a Commissioner as member of the Working Group on Indigenous Populations/Communities in Africa;
- Resolution on the situation of Freedom of Expression in Africa;
- Resolution on the adoption of the Lilongwe Declaration on access to legal assistance in the criminal justice system;
- Resolution on the composition and operationalisation of the Working Group on the Death Penalty
- Resolution on the Human Rights Situation in Darfur; and
- Resolution on the situation of women in the Democratic Republic of Congo;

Organization of Seminars

70. During the intersession, the African Commission, in collaboration with the International Working Group on Indigenous Affairs (IWGIA), organized a four days Sensitisation Seminar on the Rights of Indigenous Populations/Communities in Central Africa, from 13 – 16 September, 2006, in Yaoundé, Cameroon.

71. In collaboration with the Economic Community of West African States (ECOWAS), the Commission organized a three days Seminar on Networking of National Human Rights Institutions in West Africa from 8 – 10 November 2006, in Banjul, The Gambia.

72. Due to lack of funds, the Commission could not organize all the seminars and conferences earmarked in its Strategic Plan of Action of 2002 – 2006.

73. The African Commission reiterated its intention to organize more seminars and conferences, in particular, a seminar on-:

- Terrorism and Human Rights in Africa;
- Islam and Human Rights in Africa;
- Contemporary Forms of Slavery;
- Refugees and Internally Displaced Persons in Africa;

- Seminar on Building the Culture of Peace and Human Rights for the Military / Police ;
- Regional Conference / Seminar for Journalists;
- Human Rights Education Seminar for Teachers;
- Peaceful settlement of ethnic and social conflicts from a human rights perspective;
- The right to education: an essential condition for development in Africa;
- The right of persons with disabilities;
- Freedom of movement and the right of asylum in Africa;
- Ethnic conflict resolution in a human rights context; and
- The right to development and the right to self-determination.

74. The African Commission invited its traditional partners and State Parties to collaborate with it in the organization of these seminars and conferences.

SECTION III
Financial and administrative matters

75. The funding situation at the Secretariat of the African Commission is a cause for concern. Under Article 41 of the African Charter, the African Union Commission is responsible for meeting the cost of the African Commission's operations, including the provision of staff, financial and other resources, necessary for the effective discharge of its mandate.

76. During the 2006 financial year, the Commission was allocated One million one hundred and forty-two thousand four hundred and thirty six United States Dollars (USD 1.142, 436). The bulk of this amount was spent on operational cost.

77. Out of this amount only Forty-five thousand United States Dollars (USD 45,000) was allocated for programmes, including promotion and protection missions of the Commission. This amount did not cover even a third of the twenty two official missions earmarked.

78. The work of the Secretariat of the African Commission thus continues to be severely compromised due to inadequate funding. As a result of inadequate funding, the African Commission continues to resort to extra-budgetary resources to supplement AU funding.

79. The extra-budgetary resources, notwithstanding, the financial and human resource situation at the Secretariat of the African Commission remains critical. As at November 2006, during the holding of the 40th session, the staff situation at the Secretariat of the African Commission stood as follows:

No.	**Position**	**No. of staff needed**	**No. recruited**	**Funder**
1.	Secretary	1	0	-
2.	Deputy Secretary/Legal Coordinator	1	0	-
3.	Legal Officer Protection	3	1	AU
4.	Legal Officers Promotion	3	2	AU
5.	Legal Officers/ Assistants to Special mechanisms	10	4	IWGIA and Rights and Democracy
6.	Adm. and Finance Officer	1	1	AU
7.	Hotline Manager	1	0	-
8.	Legal Officer for NGO's and NHRIs affairs	1	0	-
9.	Funds and Resource Mobilisation officer	1	1	Danish Institute for Human Rights
10.	Documentation Officer	1	0	-
11.	Bilingual Secretary	1	1	AU
12.	Computer Technician	1	1	AU
13.	Website Manager	1	0	-
14.	Translators	2	0	-
15.	Filing Clerk	1	1	AU
16.	Drivers	2	2	AU
17.	Receptionist	1	1	AU
18.	Cleaner	1	1	AU
19.	Security guards	2	2	AU
	Total	**35**	**17**	

80. The above table shows the estimated staff needs of the Commission that would enable it effectively discharge its mandate. The table shows that the Secretariat of the Commission needs a minimum of 35 staff members to be able to work effectively. However, as can be seen from the table, the AU has made provisions for less than half that number.

81. For a Commission mandated to promote and ensure the protection of human and peoples' rights in fifty-three countries, the human, financial and material resources put at its disposal is clearly inadequate.

82. There is therefore an urgent need to recruit more staff to ensure the smooth running of the Commission.

Extra-budgetary support

83. During the period under review, the African Commission benefited from financial and material support from the following partners:

Danish Human Rights Institute

84. The Secretariat of the African Commission continues to be supported by the Danish Institute for Human Rights by financing the post of a Policy, Phasing and Resource Mobilisation Officer as well as an expert. The African Commission is also working with the Danish Institute to develop its next Strategic Plan.

Rights and Democracy

85. The Canadian NGO - Rights and Democracy has supported the Commission with personnel and has put at its disposal three Canadian cooperants since January 2006.

Danish International Development Agency (DANIDA)

86. DANIDA continues to support activities of the Working Group on Indigenous Populations/Communities through the International Working Group on Indigenous Affairs (IWGIA). This support will continue until June 2007. The European Union, through the International Labour Organization (ILO) is also supporting the activities of the WGIP.

87. The African Commission expresses its profound gratitude to all donors and partners, whose financial, material and other contributions have enabled it to discharge its mandate during the period under review.

Adoption of the Twenty First Activity Report

88. In accordance with Article 54 of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights submits the present Twenty First Activity Report to the 10th Ordinary Session of the Executive Council of the African Union, for its consideration and transmission to the 8th Summit of Heads of State and Government of the African Union holding in Addis Ababa, Ethiopia.

LIST OF ANNEXURES

Annexure I	Agenda of the 40th Ordinary Session held from 15 – 29 November 2006, in Banjul, The Gambia
Annexure II	Decisions on communications finalised at the 40th Ordinary Session
Annexure III	Decision on communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe, and Zimbabwe's response to the decision

Annexure I

Agenda of the 40th Ordinary Session held from 15 – 29 November 2006, in Banjul, The Gambia

Item 1: **Opening Ceremony** (Public Session)

Item 2: **Adoption of the Agenda** (Private Session)

Item 3: Organization of Work (Private Session)

Item 4: Human Rights Situation in Africa (Public Session)

a) Statements by State Delegates and Guests;
b) Statements by Intergovernmental Organizations;
c) Statements by National Human Rights Institutions; and
d) Statements by NGOs.

Item 5: Cooperation and Relationship with National Human Rights Institutions and NGOs (Public Session)

a] Cooperation between the African Commission on Human and Peoples' Rights and National Human Rights Institutions:
  i] Relationship with National Human Rights Institutions; and
  ii] Consideration of applications for affiliate status from National Human Rights Institutions.

b] Cooperation between the African Commission on Human and Peoples' Rights and NGOs.
  i] Relationship with NGOs; and
  ii] Consideration of applications of NGOs for Observer Status.

Item 6: Consideration of State Reports (Public Session):

a) Status of Submission of State Party Reports
b) Consideration of -:

  i] The Periodic Report of Nigeria; and
  ii] The Periodic Report of Uganda

Item 7: Promotion Activities (Public Session)

a) Presentation of the Activity Reports of the Chairperson, Vice-Chairperson and Members of the African Commission;
b) Presentation of the Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa;

c) Presentation of the Report of the Special Rapporteur on the Rights of Women in Africa;
d) Presentation of the Report of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa;
e) Presentation of the Report of the Special Rapporteur on Human Rights Defenders in Africa;
f) Presentation of the Report of the Special Rapporteur on Freedom of Expression in Africa;
g) Presentation of the Report of the Chairperson of the Working Group on the Implementation of the Robben Island Guidelines;
h) Presentation of the Report of the Chairperson of the Working Group on the Indigenous Populations/Communities in Africa;
i) Presentation of the Report of the Chairperson of the Working Group on Economic, Social and Cultural rights in Africa;
j) Presentation of the Report of the Working Group on Specific Issues Relevant to the Work of the African Commission;
k) Report of the Working Group on the Death Penalty; and
l) Organisation of Conferences and Seminars.
m) The Durban Conference on Racism – Five Years after (Durban +5)

Item 8: Consideration and Adoption of Draft Reports (Private Session)

Consideration and adoption of mission reports of the African Commission:

a) Draft Reports on the Promotional Missions to the Republics of Burundi, Rwanda, Mali, Uganda, Cameroon, Mauritius and *the* Kingdom of Lesotho;
b) Draft Report of the Working Group on Indigenous Populations/Communities in Africa to the Republic of Niger;
c) Report of information & research visit to Libya;
d) Draft Report of the Mission of the Special Rapporteur on the Rights of Women in Africa to the Republic of Cape Verde;
e) Draft Report of the Special Rapporteur on Women on the Studies on Violence Against Women in Africa

Item 9: Consideration of: (Private Session):

a) Draft Report on the Review of the Communication Procedure;
b) Draft Position Paper on *Locus standi* before the African Commission;
c) Draft Internship Policy of the Secretariat of the ACHPR;
d) Draft Position Paper on the relationship between the African Commission and the African Court;

Item 10: Protection Activities: (Private Session)

a) Report on the Follow-Up of the cooperation between the African Commission and the International Criminal Tribunal for Rwanda; and

b) Consideration of Communications.

Item 11: Methods of Work of the African Commission: (Private Session)

a) Review of the mandate of the Special Rapporteur on Arbitrary Executions and Extra-Judicial Killings in Africa;
b) Appointment of Experts Members of the Working Group on the Death Penalty;
c) Proposal of the Working Group on Indigenous Peoples (WGIP) on its composition;
d) Consideration of the proposal to create Web-pages for the activities of the Special Mechanisms of the African Commission;
e) Presentation of the Strategic Plan of the African Commission (2007-2010); and
f) Cooperation between Special Mechanisms

Item 12: Administrative and Financial Matters: (Private Session):

a) Report of the Secretary on the administrative and financial situation of the African Commission and its Secretariat; and
b) Construction of the Headquarters of the African Commission.

Item 13: Consideration and Adoption of Recommendations, Decisions, and Resolutions including: (Private Session):

a) Recommendations from the NGO Forum; and
b) Resolutions of the ACHPR
c) Concluding Observations on the periodic reports of Nigeria and Uganda.

Item 14: Follow-up on decisions (Private Session):

a) ACHPR decisions taken at the 39th Ordinary Session; and
b) Implementation of the decisions of the AU Executive Council/Assembly
c) Decision on the Sudan Report
d) Response on Resolutions adopted at the 38th Ordinary Session
e) Follow-up on Article 59 interpretation

Item 15: Dates and Venue of:
a) The 41st Ordinary Session of the African Commission (Private Session);
b) The Brainstorming Meeting between PRC & ACHPR (Private Session):

Item 16: Any Other Business (Private Session)

Item 17: Adoption of:

a) The report of the 39th Ordinary Session (Private Session);
b) The report of the 40th Ordinary Session (Private Session)

;
c) the 21st Activity Report of the African Commission (Private Session); and
d) Final Communiqué of the 40th Ordinary Session (Private Session)

Item 18: Reading of the Final Communiqué and Closing Ceremony (Public Session)

Item 19: Press Conference (Public Session)

Annexure II

Decisions on communications finalized at the 40th Ordinary session

a. DECISION ON THE MERITS

Communication 253/2002 - Antoine Bissangou/Republic of Congo

Summary of the facts:

1. On March 14, 1995 the Complainant brought a case against the Republic of Congo and the Municipal Office of Brazzaville before the Court of First Instance of Brazzaville, sitting on civil matters, with a view to obtaining the recognition of the responsibility of the Congolese Republic, as well as reparation for the damage caused to his personal property and real estate following barbaric acts carried out by soldiers, armed bands and uncontrolled elements of the Congolese National Police Force, during the socio-political upheavals that took place in the country in 1993.

2. On February 18, 1997 the civil division of the Court of First Instance passed a ruling ordering the Congolese Republic and the Municipal Office of Brazzaville to pay the following amounts:

Principal amount for all the damage caused:	*180,000,000 FCFA*
Damages:	15,000,000 FCFA
Amount representing legal costs:	7,000 FCFA
Total amount:	195,037,000 FCFA

That is the equivalent of 297,333.98 Euros, the whole being immediately enforceable.

3. On March 19, 1997, the ruling became legally binding and a certificate of no-appeal was issued to the Complainant (see file).

4. In a letter dated May 20, 1999, the Minister of Justice asked the Minister of Economy, Finance and Budget of Congo to enforce the ruling. However, in a letter dated December 30, 1999, the Minister of Economy, Finance and Budget refused to execute the ruling, for no apparent reason.

Complaint:

5. The Complainant alleges the violation of Articles 2, 3 and 21(2) of the African Charter. The Complainant is asking the African Commission to recommend to the Republic of Congo Brazzaville to comply with the ruling which has been passed on behalf of the Congolese people, and to comply at the same time with the provisions of the Charter to which it is signatory.

Procedure

6. The Complaint was received by the Secretariat of the African Commission on 27th June 2002.

7. On 1st August 2002, the Secretariat wrote to the Complainant informing him that the Complaint was registered and that it would be considered at the Commission's 32nd Ordinary Session, which was scheduled to take place from 17th to 31st October 2002 in Banjul, The Gambia.

8. At its 32nd Ordinary Session held from 17th – 23rd October 2002 in Banjul, The Gambia, the African Commission considered the Complaint and decided to be seized thereof.

9. On October 30, 2002 the Secretariat communicated the above decision to the Parties and requested them to submit in writing, their observations on the matter of exhaustion of local remedies. The Secretariat also sent a copy of the Communication to the Respondent State.

10. The Complainant sent his comments on admissibility to the Secretariat in a letter dated 17th December 2002.

11. On 24th March 2003, a reminder was sent by Note Verbale to the Respondent State, requesting its comments on admissibility to be sent to the Secretariat of the Commission.

12. On 25th March 2003, the Secretariat sent the Complainant's observations to the Respondent State and reminded the latter to send its observations concerning the exhaustion of local remedies before the 15th April 2003.

13. During the 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered the Communication and deferred its decision on admissibility to the 34th Ordinary Session. The Parties were requested to send further information on the procedure to be followed for the recovery of the debt.

14. On 23rd June 2003, the Secretariat informed the Parties of this decision and requested the Respondent State to submit its observations on the admissibility of the Communication within three (3) months from the date of the receipt of this Note, and to include the details of Congo's legislation on the matter of debt recovery.

15. On 22nd September 2003, the Secretariat again contacted the Parties involved in the Communication and requested them to submit their written observations on admissibility.

16. On 6th October 2003, the Secretariat received written submissions from the Complainant.

17. The Secretariat acknowledged receipt of the Complainant's submissions on 15th October 2003 and on the same date forwarded the said submissions to the Respondent State reminding it to forward its written submission with regard to admissibility and to provide more information on all the local remedies available in the context of debt recovery in Congolese legislation.

18. On the 4th November 2003, the Secretariat of the African Commission received written observations from the Respondent State.

19. During the 34th Ordinary Session of the African Commission held from 6th to 20th November 2003 in Banjul, The Gambia, the Respondent State made an oral presentation of its grounds of defence on the admissibility of the Communication.

20. After consideration of the Communication during its 34th Ordinary Session, the African Commission decided to defer its decision to the 35th Ordinary Session in order to allow the plaintiff time to submit his written observations on the admissibility of the Communication, taking into account the observations of the Respondent State.

21. On 7th December 2003, the Secretariat notified the Parties of the decision of the African Commission and sent to the Complainant a copy of the observations submitted by the Respondent State.

22. On 9th March 2004, the Secretariat of the African Commission informed the Parties that consideration of the admissibility of the Communication was scheduled for the 35th Ordinary Session. The Complainant was requested to send his reaction to the written observations submitted by the Respondent State.

23. On 30th march and 5th April 2004, the Secretariat of the African Commission received the observations from the Complainant on the matter of admissibility. These observations were forwarded by DHL to the Respondent State on the 30th April 2004.

24. During the 35th Ordinary Session held in Banjul from 21st May to 4th June 2004, the African Commission heard oral submissions from the Respondent State. After having considered the Communication, the African Commission declared it admissible.

25. On 18th June 2004, the Secretariat of the African Commission informed the Parties of the Commission's decision and requested them to submit more information on the merits of the Communication.

26. A reminder was sent to both Parties on 6th September 2004.

27. On the 28th October 2004, the Secretariat of the Commission received the written observations from the Complainant on the merits of the Communication and acknowledged receipt thereof.

28. During the 36th Ordinary Session held from 23rd November to 7th December 2004 in Dakar, Senegal, the African Commission considered the Communication and deferred its consideration on the merits to the 37th Ordinary Session.

29. By correspondence of 20th December 2004, the Secretariat of the Commission informed Parties to the Communication of the above decision.

30. On 10th March 2005, the Secretariat of the Commission conveyed the comments of the Complainant to the Respondent State reminding it to send its written arguments as early as possible.

31. During the 37th Ordinary session held from 27 April to 11 May 2005 in Banjul, the Gambia, the African Commission considered the communication and decided to defer its consideration on the merits to the 38th ordinary session.

32. By correspondence dated 28 June 2005, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the Respondent State to submit its arguments on the merits of the case within two months.

33. The Secretariat of the Commission sent a reminder to the Respondent State on 10 October 2005.

34. At its 38th Ordinary Session held from 21st November to 5th December 2005, the African Commission decided to defer its decision on the merits to the 39th Ordinary Session.

35. On 15th December 2005, the Secretariat of the Commission conveyed this decision on deferment to the Parties.

36. At its 39th ordinary session held in Banjul, The Gambia from 11 – 25 May 2006, the African Commission considered the communication and decided to defer its decision on the merits to its 40th ordinary session.

37. By Note Verbale of 14 July 2006 and by letter of the same date, both parties were notified of the Commission's decision.

38. At its 40th Ordinary Session held from 15 – 29 November 2006 in Banjul, The Gambia, the African Commission considered the communication and took a decision on the merits.

LAW
Admissibility

39. The admissibility of Communications submitted in conformity with Article 55 of the Charter is governed by the conditions spelt out by Article 56 of the same Charter. According to paragraph 56(5), communications can only be considered if they are

submitted "after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

40. According to Article 56(2), communications brought before the African Commission shall be "compatible with the Charter of the Organisation of African Unity of with the present Charter", and in terms of Article 56(5), communication will not be examined unless they "are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged".

41. The Complainant has submitted evidence that he brought an action before the Court of First Instance which delivered a ruling on the 18th February 1997, condemning the Respondent State to pay to him the amount of 195,037,000 FCFA, namely the equivalent of 297,333.98 Euros. This judgment was not contested by the Respondent State. A certificate of no appeal had been delivered to the Complainant by the Registrar of the Court.

42. The Complainant added the certificate of no appeal to the case file, which means that the judgment is final and should be executed. He produced supporting documents certifying that the file had been forwarded by the Ministry of Justice to the Ministry of the Economy, Finances and Budget for execution. The Complainant alleges that despite several notices sent requesting it to honour its debt, the Respondent State has refused to comply.

43. The Complainant alleges that the ruling, in relation to which execution is being called for is final and binding. He contends that the certificate of no appeal added to the case file legally establishes that there are no other remedies to be brought against the said ruling.

44. The Complainant alleges that in a country where the rule of law exists, the fact that an Administrative Officer refuses to execute a decision of the Court against which there are no more legal remedies, is a constitutive case of criminal offence.

45. The Respondent State, in making an oral presentation of its grounds of defence before the African Commission during its 34th Ordinary Session, did not contest the facts of the Complaint. It however raised a plea of inadmissibility regarding the Complainant's request on the grounds that the rule of exhaustion of local remedies had not been observed.

46. Regarding the incompatibility with the Charter, the Congolese State alleges that the object of the communication does not fall under the jurisdiction devolving on the Commission in terms of Article 45 of the Charter that is to promote and protect human and peoples' rights in Africa. According to the State, *"…The African Charter on Human and Peoples' Rights has established a non-jurisdictional mechanism to guarantee rights and freedoms, the decisions of the latter having just a moral significance and are not binding. Therefore, the Commission could not turn into a jurisdiction to consider requests for the payment of money against states."*

47. The Commission observes that the communication is based on allegations of violation of provisions of the Charter which it has the mandate to promote and protect. As the State itself acknowledged it in its submission, the African Commission *"controls the conformity of State Parties actions to African Charter on Human and Peoples' Rights"*. The Commission finds that in the case under consideration, in seizing the Commission, the complainant does not have any other intention than to request the latter to play its role by controlling the conformity to Articles 2, 3 and 21(2) of the Charter of a action (the refusal to enforce a court decision in favour of the complainant) of a State party (the Republic of Congo). The Commission concludes that the object of the communication falls under its mandate and, as a result, finds that the communication is compatible with the Charter.

48. Regarding the exhaustion of local remedies, the Respondent State contends that the Complainant had a remedy against the refusal of the Minister of the Economy, Finances and Budget to execute this ruling in accordance with the provisions of Articles 405 to 409 of the Code of Civil, Commercial, Administrative and Financial Procedure. These Articles stipulate that: *"any citizen who is qualified and so wishes has the right to bring an appeal for annulment against any regulatory or individual decision by an administrative Authority. Such an appeal must be brought within two (2) months from the date of the publication or notification of the grievance on the one hand, and exceptionally within four (4) months in case of silence from the administration which is interpreted as an implicit dismissal, on the other…"* .

49. Article 410 of the same Code adds: *« Nonetheless, before applying for the annulment of an administrative decision, the interested Party may present, within 2 months, an appeal to a higher or the same administrative Authority to cancel the said decision. In such a case, the application for annulment will only be effective either from the date of the notification of the dismissal of the administrative appeal, or on the expiry of the 4 months stipulated in the Article 408 mentioned above".*

50. The Respondent State alleges that in the case under consideration, starting from the date of the notification of the unjustified dismissal of his case by the Minister for Economy, Finance and Budget, the Complainant should have, within 2 months, brought an appeal either to the same administrative authority, or to the Head of Government as a higher administrative authority.

51. The Respondent State contends that such an early administrative appeal would have allowed the Complainant to have the negative decision annulled. Otherwise, the Complainant should have secured the real grounds for the dismissal of his claims to allow him make a submission for an annulment at the expiry of the above mentioned deadlines.

52. The Respondent State alleges that since the refusal of the Minister was an administrative decision, the Administrative Chamber of the Supreme Court was competent to deal with its annulment, in accordance with the provisions of Article 3 of law No. 17-99 of 15th April 1999 modifying and supplementing certain provisions of law No. 025-92 of 20th August 1992 and law No. 30-94 of 18th October 1994 governing the

organisation and functioning of the Supreme Court. This Article stipulates that: "*the Supreme Court shall rule on appeals relating to abuses of power lodged against decisions from various Authorities".*

53. Finally the Respondent State stresses that the Complainant, an attorney by profession, is hardly ignorant of the procedural subtleties of Congolese law and that under the circumstances, he should have submitted his grievances beforehand to the Congolese Courts which have primacy over subsidiary international appeals.

54. The Respondent State concluded that the Complainant did not resort to any internal remedy after the administrative decision rejecting his case and, in consequence, did not comply with one of the essential rules governing the admissibility of Communications before the African Commission, namely that of exhaustion of local remedies.

55. All the conditions laid down by Article 56 have been fulfilled by this Communication. However, the rule stipulating the exhaustion of local remedies as a requirement for the submission of a Communication before the African Commission assumes that the Respondent State should first of all have the opportunity to compensate, by its own means and within the context of its system of domestic law, for any prejudice that may have been caused to an individual.

56. The African Commission, in *Communications 48/90, 50/91 and 89/93 Amnesty International & al./Sudan,* ruled that all local remedies, if they exist, if they are of a legal nature, are effective and are not subordinate to the discretionary power of the public Authorities, should be exhausted.

57. The Commission is of the view that the Complainant has exhausted all local remedies in endeavouring to assert his right to compensation for the prejudice suffered and rejects the Respondent State's claims that he should have appealed against the decision of the Minister before seizing the Commission.

58. The Commission notes that no strict legal provision grants the Minister responsible for the budget any authority to refuse to pay damages which are legally granted. The execution of the judgments made against the Respondent State therefore appears to be subject to the regular procedure provided for in the Administrative Procedure Code (Article 293 and the following ones).

59. Under these circumstances, the question which arises is whether the Complainant should have initiated the procedures of forced execution against the Respondent State as provided for by the Administrative Procedure Code. The Commission considers that it is unreasonable to require from a citizen who has won the case of a payable debt against the State at the end of a legal proceedings to institute procedures of seizure against it (assuming that it is possible to resort to this means of imposition against the public Authorities). As it happened, the Complainant, having duly notified his judgment to the competent Authorities in accordance with the relevant

Articles of the Administrative Procedure Code, he had a right to expect the immediate execution of his judgment.[5]

60. The Commission is of the view that the Minister had not right to hinder or delay the execution of a final judgment without legitimate reason. The Commission observes that the decision of the Minister was unjustified and that the Respondent State did not, at any time try to clarify to the Commission the reasons for the refusal by its Officer. In this context, the Commission supports the position of the European Court according to which even the inability of the Respondent State to pay could not justify the refusal by the Minister to execute a final judgment.[6]

61. Furthermore, the Commission considers that the appeal provided for in Article 402 of the Administrative Procedure Code does not constitute a legal remedy which can be used by the Complainant. The Commission reiterates that local remedies, if any, should be legal, effective and not subject to the discretionary powers of the public Authorities. Concerning the appeal for annulment provided for in Article 410 of the Administrative Procedure Code, the Commission is not convinced that it would have allowed the Complainant to gain satisfaction. Even a ruling by the Supreme Court setting aside the unjustified decision of the Minister would have given the Complainant the power to demand the execution of his judgment without however providing him with any means to enforce this ruling. Under these circumstances, the Commission considers this remedy as ineffective.

62. In conclusion, even assuming that the above-mentioned appeals had enabled the Complainant to recover his debt, the Commission observes that the Complainant had not been informed of the reasons underlying the decision of the Minister, a decision about which, moreover, he does not appear to have been notified.

63. For these reasons and considering the fact that the Complainant had duly exhausted all local remedies, the African Commission declares the Communication admissible.

THE MERITS

64. The Complainant alleges the violation of Article 2 of the African Charter which stipulates that “Every individual has the right to enjoy the rights and freedoms recognised and guaranteed in the present Charter…” and the violation of Article 3 of the African Charter which stipulates that “Every individual shall be equal before the law, every individual shall be entitled to equal protection of the law”.

65. The Complainant contends that the Respondent State does not treat its citizens in the same manner and does not guarantee the total equality of its citizens before the

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[5] See the decision of the European Court of Human Rights in the case *Metaxas vs. Greece,* no. 8415/02, § 19, 27 may 2004.

[6] *Burdov vs. Russia,* no. 59498/03, § 34, 7 May 2002, and *Ruianu vs. Rumania,* no. 34647/97, 17 June 2003.

law by leaving it to the discretion of the Minister of the Economy, Finances and the Budget to choose which judgments to honour. In support of his allegations, he alludes to the letter of the Permanent Secretary of the Minister dated 30th December 1999 which rejects, without justification, the request for execution of his judgment and those of two other people.

66. It is important to point out here that a judgment rendered in the presence of both Parties had jointly and severally condemned the Republic of Congo and the Mayor's Office of Brazzaville to pay the Complainant the amounts of 180,000,000 FCFA representing principal and 15,000,000 FCFA representing damages and interest, in compensation for the prejudice caused to his personal assets and property by the soldiers and officers of the national Police Force during the socio-political upheavals of 1993. Neither the Republic of Congo, nor the Brazzaville Mayor's Office lodged an appeal against the judgment, so that the latter became final on the 19th March 1997. On the 30th December 1999, with no apparent reason, the Permanent Secretary of the Minister of the Economy, Finances and Budget informed the Minister of Justice about his refusal to execute the judgment of the Complainant.

67. The Respondent State does not oppose the facts alleged in this Communication but refutes the allegations of discrimination. It retorts that the three individuals affected by the Minister's refusal do not come from the same ethnic group or region nor do they share the same religion or political opinion. One of the individuals concerned is even said to be a former Minister of the Government who was actually holding office at the time of the rejection. Under the circumstances, the Congolese State contends that the Communication constitutes an abuse of rights in terms of Article 144, paragraph (c) of the African Commission's Rules of Procedure.

68. The two provisions cited by the Complainant repose, on the one hand, on the principle of non-discrimination and on the other, on that of equality. These principles mean that citizens should be treated in a fair and equitable manner before the law and have the right to enjoy, with no distinction whatsoever, the rights guaranteed by the Charter. The right to equality is all the more important since it determines the possibility for the individual to enjoy many other rights.

69. Like Article 14 of the European Convention, Article 2 does not stipulate a general banning of discrimination; it only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter. The Commission considers that the Complainant has not adequately supported his claims of discrimination to show that this Article has been violated; besides, his not having proven how the enjoyment of one of the rights guaranteed by the Charter had been hindered in a discriminatory manner, his Complaint is not based on any of the grounds of discrimination listed out in Article 2 or on grounds similar to the latter.

70. Nonetheless, the Commission notes that Article 3 of the African Charter contains a general guarantee of equality which supplements the ban on discrimination provided for in Article 2. In this regard, the African Charter differs from the European Convention and draws inspiration from the Agreement on Civil and Political Rights. Equality before

the law, protected by paragraph 1 of Article 3, relates to the status of individuals before the law. Equal protection by the law, guaranteed in paragraph 2 relates to the implementation of the law and is applicable where the rights of the Complainant are implemented unequally.

71. The Commission further notes that for Article 3 to be applicable, the inequality alleged by the Complainant should follow from the "law". In this context, the legislative or regulatory Act constitutes the most unambiguous form of law. It is obvious however that Member States could easily circumvent the Charter is the term "law" were to be restricted to these formal methods of legislating. The Commission is of the opinion that the Member States would violate Article 3 if they were to exercise a power or judgment conferred by a law in a discriminatory manner. As it happens, the refusal by the Minister of the Economy, Finances and the Budget is not based on any specific legislative authority. Nevertheless, the Commission feels that it was incumbent on the Minister to honour the judgment by virtue of the rule of law and of the principle of the *res judicata*.

72. In this context the Commission observes that the Complainant was unjustifiably refused the implementation of a legal ruling which had the character of res judicata. The Minister of the Economy, Finances and the Budget rejected his request for execution as well as that of two other individuals for no apparent reason. In his claims before the African Commission, the Respondent State did not put forward any argument to explain the decision of the Minister in rejecting the Complainant's claim. Moreover, in its submissions dated 30 March 2004 in reaction to the complainant's arguments, the State has quoted victims of the same violent events who have been compensated. The Minister thereby transformed the right of the Complainant to an effective remedy before the Courts into an illusion and denied him the right to fair legal compensation. Under these circumstances, the Commission is of the view that the decision of the Minister arbitrarily deprived the Complainant of the protection of the law accorded to other citizens in accordance with the provisions of Article 3 of the Charter.

73. Furthermore, although the Complainant does not specifically mention this Article of the Charter, the examination of the facts shows a violation of Article 7 of the Charter concerning the right to fair trial. The effective exercise of this right by individuals requires that:

> *"All State Institutions against which an appeal has been lodged or a legal ruling has been pronounced conform fully with this ruling or this appeal."*[7]

74. The Commission notes that in similar instances, the European Court of Human Rights declared that the right to access to a Court guaranteed by Article 6 (1) of the European Human Rights Convention would be illusory if the domestic laws of a State allowed a final and binding legal ruling to remain ineffective to the detriment of one Party. The Court therefore ruled that the execution of a judgment, no matter from what jurisdiction, should be considered as being an integral part of the "proceedings" in

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[7] See the Guidelines and Principles on the right to a fair trial and legal assistance in Africa.

accordance with Article 6. The Court further recognised that the effective protection of the person to be tried and the re-establishment of legality constituted an obligation for the State to comply with a judgment or ruling pronounced by the highest Court in the land. In consequence, by virtue of this Article, the execution of a legal ruling can neither be unduly prevented, nullified nor delayed.[8]

75. The Commission is also of the view that the right to be heard guaranteed by Article 7 of the African Charter includes the right to the execution of a judgment. It would therefore be inconceivable for this Article to grant the right for an individual to bring an appeal before all the national Courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings. To interpret Article 14 any other way would lead to situations which are incompatible with the rule of law. As a result, the execution of a final judgment passed by a Tribunal or legal Court should be considered as an integral part of "the right to be heard" which is protected by Article 7.

76. Furthermore, the Commission considers that the refusal by the Minister to honour the judgment passed in favour of the Complainant also constitutes a violation of Article 14 of the Charter. Although the Complainant only alluded to this Article at the moment of his argument, the Commission considers that his initial claims sufficiently supported a claim of violation of the right to property. Drawing inspiration from the jurisprudence of the European Court under Article 1 of Protocol No. 1 of the European Convention,[9] the Commission considers that a monetary compensation granted by judgment having acquired the authority of res judicata should be considered as an asset. Therefore, the unjustified refusal of the Respondent State to honour the final judgment passed in favour of the Complainant hindered the enjoyment of his assets.

77. The African Commission appreciates the fact that in spite of the situation which was then prevailing in the Republic of Congo during the period under review, the Court had been able to act rapidly and firmly in pronouncing the judgements in a bid to restore the rule of law.

78. The African Commission nonetheless remains conscious of the fact that without a system of effective execution, other forms of private justice can spring up and have negative consequences on the confidence and credibility of the public in the justice system.

79. Finally, the Commission wishes to make some comments with regard to the claims of the Complainant based on Article 21 (2) of the Charter. This Article stipulates that "in case of spoliation the dispossessed people shall have the right to the lawful recovery of their property as well as to an adequate compensation". The Complainant contends that the Respondent State violated this Article in refusing to honour a judgment of the Brazzaville High Court upholding the total responsibility of the

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[8] See, among others, the rulings on *Hornsby vs. Greece* of 19th March 1997, Collection 1997-II, pp.510-511, § 40, *Burdov vs. Russia*, cited above, *supra* note 2.

[9] See *Burdov*, cited above; supra note 1, and *Stran Greek Refineries and Stratis Andreadis vs. Greece*, judgment of the 9th December 1994, Series A no. 301-B, p.84.

Respondent State and that of the Brazzaville Mayor's Office in relation to the looting of his assets by the soldiers and the unruly elements of the national Police Force.

80. The African Charter does not provide a definition of the concept of "people" that is found in Articles 19 to 24. This concept nonetheless defines third generation rights whose recognition constitutes the main distinctive feature of the African Charter. Article 21 of the Charter is one of these rights; it guarantees to all peoples the right to freely dispose of their wealth and natural resources. Under the terms of this Article, a people stripped of their wealth and natural resources has the right to the recovery of its property and to an adequate compensation.

81. In *Social and Economic Rights Action Center, Centre for Economic and Social Rights vs. Nigeria, Communication 159/96 (2001),* the African Commission recalled in the following terms, the origin of Article 21: "[This] provision dates back to the colonial period during which the material and human resources of Africa had been greatly exploited by foreign powers, thus creating a tragedy for the Africans themselves, depriving them of their inalienable rights and land". Considering its nature and its objective, this Article can only be referred to in the *exclusive* interest of a people that has the legitimate right to an adequate compensation as well as to the recovery of its assets in case of spoliation.

82. In this case, the movable and immovable property of the Complainant that had been destroyed during the socio-political events which shook the country in 1993 does not constitute the wealth and natural resources of a people but rather individual assets. It is important to point out that in the present Communication the Complainant is acting on his own behalf and on behalf of a group of individuals or of a population living in a given territory. Under these circumstances, the African Commission does not find any violation of Article 21 (2) of the African Charter.

83. The complainant also requests the Commission to prescribe the respondent State to pay him damages and a daily penalty for delay in payment of the sum granted to him by a court ruling, which he estimates at 200.000.000 FCFA et 50.000.000 FCFA respectively.

84. The Commission, although admitting that the complainant suffered some loss due to the delay in the payment of the sum granted by Congolese courts, does not consider itself in a position to put a figure to the loss. This is the reason why, relying on its jurisprudence, especially its decision on communication 59/91,[10] the Commission recommends that the amount of the compensation be determined according to Congolese legislation.

For these reasons, the African Commission

1. **Observes** that the Republic of Congo is in violation of Article 3, 7 and 14 of the African Charter;

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[10] Communication 59/91 *Embga MekongoLouis v Cameroon*, paragraph 2.

2. **Says** that there was no violation of Articles 2 and 21(2) of the African Charter;

3. **Urges** the Republic of Congo to harmonize its legislation with that of the African Charter;

4. **Requests** the Republic of Congo to compensate the Complainant as required by paying him the amount fixed by the High Court of Brazzaville, namely the global amount of 195,037,000 FCFA equivalent to 297,333.00 Euros;

5. **Further requests** the Republic of Congo to pay compensation for the loss suffered by the complainant, the amount of which shall be determined in accordance with Congolese legislation.

Done at the 40th Ordinary Session of the African Commission held in Banjul, The Gambia, from 15 - 29 November, 2006

b. DECISIONS ON ADMISSIBLE

i) Communication 304/2005 – FIDH, National Human Rights Organization (ONDH) and Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) / Senegal

Summary of Facts

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Commission) received a Communication on 2 May 2005 from the above NGOs, which was submitted in accordance with the provisions of Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The Communication is submitted against the Republic of Senegal (State Party[11] to the African Charter and hereinafter referred to as Senegal) and alleges that legislation enacted by the Government of Senegal violates the Government's obligations under the African Charter.

3. On 7 January 2005, the Senegalese Parliament adopted the "Ezzan" law. In Article 1, this law grants a complete amnesty for all crimes committed, in Senegal and abroad, relating to the general or local elections or committed with political motivations between 1 January 1983 and 31 December 2004, whether the authors have been judged or not.

4. Article 2 of the law was found unconstitutional by the Constitutional Court on 12 February 2005 and grants a similar amnesty for all crimes committed in relation to the death of Mr. Babacar Seye, judge of the Constitutional Court.

The Complaint:

5. The Communication alleges that the adoption of the "Ezzan" law violates Article 7.1(a) of the African Charter.

6. The complainants request that the African Commission examine the effects of this legislation and determine whether it is in conformity with the obligations assumed by the State under the Charter.

The Procedure:

7. The Secretariat registered the complaint as Communication 304/05-FIDH, Organisation Nationale des Droits de l'Homme (ONDH) AND Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) / Senegal**.** By letter ACHPR/COMM/304/05/SEN/IH of 4 October 2005, the Secretariat of the African Commission acknowledged receipt of the Communication to the complainants and

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[11] Senegal ratified the African Charter on 13th August 1982.

stated that it would be put on the African Commission's agenda for *prima facie* consideration at its 38th Ordinary Session, scheduled from 21st November to 5th December 2005 in Banjul, The Gambia.

8. At its 38th Ordinary Session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission on Human and Peoples' Rights considered the communication and decided to be seized thereof.

9. By letter ACHPR /COMM/304/05/SEN/IH of 15 December 2005, the Commission kindly asked the parties if they could forward their arguments on admissibility in accordance with Article 56 of the African Charter within three (3) months from the date of this notification.

10. By letter ACHPR/COMM/304/05/SEN/IH of April 4th the Secretariat of the Commission reminded the parties its letter of the 15th of December and kindly asked the parties to submit their arguments on the admissibility.

11. On the 10th April 2006, the Secretariat acknowledged receipt of the Respondent State's correspondence transmitting its arguments on admissibility of Communication 304/05 FIDH & Others against the State of Senegal.

12. At its 39th Ordinary Session which was held from 11th to 25th May 2006 in Banjul, The Gambia, the African Commission considered Communication 304/05 FIDH and others against the State of Senegal and intended to take a decision on the admissibility of the Complaint at its 40th Ordinary Session so as to allow the Complainants time to submit their comments on admissibility.

13. By letter dated 17th July 2006, the Secretariat of the Commission informed the Parties of this decision of the 39th Session and requested the Complainants to convey their comments on the admissibility of this Communication not later than the 30th September 2006, to enable the Commission make a pronouncement thereon during its 40th Ordinary Session scheduled for the 15th to 29th November 2006.

14. On the 10th October 2006, the Secretariat of the Commission received the comments from the Complainants on the admissibility of Communication 304/05.

Law
Admissibility
Arguments of the Complainants

15. The FIDH and its member organizations in Senegal, in their request to institute proceedings, claim that their Communication is being brought against a State Party to the African Charter by NGOs which have Observer Status with the African Commission and that it is alleging the violation of a provision of the Charter, specifically Article 7 (1) which stipulates that::

> "Every individual shall have the right to have his cause heard. This right includes:
>
> The right to appeal to the competent national organs against acts violating his fundamental rights as recognized and guaranteed by Conventions, Laws, Regulations and Customs in force;"

16. The Complainants also claim that local remedies have been exhausted since the Constitutional Council which had been seized by some Members of the National Assembly had declared that the Law in question was in conformity with the Constitution with the exception of Article 2 which had been ruled unconstitutional by the Council. The Complainants recall that under the terms of the Senegalese Constitution, the decision of the Constitutional Council is "the last recourse".

17. The Complainants further specify that their challenge of the Law in question has not been brought before any other international judicial or quasi judicial body.

Arguments of the State

18. The State claims first of all that its statement of defense on admissibility submitted after the three months deadline extension granted by the Commission is admissible so long as the Commission has not arrived at a decision on admissibility, especially where the Rules of Procedure of the Commission do not provide for any sanction of a procedural nature in case of late submission of a statement.

19. The State then emphasizes that a communication submitted in accordance with the provisions of Article 55 of the Charter should be based on verified facts that have caused damage, with real identifiable victims thereby making possible the exhaustion of local remedies. As far as the State is concerned, the Communication submitted by the complainants is based on potential, even hypothetical violations since neither the authors of the communication, nor the Members of Parliament who had brought the case before the Constitutional Council were victims and that their action could hardly be interpreted as an attempt to exhaust local remedies.

20. The Senegalese State is also of the view that the communication is incompatible with the Charter in that the complainants made reference either to cases which have been conclusively dealt with by the law courts, or to events which, having taken place in 1993, fell under the hammer of the decennial prescription well before the promulgation of the law being challenged.

21. According to the State which, for this purpose, is basing its argument on the decision of the Constitutional Council on case No. 1-C-2005 of 12th February 2005, the provisions of the Law No. 2005-05 of 17th February 2005 are clear, without ambiguity and do not at all intend to prohibit recourse to the competent Courts. As far as the State is concerned, by seizing the Commission, the complainants have no other intention than to have the Commission interpret the provisions of a domestic law, competence which, in the State's view, the Commission does not have.

22. The above-mentioned decision by the Constitutional Council had been made on the appeal submitted by Members of Parliament after adoption of the law by the National Assembly and prior to its promulgation by the President of the Republic. The Members of Parliament had requested the Constitutional Council to declare Articles 1, 2, 4 para. 2 and 10 of the law in question as being in conflict with some provisions of the Constitution, notably the preamble and Articles 1, 67, 76 and 88, as well as with some provisions of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights. Whilst it ruled that Article 2 of the law in question was in conflict with the Constitution, the Constitutional Council declared itself incompetent to pronounce on the conformity of the said law with the Treaties ratified by Senegal. The Council considered that:

> "…Article 74 of the Constitution grants the Constitutional Council competence to pronounce solely on the conformity to the Constitution, of laws referred to it for consideration;
>
> …under the terms of Article 98 of the Constitution, "the Conventions or Agreements lawfully ratified or approved have, from their date of publication, competence higher than that of the laws, subject to, for each Convention or Treaty, its application by the other Party"; that these provisions neither prescribe nor entail the checking of the conventionality of the laws within the framework of pronouncement on the conformity of laws with the Constitution as provided for in Article 74 of the said Constitution;
>
> …that it is beyond the competence of the Constitutional Council to assess the conformity of the law with the provisions of an international Convention or Treaty;"

23. The Respondent State considers further that to claim, as the complainants have done, "that in promulgating the amnesty law "Ezzan" passed by National Representation on the 4th January 2005, the President of the Republic of Senegal had allowed the entry into force of a law which violates the above mentioned Article (of the Charter)" is insulting to the State of Senegal and to its democratic institutions.

24. In its oral submission before the Commission during the 40th Session, the Respondent State had re-affirmed that the law as promulgated by the President of the Republic after verification of its conformity with the Constitution had not been subjected to any jurisdictional appeal, and the absence of real and identifiable victims makes such an appeal improbable. The State also recalled that the ruling of the Constitutional Council does not prevent future victims from seizing the competent courts to demand redress for any damage they may have suffered.

25. Furthermore, the State clarified the procedure to be adopted before the Constitutional Council. The Council can be seized through action (before the promulgation of a law) and by exception (after the promulgation of a law). Through action, only the President of the Republic and one tenth of the Members of the National Assembly can challenge a law adopted by the National Assembly before the

Constitutional Council. Through exception, any citizen, during a proceedings to which he is a party before the National Council or the Appeals Court, can challenge the unconstitutionality of a law. In such as case, the National Council or the Appeals Court defers the judgment and seizes the Constitutional Council which first of all has to rule on the constitutionality of the said law.

26. The Respondent State further withdrew its submission on the use of insulting language by the complainants.

27. The State of Senegal prays the African Commission on Human and Peoples' Rights to declare Communication 304/05 inadmissible.

Comments by the complainants on the memorandum of the State on admissibility

28. The complainant NGOs first of all challenge the admissibility of the submission of the State on the grounds that it had not been submitted within the three months deadline given to the State by the Commission.

29. The complainants then go on to refute, one by one, the arguments of inadmissibility raised by the Respondent State. Thus, with regard to the compatibility with the Charter, they contend, using the jurisprudence of the African Commission as basis, notably its decision on communication *245/2002 Zimbabwe Human Rights NGO Forum vs. Zimbabwe,* that to be compatible with the Charter, the communication has only got to invoke the provisions of the law which are presumed to have been violated, and that from then on it is “up to the African Commission, after having considered all the facts at its disposal, to make a ruling on the rights which have been violated and to recommend the appropriate remedy to restitute the rights of the complainant”. According to them, communication 304/05 attempts to denounce the impunity sanctioned by the amnesty law known as “Ezzan” by making it impossible for the perpetrators of crimes to be brought to justice in blatant violation of Article 7.1.a of the Charter.

30. The complainants also assert that the simple fact of declaring that a State Party has violated a provision of the Charter can hardly constitute, on its own, an “insulting” remark, and that “to admit that such an allegation is insulting would result in challenging the principle itself of resorting to the Commission for a remedy”.

31. The complainant also denies having based its Communication on “potential or hypothetical” facts, or limiting itself “to simple declarations by re-echoing the artificial opinions of the Political Opposition”, as is being claimed by the State in its submission. The facts which form the basis of the communication, it contends, have been verified. For the complainant NGOs, both the FIDH and its affiliates in Senegal and other international human rights protection institutions such as the United Nations Human Rights Commission, had previously denounced the human rights violations committed in the context of the electoral process in Senegal.

32. With regard to the identification of the victims, the complainant NGOs recall that Article 56, paragraph 1 of the Charter simply requires that the identity of the authors of a communication be mentioned. They base their argument on the position of the Commission in its decision on communications *54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 Malawi African Association, Amnesty International, Mme Sarr Diop, InterAfrican Human Rights Union and RADDHO, Widows and Entitled Persons Association, Mauritanian Human Rights Association vs. Mauritania* in which case the Commission had felt that the "authors do not necessarily have to be the victims or members of their family". The NGOs also recall in their favour the decision of the Commission according to which Article 56, paragraph 1 does not require that the names "of all the victims of the alleged violations" be indicated (*Communication 159/96 InterAfrican Human Rights Union, International Federation of Human Rights Leagues, African Human Rights Group, National Human Rights Organization in Senegal and the Malian Human Rights Association vs. Angola).*

33. Concerning the exhaustion of local remedies, the complainants recall that according to the terms of the Constitution of the Republic of Senegal, the International Conventions have a supra-legislative value, that some of them, the African Charter included, having been cited in the preamble, even form an integral part of this constitutionality, and that the Constitutional Council is the sole competent body to rule on the constitutionality of a law. They also recall that the decisions of the Constitutional Council cannot be appealed and that only the President of the Republic, one tenth of the Members of the National Assembly, the National Council or the Court of Appeal are empowered, when an exception of unconstitutionality is brought before them, to seize the Constitutional Council. They therefore conclude that the decision of the Constitutional Council declaring that the disputed law is in conformity with the Constitution makes it impossible for anybody to challenge this law before the national courts.

34. The complainant NGOs recall in conclusion that their communication had been submitted within a reasonable time frame and that they had not instituted any other international legal proceedings.

35. In their oral submission before the African Commission during the 40th Session, the complainants recalled that the communication had not been drafted in abusive or insulting language. Furthermore, they re-affirm that the Constitutional Council had already made a ruling on the law in question, and that the decision of the Constitutional Council could not be subjected to any appeal. The complainants further contended that if remedies of a civil nature are guaranteed by the law being challenged, the amnesty law makes it impossible for any kind of criminal punishment to be meted out against the perpetrators of crimes, thereby supporting impunity in Senegal.

36. The Complainants invite the Commission to declare the Communication admissible.

Decision of the Commission

37. The admissibility of communications presented in conformity with the terms of Article 55 of the Charter is governed by Article 56 of the African Charter which stipulates that:

> "The Communications referred to in Article 55 received by the Commission and pertaining to human and peoples' rights should necessarily, to be considered, fulfill the following conditions:
>
> 1. Indicate the identity of the author even if the latter requests the Commission to maintain his/her anonymity;
> 2. Should be compatible with the Charter of the Organization of African Unity or with the present Charter;
> 3. Should not contain language which is abusive or insulting towards the implicated State, its institutions or the OAU;
> 4. Should not limit itself to gathering only the information broadcast by the mass media;
> 5. Should be subsequent to the exhaustion of local remedies, if any, unless it is clear to the Commission that the procedure of these remedies is unduly prolonged;
> 6. Should be submitted within a reasonable time frame starting from the exhaustion of local remedies or from the date stipulated by the Commission as being the beginning of the deadline to its own seizure.
> 7. Should not pertain to cases which have been settled in conformity with either the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of this Charter".

38. The Commission recalls that the conditions outlined in Article 56 are cumulative and should all be adequately fulfilled for a communication submitted in conformity with the terms of Article 55 to be admissible. Consequently, non-respect of any one of these conditions is liable to render a communication inadmissible.

39. In this particular case, most of the conditions laid down by Article 56 appear, *prima facie* to have been respected by the authors of Communication 304/05: The Communication is not anonymous; it pleads the violation of a provision of the Charter; it is not exclusively based on information broadcast by the mass media; it is not the object of any international proceedings before another judicial or quasi- judicial body; it was submitted within a reasonable time frame, and the Commission did not find any abusive or insulting language in it. The only condition which really poses a problem for both parties is Article 56(5) of the Charter which is the question of exhaustion of local remedies.

40. Before considering the condition relating to the exhaustion of local remedies, the Commission would like to address the matter of the identity of victims raised by the Respondent State in its argument. The Commission recalls, in this context, that the

African Charter does not call for the identification of the victims of a Communication. According to the terms of Article 56(1), only the identification of the author or authors of the Communication is required. Besides it is not necessary for the author or authors to be present or the victims even where some link between the author and the victim exists. That had in fact been confirmed by the practice of the African Commission[2] . The flexibility of Article 56 of the African Charter, which differs in this from the other international human rights protection instruments, is fully justified in the African context and "reflects sensitivity of the practical difficulties which individuals can be faced with in the countries where human rights are violated".[3]

41. Concerning the exhaustion of local remedies, according to the provisions of Article 56(5):

> *"The Communications referred to in Article 55 received by the Commission and relative to human and peoples' rights should, necessarily, to be considered, fulfill the following conditions:*
>
> *"….Be sent after exhausting local remedies, if any, unless it is obvious to the Commission that the procedure of these remedies is unduly prolonged."*

42. It does not at all show from the facts at the disposal of the Commission that efforts had been made by the authors of the communication to exhaust the local remedies available against Law No. 2005-05 of 17th February 2005. The remedy used by some Members of the National Assembly cannot constitute, in the view of the Commission, an attempt to exhaust local remedies for two main reasons: First of all, this recourse had been initiated on the 12th and 13th January 2005 and the ruling of the Constitutional Council had been made on the 12th February 2005, that is to say before the entry into force of Law No. 2005-05 of 17th February 2005. The Commission is of the view that a law which has not yet entered into force cannot violate any right which is protected by the Charter.

43. Then, it would appear from the facts as presented by the two Parties, from the appeal by the Parliamentarians and from the ruling of the Constitutional Council which sanctioned it, that the victims had the opportunity to seize the competent Senegalese Courts or even the Constitutional Council through the method of challenge of constitutionality. The Commission observes that instead of following this procedure, the Complainants approached it (the Commission) directly.

44. If the Parties agree to recognize that the decisions of the Constitutional Council cannot be appealed, there is no evidence to show that where the Constitutional Council declares itself incompetent to deal with a given issue (here it relates to the verification of the conformity of a law with a Convention, in this case the African Charter), no other

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[2] See notably the decision on Communications *54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 Malawi African Association, Amnesty International, Mrs. Sarr Diop, InterAfrican Human Rights Union and RADDHO, Widows and Entitled Persons Association, Mauritanian Human Rights Association vs. Mauritania.*

[3] Idem, paragraph 78.

legal body in Senegal is competent on the matter. The Commission is of the view that the local remedies to which Article 56(5) makes reference, cannot be limited to penal remedies. They include all the legal remedies, whether civil, penal or administrative.

45. On the basis of all of the above arguments, the Commission concludes that the complainants did not exhaust all the local remedies.

For this reason, the Commission declares the communication inadmissible.

Done at the 40th Ordinary Session of the African Commission held in Banjul, The Gambia, from 15 - 29 November, 2006

ii) Communication 322/2006 – Tsatsu Tsikata/ Republic of Ghana[12]

Summary of the facts

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat") received the Communication from the Complainant - Redmond, Tsatsu Tsikata, in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the "African Charter").

2. The author of the present Communication, who is himself the Complainant, submitted the Communication against the Republic of Ghana ("Ghana"), alleging that the latter is **in the process of trying him** for "wilfully causing financial loss to the State" contrary to Section 179A (3) of the Criminal Code, 1960 (Act 29); an act, which did not constitute an offence at the time of the commission. He alleges that this is contrary to Article 19 (5) of the Constitution of Ghana, which prohibits retroactive criminalization, and **Article 7 (2)** of the African Charter. He had challenged this in the High Court in Ghana, and his contention was upheld.

3. He further alleges that in the course of his trial, he has been denied the right to a fair trial, in violation of **Article 7 (1)** of the African Charter. He alleged that he had been summoned "in the name of the President" to appear before a "Fast-Track Court"; and he had challenged the constitutionality of both at the Supreme Court, which claims were upheld on 28th February 2002. However, after the Executive's alleged interference with the decision, and the "questionable" appointment of a new Justice of the Supreme Court, the decision was "reversed" by an 11-member panel of the Supreme Court, including the newly-appointed Justice, on 26th June 2002. The case was further "remitted" to the "Fast-Track Court", which had now been declared Constitutional.

4. +The author also notes that the Chief Justice had prior to the Supreme Court's latter decision, publicly and explicitly stated his determination to have the earlier decision of the case reversed.

5. The author also contends that both the manner of appointment of the new Justice of the Supreme Court and the conduct of the Executive towards the Judiciary in relation to his case constituted a violation of **Article 26** of the African Charter, which obliges States to guarantee the independence of the Judiciary.

6. The author stated that on 9th October 2002, he was again charged before the "High Court of Accra" on four counts, including the retroactive charge of "wilfully causing financial loss to the State" (paragraph 2 above); and intentionally misapplying public property contrary to section 1 (2) of the Public Property Decree 1977, (SMCD 140). He alleges that the facts on which the charges were based are the same as those on which he had been charged before three (3) previous courts: a) Circuit Tribunal; b) Fast Track Court; and c) the normal High Court.

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[12] Ghana ratified the African Charter on 24th January 1989, and is thus a State Party.

7. The author further alleges a violation of his right to fair trial under **Article 7(1)** of the African Charter when the trial judge of the High Court of Accra overruled his Counsel's submission of "no-case-to-answer", without giving reasons; thereby violating his **right to be presumed innocent until proven guilty by a competent court or tribunal**, as well as right to have the violations of his fundamental rights redressed.

8. He further alleges that he had appealed to the Court of Appeal, and that in upholding the decision of the lower court, the Court of Appeal had relied on a repealed law, which was neither cited in the charge sheet, nor at any point in the trial proceedings at the High Court, except in response to the submission of "no-case-to-answer". He alleges that the Court of Appeal thereby denied him of his right to defence guaranteed under **Article 7 (1) (c)** of the African Charter as he could not have known before the trial, that a repealed law, which he had no (prior) notice of in the charge sheet or at any point in the trial, would be the basis of his charge. He also alleges a further breach of his right to be presumed innocent until proven guilty by a competent court or tribunal guaranteed by **Article 7 (1) (b)** of the African Charter.

9. He submits that there is a further violation of **Article 7 (2)** of the African Charter, and a failure to enforce Articles 19 (5) and (11) of the Constitution of Ghana, which accord him certain fundamental rights as an accused person.

10. He contends that he was further denied the right to defence guaranteed under **Article 7 (1) (c)** of the African Charter when upon his subpoena, the counsel for the International Finance Commission (IFC) appeared before the Court and argued that the IFC was immune from the court's jurisdiction; and this argument was upheld, even by the Court of Appeal, despite the provision of Article 19 (2) (g) of the Constitution of Ghana, which guarantees the accused's right to call witnesses, and the fact tat the statutory provisions on the IFC in Ghana do not grant them the claimed immunity from testifying.

11. He noted that Article 19 (2) (g) of the Constitution of Ghana is similar to the paragraph 2 (e) (iii) of the provisions of the **Elaboration of the Right to Fair Trial by the African Commission on Human and Peoples' Rights**, meeting at its 11th Ordinary Session in Tunisia, 2-9 May 1992.

12. Lastly, he contended that the continuation of his trial on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage.

The Complaint

13. The author of this Communication contends that the charge on which his trial is based constitutes a violation of the right against non-retroactive criminalization under Article 7 (2) of the African Charter.

14. He also contends that the manners in which the trial has been, and is being carried out violate Article 7 (1) of the African Charter.

15. He seeks the intervention of the African Commission on Human and Peoples' Rights, and urges the Commission to invoke Rule 111 of its Rules of Procedure on Provisional measures, and request the Republic of Ghana not to proceed further with his trial until his case has been heard by the African Commission.

The Procedure

16. The present Communication was received by the Secretariat of the African Commission on 27th April, 2006.

17. The Secretariat of the Commission acknowledged receipt of the Communication to the Complainants under letter ACHPR/LPROT/COMM/322/2006/RE of 2nd May 2006, providing the references of the Communication and informing the Complainant that the Communication would be scheduled for consideration by the African Commission at its 39th Ordinary Session to be held in May 2006, in Banjul, The Gambia.

18. At its 39th Ordinary Session, held from 11th to 25th May 2006, in Banjul, The Gambia, the Commission decided to be seized of the Communication, but declined to request the Respondent State to take provisional measures in accordance with Rule 111(1) of its Rules of Procedure because the Complainant did not demonstrate the irreparable damage that would be caused if the provisional measures were not taken.

19. On 1st June 2006, the Secretariat of the African Commission informed the parties of the above-mentioned decision and asked them to provide it with more information on the admissibility of the Communication, in accordance with Article 56 of the African Charter. It also sent a copy of the Communication to the Respondent State. It requested the parties to send their written observations to the Secretariat within three (3) months after notification of the decision.

20. On 31st August and 5th September 2006, the Secretariat of the Commission received the submissions of the Respondent State by fax & mail, respectively.

21. At its 40th Ordinary Session held from 15th to 29th November 2006 in Banjul, The Gambia, the African Commission considered this Communication on admissibility.

LAW
Admissibility

The Complainant's submission

22. In the case under consideration, the Complainant makes reference to several recourses to the domestic courts for redress of the alleged violations of his rights, but gives no indication of the exhaustion of all available domestic remedies, particularly in view of the alleged on-going violation.

From the facts presented, the alleged on-going violation of his rights involves an on-going trial, the legality of which he challenges on the basis of the provisions of the Charter. He however failed to present evidence of the conclusion of this trial, and or to prove that it has been unduly prolonged.

23. The Complainant contended that the continuation of his trial based on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage, but without elaborating how.

The Respondent State's submission

24. In its response in accordance with Rule 116 of the Rules of Procedure of the African Commission, the Respondent State referred to the provisions of Article 56 (5) of the African Charter which provides for the exhaustion of local remedies as a requirement for the African Commission to rule on the admissibility of Communications, unless it is obvious that this procedure is unduly prolonged. It therefore submitted that since the matter of the Complainant's Communication is still pending in the High Court of Justice, Ghana, with further unexplored rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with Articles 137 & 131 respectively of the Constitution of Ghana, the Communication should be declared inadmissible by the Commission.

25. The Respondent State also recalled that the guidelines for submission of Communications provide that each Communication should particularly indicate that local remedies have been exhausted, and observed that the Complainant failed to provide any evidence of the domestic legal remedies pursued.

26. The Respondent State also argued that the Complainant further failed to meet the requirement of Article 56(5) of the Charter as he could not show in his complaint that the procedure in the High Court of Justice has been protracted or unduly delayed. It further submitted that if indeed any delay has been occasioned, it would be due to the Complainant's own repeated requests for adjournments and interlocutory appeals.

27. The Respondent State also made reference to Article 56(6) of the Charter, which provides for Communications to be submitted "within a reasonable period from the time local remedies are exhausted…", and submitted that the Complainant acted impetuously given that the matter has not been concluded, and time has not begun to run so as to afford the complainant an opportunity to bring his complaint.

28. Furthermore, the Respondent State noted Article 56(3) of the Charter and the guidelines for submission of Communications which provide that a Communication shall be considered "if it is not written in disparaging or insulting language directed against the State concerned…"; and submitted that the language in paragraphs 15, 16 and 17 of the Complainant's Communication is insulting to Ghana and its Judiciary where lack of integrity, impropriety, bias and prejudice are imputed to the Executive and the Judiciary of the Republic of Ghana. To this effect, the Respondent State cited the Complainant's statement in paragraph 17 of his Communication whereby he stated that: "Far from guaranteeing the independence of the Court in relation to my trial, the Government of

Ghana has shown an irrevocable determination to have me found guilty by hook or crook and incarcerated".

The Commission's decision

29. The admissibility of the Communications submitted before the African Commission is governed by the seven conditions set out in Article 56 of the African Charter.

30. The parties' submissions only relate to the provisions of Articles 56(3) (5) and (6).

31. Article 56(3) specifically stipulates that Communications shall be considered if they "are not written in disparaging or insulting language directed against the State concerned and its institutions…"

32. In respect of the Respondent's State's submission that paragraphs 15, 16 and 17 of the complaint is written in disparaging or insulting language directed against the former, the Commission holds that this is not the case. The Commission notes that these stipulated paragraphs of the complaint are only facts of allegations of Charter violations; and expressions of the complainant's fear in this regard. It is on the basis of these allegations and fear that the Complainant had submitted this Communication. The Commission reiterates that the purpose of its mandate is to consider complaints alleging such perceived judicial bias and prejudice, and undue interference by the executive with judicial independence, in accordance with Article 7 of the Charter, its R*esolution on the Respect and the Strengthening on the Independence of the Judiciary (1996)*[13], and other relevant international human rights norms; in accordance with articles 60 and 61 of the Charter.

33. In this light, the Commission wishes to distinguish these paragraphs, for instance, from its decision in the case of *Ligue Camerounaise des Droits de l'Homme vs. Cameroon [Comm. 65/92]*, where the Commission condemned the use of words such as "Paul Biya must resond to crimes against humanity"; "30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya"; "regime of torturers"; and "government barbarisms"; as insulting language.

34. In respect of Article 56(5), which stipulates that Communications shall be considered if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged…", the Commission notes the importance of this rule as a condition for the admissibility of a claim before an international forum. It notes that the rule is based on the premise that the Respondent State must first have an opportunity to redress by its own means and within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

35. In light of the parties' submissions, the African Commission notes that the Complainant's allegations are in respect of an on-going/unconcluded trial. The

[13] ACHPR /Res. 21(XIX) 96.

information provided by the Complainant himself states that the communication is still pending before the courts of the Republic of Ghana. The Commission further notes that should the on-going trial end against the Complainant's favour, he has further rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with Articles 137 & 131 respectively of the Constitution of Ghana. In this regard, the Commission draws the attention of the parties to the similar case of *Kenya Human Rights Commission vs. Kenya [Comm. 135/94]*, where it had held that "…the facts supplied by the Complainants themselves stated that the Communication was pending before the Courts of Kenya,... [and] that the Complainants had therefore not exhausted all available local remedies."

36. Therefore, although the Communication presents a *prima facie* case of a series of violations of the African Charter, a close look at the file and the submissions indicate that the Complainant is yet to exhaust all the local remedies available to him.

37. With regard to Article 56(6) of the Charter which provides that Communications shall be considered if "… they are submitted within a reasonable period of time from the time local remedies are exhausted, or from the date the Commission is seized of the matter", the Commission holds that this is quite related to the principle of the exhaustion of local remedies in accordance with article 56(5). This means that the Commission estimates the timeliness of a Communication from the date that the last available local remedy is exhausted by the Complainant. In the case of unavailability or prolongation of local remedies, it will be from the date of the Complaianant's notice thereof.

38. Unlike its Inter-American[14] contemporary, the Commission does not specify a time-period within which Communications must be submitted. However, it advised on the early submission of Communications in the case of *John K. Modise vs. Botswana [Comm. 97/93]*.

39. However, having found that the Complainant has not exhausted local remedies the Commission concurs with the Respondent State's argument that the Complainant had acted impetuously in bringing this Communication. This is because the matter has not been concluded, for which reason time has not begun to run such as to afford the complainant the opportunity to bring this complaint.

For these reasons, the African Commission,
Declares the communication inadmissible for non-exhaustion of local remedies.

Done at the 40th Ordinary Session held from in Banjul, The Gambia,
15 - 29 November 2006.

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14 Article 32 of the Rules of Procedure of the Inter-American Commission; www.cidh.org.

Annexure III

Decision on communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe, and Zimbabwe's response to the decision.

a. **Decision on communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe,**

Communication 245/2002 – Zimbabwe Human Rights NGO Forum/Zimbabwe

Summary of Facts

1. The communication is submitted by the Zimbabwe Human Rights NGO Forum, a coordinating body and a coalition of twelve (12) Zimbabwean NGO human rights based in Zimbabwe.

2. The complainant states that in February 2000, the country held a Constitutional Referendum in which the majority of Zimbabweans voted against the new government drafted Constitution.

3. The complainant is alleges that following the Constitutional Referendum there was political violence, which escalated with farm invasions, by war veterans and other landless peasants. That during the period between February and June 2000 when Zimbabwe held its fifth parliamentary elections, ZANU (PF) supporters engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties. It is alleged that violence was deployed by the party as a systematic political strategy in the run up to the Parliamentary elections.

4. The complainant also alleges that in the 2 months before the Parliamentary elections scheduled for 24th and 25th June 2002, political violence targeted especially white farmers and black farmers workers, teachers, civil servants and rural villagers believed to be supporting opposition parties.

5. Such violence included dragging farm workers and villagers believed to be supporters of the opposition from their homes at night, forcing them to attend re-education sessions and to sing ZANU (PF) songs. The Complainant alleges that men, women and children were tortured and there were cases of rape. Homes and businesses in both urban and rural areas were burnt and looted and opposition members were kidnapped, tortured and killed.

6. It is also alleged that ZANU (PF) supporters invaded numerous secondary schools; over 550 rural schools were disrupted or closed as teachers, pupils and rural opposition members numbering 10,000 fled violence, intimidation and political re-education. Other civil servants in rural areas such as doctors and nurses were targeted for supposedly being pro-Movement for Democratic Change (MDC). Nyamapanda border post was closed for 2 days as civil servants fled ZANU (PF) supporters. Bindura University was closed by a student boycott after ZANU (PF) members were asked to

produce a list of MDC supporters and one MDC supporter was kidnapped and assaulted by ZANU (PF) supporters/members posing as MDC.

7. It is also alleged that numerous activists including Morgan Tsvangirai – President of the main opposition party the MDC, Grace Kwinjeh, a journalist and a human rights activist, the Daily News Editor - Geoff Nyarota, an Anglican Priest - Tim Neill, MDC candidate from Chimanimani - Roy Bennet, Robin Greaves, a Nyamandlovu farmer and other farmers received death threats.

8. The complainant alleges that there were reports of 82 deaths as a result of organised violence between March 2000 and 22nd November 2001.

9. The complainant also allege that following the elections, MDC contested the validity of the outcome of the elections in 38 constituencies won by ZANU (PF) and this prompted another wave of violence.

10. The complainant claims that human rights abuses were reported in most of those cases that were brought before the High Court. However, those individuals that testified in the elections challenges before the Harare High Court, were subjected to political violence on returning home and thus forcing some to refrain from testifying and others to flee their homes due to fear of being victimized.

11. The complainant also states that in some cases MDC supporters were also responsible for minor assaults against some ZANU (PF) stalwarts.

12. The complainant alleges that various officials of the ruling ZANU (PF) party condoned the use of violence for political gains and quotes statements made by President Mugabe, Josaya Hungwe of Masvingo Province, the Minister of Foreign Affairs - Stan Mudenge, war veterans Andrew Ndhlovu and Edmon Hwarare that reinforced the ongoing violence.

13. The complainant also alleges that the primary instigators of this violence were war veterans who operated groups of militias comprising of ZANU (PF) youth and supporters. They also allege that the State was involved in this violence through Zimbabwe Republic Police (ZRP), the Zimbabwe National Army (ZNA) and the Central Intelligence Organisation (CIO) specifically through facilitating farm invasions.

14. The complainant states that prior to the June 2000 parliamentary elections, the ZRP on numerous occasions turned a blind eye to violence perpetrated against white farmers and MDC supporters. It is alleged that the police forces have generally failed to intervene or investigate the incidents of murder, rape, torture or the destruction of property committed by the war veterans. Furthermore, a General Amnesty for Politically Motivated Crimes gazetted on 6th October 2000 absolved most of the perpetrators from prosecution. While the Amnesty excluded those accused of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms or any offence involving fraud or dishonesty very few persons accused of these crimes have been prosecuted.

Complaint

15. The complainant alleges a violation of **Articles 1, 2, 3, 4, 5, 6, 9, 10, 11 and 13** of the African Charter on Human and Peoples' Rights.

Procedure

16. The communication was received at the Secretariat of the Commission on 3 January 2002.

17. On 8 January 2002 the Secretariat acknowledged receipt of the communication and informed the complainant that the matter would be scheduled for consideration by the Commission at its 31st Session.

18. During its 31st ordinary session held from 2 – 16 May 2002 in Pretoria, South Africa, the African Commission examined the complaint and decided to be seized of it.

19. On 29th May 2002 the parties to the communication were informed of the Commission's decision and requested to forward their submissions on admissibility to the Secretariat within 3 months.

20. At its 32nd Ordinary Session held from 17 – 23 October 2002 in Banjul, The Gambia, the African Commission examined the communication and decided to defer its consideration on admissibility to the 33rd Ordinary Session and the parties to the communication were informed accordingly.

21. At its 33rd Ordinary Session held from 15 - 29 May 2003, in Niamey, Niger, the African Commission heard oral submissions from both parties to the communication and decided to defer its decision on admissibility to the 34th Ordinary Session.

22. On 10th June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and requested them to forward their written submissions on admissibility within 2 months.

23. At its 34th Ordinary Session held in Banjul, The Gambia from 6 - 20 November 2003, the African Commission examined the communication and decided to declare the communication admissible.

24. By letter dated 4 December 2003, the parties to the communication were informed of the African Commission's decision and requested to submit their written submissions on the merits within 3 months.

25. At its 35th Ordinary Session held in Banjul, The Gambia from 21 May - 4 June 2004, the African Commission examined the communication and decided to defer it to the 36th Ordinary Session for further consideration.

26. By Note Verbale dated 15th June 2004, and by letter bearing the same date, the Secretariat of the African Commission informed the parties accordingly.

27. At its 36th Ordinary Session held from 23 November – 7 December 2004, in Dakar, Senegal, the African Commission considered the communication and deferred its decision to the 37th Ordinary session.

28. By Note Verbale of 16 December 2004 and by letter of 20 December 2004, the Secretariat informed the State and the complainant respectively of the decision of the African Commission.

29. At its 37th Ordinary Session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission deferred consideration of the communication due to lack of time.

30. By note verbale dated 24 May 2005 the State was notified of the decision of the African Commission. By letter of the same date the Secretariat of the African Commission notified the complainant.

31. At its 38th ordinary session held from 21 November to 5 December 2005, the African Commission differed consideration on the merits to the 39th session.

32. By Note Verbale of 15 December 2005 and by letter of the same date, the Secretariat of the African Commission notified both parties of the African Commission's decision.

33. At its 39th Ordinary Session held from 11 – 25 May 2006, the African Commission considered the communication and found the Republic of Zimbabwe in violation of certain provisions of the African Charter.

34. By Note Verbale of 29 May 2006 and by letter of the same date, both parties were notified of the African Commission's decision.

35. The Commission took a decision on the merits of the communication during its 39th Ordinary Session, which was held from 11th to 25th May 2006 in Banjul, The Gambia.

LAW
Admissibility

36. The law relating to the admissibility of communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a complainant for a communication to be declared admissible.

37. In the present communication, the Respondent State submitted that the communication should be declared inadmissible by virtue of the fact that the

communication did not satisfy the requirements contained in Articles 56(4) and (5) of the African Charter.

38. Article 56(4) of the African Charter provides that -:
Communications … received by the Commission shall be considered if they-:
(4) are not based exclusively on news disseminated through the mass media

39. The Respondent State alleged that the statement of facts submitted by the complainant was based on information disseminated through the mass media which information should be considered cautiously. They submit that the statements recorded by the complainant in Appendix 1 are tailor-made to suit press reports. The State indicated that an illustration of such a case was when an independent newspaper, the Daily News on 23 April 2002 published a story furnished by one Mr. Tadyanemhanda stating that his wife Brandina Tadyanemhanda had been decapitated by ZANU (PF) members in front of her children for the sole reason that she was a supporter of the MDC Party, noting that the story was later found to be false. That Mr. Tadyanemhanda's son, Tichaona Tadyanemhanda was listed as one of those persons whose death was reported to have occurred as a result of the political violence that took place from March 2000 to 30 November 2001. The Respondent State concluded that, as indicated by the Police, the death of Tichaona Tadyanemhanda was never political.

40. The Respondent State maintained that during the period prior to, during and following the Referendum, there was a concerted effort by the ''so called independent press'' and the international press to publish false stories in order to tarnish Zimbabwe's image. The State thus submitted that the media reports in Appendix 2 of the complainant's submissions were not meant to buttress the accounts of eyewitnesses but that the statement of facts by the complaint was a presentation of the contents of newspaper articles.

41. In their submissions to the African Commission, the complainant stated that the communication was not based solely on reports gathered from the press. They asserted that Appendix 1 contained statements made by victims, while Appendix 4 was a judgment of the High Court of Zimbabwe and Appendix 2 contained selected extracts of media reports and the information therein had been provided in order to buttress the statements made by victims. According to the complainant, the newspaper reports were meant to corroborate the direct evidence provided by the victims.

42. The African Commission has had the opportunity to review the documents before it as submitted by the complainant. While it may be difficult to ascertain the veracity of the statements allegedly made to the complainant by the alleged victims, it is however evident through the judgment of the High Court of Zimbabwe that the communication did not rely *"exclusively on news disseminated through the mass media"* as the Respondent State would like the African Commission to believe.

43. Besides, this Commission has held in *Communications 147/95 and 149/96*[15], that "while it would be dangerous to rely exclusively on news disseminated through the mass media, it would be equally damaging if the African Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word "exclusively". Based on this reasoning, the African Commission is of the opinion that the communication is not based "exclusively on news disseminated through the mass media. The operative term being "exclusively".

44. The other provision of the Charter in contention between the parties is Article 56(5) of the African Charter. This sub article provides that …communications … received by the Commission shall be considered if they-:

> *(5) are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged*

45. The Respondent State submitted in this regard that the complainant failed to exhaust domestic remedies by virtue of failing to pursue the alternative remedy of lodging a complaint with the Office of the Ombudsman, which is mandated to investigate human rights violations. The African Commission holds that the internal remedy to which Article 56(5) refers entails remedies sought from courts of a judicial nature, and the Office of the Ombudsman is certainly not of that nature.[16]

Specific Case of Talent Mabikka

46. With respect to the case of Tichaona Chiminya and Talent Mabika (Appendix 4), the complainant claimed that they attempted to access domestic remedies as shown by the record of the High Court. In this case, the Judge ordered the transmission of the record of proceedings to the Attorney General with a view to instituting criminal proceedings against the murderers of Tichaona Chiminya and Talent Mabika. The complainant stated that as at when the communication was lodged to the African Commission, no such prosecution had taken place.

47. The African Commission is in possession of a copy of the proceedings of the High Court of Zimbabwe relating to the Buhera North Election challenge and where Justice Devitte made an order with respect to the case of Chiminya and Mabika. From the proceedings, the High Court ordered that *"in terms of Section 137 of the Act, the record of evidence must be transmitted by the Registrar to the Attorney General 'with a view to the institution of any prosecution proper to be instituted in the circumstances' and the attention of the Attorney General is drawn to the evidence on the killing of Chiminya and Mabika."* The High Court Order was made on 2 March and 26 April 2001 and the complainant argued that at the time of bringing the communication, about 8 months later, on 3 January 2002, there had been no prosecution of the suspected murderers.

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[15] Consolidated communication – Sir Dawda K. Jawara/The Gambia.

[16] Communication 221/98 Alfred B. Cudjoe/Ghana.

48. The Respondent State argued that the order made by the High Court called upon the Attorney General to exercise his powers under Article 76 of the Constitution of Zimbabwe to direct the police to carry out investigations and depending on the outcome of those investigations prosecute the case. The Respondent State submitted that the Attorney General received the docket relating to the killing of Chiminya and Mabika from the police and that it was evident from the docket that it had been opened the very day that the incident in question had happened and that the recording of statements on the case had commenced immediately. However, after perusing the docket, the Attorney General referred the docket back to the police with directions on what further investigations should be conducted into the matter before the matter could be prosecuted. The Respondent State submitted that as at when the communication was submitted to the African Commission, the matter was still being investigated and that the Police had recorded 23 statements from witnesses.

49. The African Commission is of the view that with respect to the alleged murder of Chiminya and Mabika, the matter was still before the courts of the Respondent State and cannot be entertained by it.

50. However, the Commission is of the opinion that there are no domestic remedies available to all the persons referred to in Appendix 1, who as victims, were effectively robbed of any remedies that might have been available to them by virtue of Clemency Order No 1 of 2000. The Clemency Order granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between 1 January 2000 and July 2000. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period.

51. In terms of the Clemency Order, "a politically motivated crime" is defined as -:

(a) Any offence motivated by the object of supporting or opposing any political purpose and committed in connection with:

(i) The Constitutional referendum held on the 12th and 13th of February 2000; or
(ii) The general Parliamentary elections held on 24th and 25th June 2000; whether committed before, during or after the said referendum or elections."

52. The only crimes exempted from the Clemency Order were murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

53. The complainant averred that the exceptions in the Clemency Order were a hoodwink; that even where reports were made by victims of criminal acts not covered by the Clemency Order, arrests were never made by the police neither were investigations undertaken and therefore there was no prosecution of the perpetrators of the violence, concluding that, the Clemency Order was constructively, a blanket amnesty.

54. The complainant argued further that it could not challenge the Clemency Order in a court of law because the President of Zimbabwe, who was exercising his prerogative powers in terms of the Constitution of Zimbabwe, ordered it.

55. Additionally, the complainant argued at the 33rd Ordinary Session of this Commission, that it was not possible to exhaust domestic remedies during the period in question because there was pervasive violence; and gross and massive human rights violations took place on a large scale and more particularly, politically motivated violence. The complainant referred the African Commission to Justice Devitte's judgment in *CFU v Minister of Lands & Others, 2000(2) ZLR 469(s)*, in which the Judge summarized the extent of the violence that transpired during the period that the communication covered. In that judgment Justice Devitte stated that: *"Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. The Government has flouted laws made by parliament. The activities of the past nine months must be condemned."*

56. Furthermore, the complainant argued that the violence was extended to some members of the Judiciary. The complainant submitted that during the time in question, some members of the judiciary were threatened, several magistrates were assaulted while presiding over politically sensitive matters and several Supreme Court judges were forced to resign. According to the complainant, there were instances where persons approached the courts and sought to interdict the government of Zimbabwe or the persons who had forcefully settled themselves on private properties; court orders were granted but subsequently they were ignored because the government of Zimbabwe said it could not allow itself to follow court decisions that went against government policy. The complainant asserted that in the overall context of such a situation there was no realistic hope of getting a firm and fair hearing from judicial system that had been so undermined by the Respondent State.

State Party's Response

57. Responding to the complainant's submission relating to the effect of the Clemency Order, the Respondent State submitted that the victims of the criminal acts covered by the Clemency Order could have and could still institute civil suits and sought to be compensated, which according to the Respondent State, would be more beneficial to the victims than the imprisonment of the perpetrators of the crimes.

58. In its oral submissions during the 33rd Ordinary Session of the African Commission, the Respondent State argued that the complainant could have sought alternative remedies under Section 24(1) of the Constitution of Zimbabwe. This provision accords aggrieved persons the right to seek redress from the Supreme Court where it is alleged that the Declaration of Rights has been, is being or is likely to be contravened in relation to them.

59. The Respondent State also submitted that the complainant had the right and could have challenged the legality of the Clemency Order in Court. The Respondent

State argued that there had been cases in Zimbabwe where persons had challenged the legality of the prerogative of the President and that such a challenge was before the courts of Zimbabwe. The Respondent State argued that challenging the legality of Clemency Order would have eventually paved the way for prosecuting the persons that committed those criminal acts covered by the Clemency Order; therefore by neglecting to challenge the legality of the President's prerogative, the complainant had failed to exhaust local remedies. The Respondent State argued further that until the courts in Zimbabwe rule otherwise on the matter of the legality of the presidential prerogative, the complainant could still utilise the courts in Zimbabwe to challenge the legality of the Clemency Order.

60. With respect to the situation prevailing during the period in question, the Respondent State admitted that of the numerous cases reported to the police, only a small percentage of the murder cases were committed to the High Court. The Respondent State argues that, at the time its criminal justice system could not have been expected to investigate and prosecute all the cases and ensure that remedies were given, bearing in mind the considerable number of cases that were reported.

61. The situation notwithstanding, the Respondent State argued that the complainant could have attempted to ask the Attorney General to invoke his powers under Section 76(4a). Section 76(4a) of the Constitution of Zimbabwe mandates the Attorney General to *"require the Commissioner of Police to investigate and report to him on any matter which, in the Attorney General's opinion, relates to any criminal offence or alleged or suspected criminal offence, and the Commissioner of Police shall comply with that requirement"*. The Respondent State argued that except in the case of Tichaona Chiminya and Talent Mabika, the complainant had made no attempts to request the Attorney General to invoke Section 76(4a) in relation to the reported cases neither did they seek to find out from the Attorney General what course of action had been taken with respect to those cases.

62. The Respondent State also submitted that if all else was not possible, the complainant could have instituted private prosecutions against those persons alleged to have committed crimes and had not been prosecuted by the State in accordance with Section 76(4) of the Constitution of Zimbabwe.

African Commission's decision on admissibility

63. The complainant in this communication states that during the period in question, the criminal acts that were committed ranged from assault, arson, theft, torture, kidnap, torture, murder etc and these acts were directed towards persons perceived to be or known as supporters of the opposition and as such were politically motivated.

64. The African Commission holds the view that by pardoning *"every person liable for any politically motivated crime …"* the Clemency Order had effectively foreclosed the complainant or any other person from bringing criminal action against persons who could have committed the acts of violence during the period in question and upon which

this communication is based. By so doing, the complainant had been denied access to local remedies by virtue of the Clemency Order[17].

65. Exhaustion of local remedies does not mean that the complainants are required to exhaust any local remedy, which may be impractical or even unrealistic. Ability to choose which course of action to pursue when wronged is essential and clearly in the instant communication the one course of action that was practical and therefore realistic for the victims to pursue – that of criminal action was foreclosed as a result of the Clemency Order.

66. The Respondent State also submitted that the complainant failed to exhaust domestic remedies when they did not challenge the legality of the President's prerogative to issue a Clemency Order.

67. The African Commission is of the view that asking the complainant to challenge the legality of the Clemency Order in the Constitutional Court of Zimbabwe would require the complainant to engage in an exercise that would not bring immediate relief to the victims of the violations. The African Commission is aware that the situation prevailing in Zimbabwe at the time in question was perilous and therefore required the State machinery to act fast and firmly in cases such as this in order to restore the rule of law. To therefore ask victims in this matter to bring a constitutional matter before being able to approach the domestic courts to obtain relief for criminal acts committed against them would certainly result into going through an unduly prolonged procedure in order to obtain a remedy, an exception that falls within the meaning of Article 56(5) of the African Charter.

68. It is argued by the Respondent State that before bringing this matter to the African Commission, the complainant could have utilised the available domestic remedies by requesting the Attorney General to invoke his powers under Article 76(4a) or undertaken private prosecution of the persons alleged to have committed the said criminal acts under Article 76(4).

69. The African Commission believes that the primary responsibility for the protection of human rights in a country lies with the government of that country. In the instant case, the international community in general and the African Commission paid particular attention to the events that took place in the run up to the referendum in Zimbabwe in February 2000 right up to the end of and after the Parliamentary elections of June 2002. The Respondent State was sufficiently informed and aware of the worrying human rights situation prevailing at the time.

70. The responsibility of maintaining law and order in any country lies with the State specifically with the police force of that State. As such, it is the duty of the State to ensure through its police force that where there is a breakdown of law and order, the

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[17] Communications 54/91, 61/91, 98/93, 164/97 & 196/97, 210/98 – Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme/Mauritania

perpetrators are arrested and brought before the domestic courts of that country. Therefore any criminal processes that flow from this action, including undertaking investigations to make the case for the prosecution are the responsibility of the State concerned and the State cannot abdicate that duty. To expect victims of violations to undertake private prosecutions where the State has not instituted criminal action against perpetrators of crimes or even follow up with the Attorney General what course of action has been taken by the State as the Respondent State seems to suggest in this matter would be tantamount to the State relinquishing its duty to the very citizens it is supposed to protect. Thus, even if the victims of the criminal acts did not institute any domestic judicial action, as the guardians of law and order and protectors of human rights in the country, the Respondent State is presumed to be sufficiently aware of the situation prevailing in its own territory and therefore holds the ultimate responsibility of harnessing the situation and correcting the wrongs complained of[18].

71. It is apparent to the African Commission that the human rights situation prevailing at the time this communication was brought was grave and the numbers of victims involved were numerous. Indeed the Respondent State concedes that its criminal justice system could not have been expected to investigate and prosecute all the cases reported and ensure that remedies are given. This admission on part of the Respondent State points to the fact that domestic remedies may have been available in theory but as a matter of practicality were not capable of yielding any prospect of success to the victims of the criminal assaults.

72. Thus, for the reasons outlined above, the African Commission **declares this communication admissible** and in coming to this conclusion, would like to reiterate that the conditions laid down in Article 56(5) are not meant to constitute an unjustified impediment to access international remedies. As such, the African Commission interprets this provision in light of its duty to protect human and peoples' rights and therefore does not hold the requirement of exhaustion of local remedies to apply literally in cases where it is believed that this exercise would be impractical or futile.

The Law - Merits

Complainant's submissions on the Merits

Allegation of violation of Article 1 of the African Charter

73. The complainant submitted that in terms of Article 1 of the African Charter, the obligation of States Parties to respect the rights enshrined in the Charter entails an obligation to refrain from conducts or actions that contravene or were capable of

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[18] Communications 54/91, 61/91, 98/93, 164/97 & 196/97, 210/98 Malawi African Association , Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme & RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme/ Mauritania. See also Communications 48/90, 50/91, 52/91, 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan.

impeding the enjoyment of the rights and by so doing ensuring that human rights were protected. The complainant submitted further that to recognise the rights and duties enshrined in the African Charter, States Parties also committed themselves to respect those rights and to take measures to give effect to them[19].

74. The complainant went on to say that this duty pertains to the regulatory functions of the Member State to prevent violations of rights by both State agents and other persons or organisations that were not State agents. This, according to the complainant, may necessitate the adoption of legislative, policy and administrative measures to prevent unwarranted interference with the enjoyment of these rights. Such measures include investigating allegations of violations as well as prosecuting and punishing those responsible for violations contained in the African Charter[20].

75. It is submitted by the complainant that in the present communication State agents were directly involved in committing serious human rights violations such as in the case of the extra judicial execution of Tichaona Chiminya and Talent Mabika in Manicaland Province by an officer of the Central Intelligence Organisation.

76. It is also claimed that violent acts were carried out by State agents acting under the guise of public authority. According to the complainant, there were instances where police officers refused to record and investigate complaints of victims of various abuses thereby removing the protection of the law from the victims. Annexed to the communication as appendix one were statements allegedly made by alleged victims of violence stating that they made reports to the police but no action was taken, neither was any arrests made. Most of them claimed the Police refused to investigate their complaints because they were in the opposition MDC party.

77. The complainant averred that the Government of Zimbabwe failed to provide security to members of opposition political parties thereby allowing serious or massive violations of human rights, adding that, the law enforcement agents on several occasions failed to intervene to prevent serious violations of human rights. The complainant argued that it is the primary responsibility of the Government of Zimbabwe to secure the safety and the liberty of all of its citizens and to conduct investigations into allegations of torture, murder and other human rights violations[21].

78. Regarding the Clemency Order No 1 of 2000 granting a general amnesty for politically motivated crimes committed in the period preceding the June 2000 general elections, the complainant submitted that by failing to secure the safety of its citizens and by granting a general amnesty, the Respondent State had failed to respect the

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[19] Communication 204/97 – Mouvement Burkinabe des Droits de l'Homme et des Peuples/Burkina Faso and Communication 74/92 – Commission Nationale des Droits de l'Homme et des Libertes/Chad.

[20] See Valesquez Rodriguez Case, Inter-American Court of Human Rights, Judgment of 29 July 1988 paragraphs 160 – 167.

[21] Communication 74/92 – Commission Nationale des Droits de l'Homme et des Libertes/Chad.

obligations imposed on it under Article 1 of the African Charter. Any violation of the provisions of the African Charter automatically means a violation of Article 1 of the African Charter and that goes to the root of the African Charter[22] since the obligations imposed by Article 1 of the African Charter are peremptory[23].

Allegation of violation of Article 2 of the African Charter - Non-discrimination

79. The complainant alleged a violation of Article 2 of the African Charter which provides that "e*very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status".*

80. The complainant submitted further that the Respondent State denied the victims their rights as guaranteed by the African Charter on the basis of their political opinions, and by so doing, the Respondent State violated Article 2 of the African Charter.

81. Article 2 of the African Charter guarantees enjoyment of the rights enshrined in the African Charter without distinction of any kind including political opinion[24] and the African Commission has held that the rights guaranteed in Article 2 are an important entitlement as the availability or lack of them affects the capacity of one to enjoy many other rights[25].

Allegation of violation of Article 3(2) of the African Charter

82. The complainant also alleged a violation of Article 3(2) of the African Charter which provides that "e*very individual shall be entitled to equal protection of the law".*

83. The complainant asserted that the police selectively enforced the law to prejudice victims of gross violations of human rights. The complainant argued that the statements appended as appendix one to the communication revealed that the police refused to record and investigate complaints filed by the victims in violation of Article 3(2) of the African Charter.

84. The complainant requested the African Commission to have due regard to the Zimbabwe Supreme Court case of ***Chavunduka & anor v Commissioner of Police***[26]

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[22] Consolidated communication 147/95 and 149/96 – Sir Dawda K. Jawara/The Gambia.

[23] Communication 211/98 – Legal Resources Foundation/Zambia.

[24] Consolidated communication 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 – Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits del'Homme, RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits del'Homme/Mauritania.

[25] Communication 211/98 – Legal Resources Foundation/Zambia.

[26] Chavunduka & anor v Commissioner of Police 2000(1) ZLR 418 (S).

when interpreting Article 3(2) of the African Charter, noting that the request was based on the African Commission's own jurisprudence which states that in interpreting the African Charter, the African Commission may have regard to principles of law laid down by States Parties to the African Charter and African Practices consistent with international human rights norms and standards.[27] In the ***Chavunduka*** matter, the Supreme Court held that the police have the public duty to enforce the law. Consequently the entitlement of every person to the equal protection of the law embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator and the bringing of him or her before a court.

Allegation of violation of Article 4 of the African Charter

85. The complainant alleged a violation of Article 4 of the African Charter. Article 4 of the African Charter provides that "*human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".*

86. The African Commission considers that the right enshrined in Article 4 *"is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life."*[28]

87. The complainant claimed that numerous people were victims of extra-judicial or summary executions, attacks or attempted attacks against their physical integrity and acts of intimidation. Documents attached by the complainant to support this claim include the judgment of the High Court of Zimbabwe in the *Buhera North Election Petition;* a list of persons who died between March 2000 and 31 December 2001 as a result of what it believed was politically motivated violence and extracts of newspaper articles.

88. The complainant submitted further that some of the executions were carried out by ZANU (PF) supporters and war veterans but also that extra-judicial or summary executions carried out by any other State agents such as an officer of the Central Intelligence Organisation are also a violation of Article 4 of the African Charter.

89. The complainant further asserted that whether all levels of the Government were aware of the acts complained of or that such acts were outside the sphere of the agent's authority or violated Zimbabwean law was irrelevant for the purpose of establishing whether the respondent State was responsible under international law for the violations of human rights as alleged in the communication. The complainant maintained that the

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[27] Communication 218/98 – Civil Liberties Organisation, Legal Defence Centre, Legal Defence & Assistance Project/Nigeria; Communication 225/98 – HURILAWS/Nigeria; See also Article 61 of the African Charter.

[28] Communication 223/98 – Forum of Conscience/Sierra Leone.

State is required under Article 1, to take all reasonable measures to ensure that people within its jurisdiction were treated in accordance with international human rights norms and standards[29].

90. Furthermore, the complainant averred that the right to life read together with the State's general obligation required by implication that there should be some form of *effective official investigation* when there has been an extra-judicial execution. This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State[30].

91. The complainant referred the Commission to the European Court decision in **Jordan v the United Kingdom**[31] which stated that "an effective official investigation must be carried out with promptness and reasonable expedition. The investigation must be carried out for the purpose of securing the effective implementation of domestic laws, which protect the right to life. The investigation or the result thereof must be open to public scrutiny in order to secure accountability. For an investigation into a summary execution carried out by a State agent to be effective, it may generally be regarded as necessary for the person responsible for the carrying out of the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence".

92. The complainant submitted that in the present communication there were no effective official investigations carried out in cases of extra-judicial or summary executions noting that this was because the very police which was implicated in failing to intervene and stop the murders were responsible for carrying out the investigations. The complainant referred the African Commission to its jurisprudence in several cases brought against Sudan with respect to the situation pertaining in that country between 1989 and 1993. In those communications, the African Commission held that "investigations into extra-judicial executions must be carried out by entirely independent individuals, provided with the necessary resources, and their findings must be made public and prosecutions initiated in accordance with the information uncovered"[32].

Allegation of violation of Article 5 of the African Charter

93. The complainant also alleged a violation of Article 5 of the African Charter which provides that "e*very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and*

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[29] See Valesquez Rodriguez Case, Inter-American Court of Human Rights, Judgment of 29 July 1988 paragraphs 170, 177 and 183.

[30] Sabuktekin v Turkey (2003) 36 EHRR 19.

[31] Jordan v United Kingdom (2003) 37 EHRR 2.

[32] Consolidated communication 48/90, 50/91, 52/91, 89/93 – Amnesty International, Comite Loosli Bacheland, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan; See also Resolution 1989/65 of 24 May 1989 of the Economic and Social Council of the United Nations

degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

94. The complainant submitted that ZANU (PF) supporters acting in concert with war veterans subjected their victims to severe mental and physical suffering. They abducted and force-marched farm labourers to camps for political re-education meetings and to attend ZANU (PF) rallies as in the case of Robert Serengeti, Fungai Mafunga, Chamunorwa Steven Bitoni, Tazeni Chinyere, Champion Muleya, Bettie Muzondi and Misheck Muzondi. According to the complainant, while in the political re-education meetings, some of the farm workers were asked to produce ZANU (PF) membership cards and where they failed to produce ZANU (PF) membership cards they were interrogated about their involvement with opposition political parties. It is alleged that they were further ordered to lie prone and to roll in the mud while water was poured over them and that victims reported being subjected to severe beatings with various objects such as sticks, *sjamboks*, open hands, axe handles and hosepipes. Petros Sande for example, is alleged to have testified that he was ordered to stick his penis in the sand and imitate sexual positions until he masturbated. When he failed to perform to his assailants' satisfaction his penis was hit with a stick.

95. The complainant provided information about persons who alleged to have been subjected to ill-treatment and stated that the victims of these atrocities reported to the police but in many of the cases the police made no effort to arrest or investigate the reports. Other victims were issued with death threats if they reported while others such as Sekai Chadeza feared reprisals and so they declined to report the assaults to the police.

96. The complainant submitted that all the above examples reveal a violation of Article 5 of the African Charter by the Respondent State and referred the African Commission to its jurisprudence in **International Pen et al (on behalf of Ken Saro-Wiwa Jnr)/Nigeria**[33] where it held that "the prohibition in Article 5 included not only actions which cause serious physical or psychological suffering, but also actions which humiliate the individual or force him or her to act against his will or conscience." According to the complainant, the prohibition of torture, cruel, inhuman and degrading treatment is absolute[34] and one of the most fundamental values of a democratic society[35].

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[33] Consolidated communication 137/94, 139/94, 161/97 – International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria; See also communication 224/98 – Media Rights Agenda/Nigeria; See also the definition of Torture in Article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations in Resolution 3452(XXX) of 9 December 1975 and Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

[34] Communication 225/98 – HURILAWS/Nigeria.

[35] Lorse v Netherlands (2003) 37 EHRR 3.

Allegation of violation of Article 6 of the African Charter

97. The complainant also alleged a violation of Article 6 of the African Charter which provides that *"every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."*

98. The complainant submitted that the victims in the communication were abducted and kidnapped and held in detention for a whole night at camps established by war veterans and ZANU (PF) supporters mainly because they held differing political opinions. The complainant asserted that kidnapping of a person is an arbitrary deprivation of their liberty.[36]

99. The complainant further submitted that the African Commission has held that detaining a person on account of their political beliefs, especially where no charges are brought against them renders the deprivation of liberty arbitrary and where government maintains that no one is presently detained without charge does not excuse past arbitrary detentions[37]. The complainant makes reference to the decision of the European Court of Human Rights in ***Ibilgin v Turkey***[38] where it stated that *"any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention."*

100. The complainant stated that arbitrary deprivation of liberty often involve an element of suffering or humiliation which also amounts to cruel, inhuman or degrading treatment[39].

Allegation of violation of articles Article 9, 10 and 11 of the African Charter

101. The complainant further alleged a violation of Articles 9, 10 and 11 of the African Charter averring that there is a close relationship between these rights[40].

Article 9 of the African Charter provides -:
(1) Every individual shall have the right to receive information

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[36] See Valesquez Rodriguez Case, Inter-American Court of Human Rights, Judgment of 29 July 1988, paragraph 155.

[37] Consolidated communication 140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria.

[38] Ibilgin v Turkey (2003) 35 EHRR 39.

[39] Communication 225/98 – HURILAWS/Nigeria; See also Lorse v Netherlands (2003) 37 EHRR 3.

[40] Consolidated communication 137/94, 139/94, 161/97 – International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria.

(2) Every individual shall have the right to express and disseminate his opinions within the law

Article 10 of the African Charter provides -:
(1) Every individual shall have the right to free association provided that he abides by the law.
(2) Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

Article 11 of the African Charter provides -:
Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others

102. The complainant alleged that the victims in the present communication were abused because they held and sought to impart political views and opinions that were unfavourable to those of the Respondent State. It is alleged that they were forced to attend all night rallies where they were given information on why they should support ZANU (PF) and not the opposition MDC. Furthermore, the victims were forced to surrender their parties' campaign materials and were prevented from communicating to others their parties' policies.

103. The complainant submitted further that freedom of expression is a basic human right vital to an individual's personal development and political consciousness. It is therefore one of the essential foundations of a democratic society and one of the basic conditions for its progress.[41]

104. According to the complainant, the persecution of real or perceived members of opposition political parties in an attempt to undermine the ability of the opposition to function amounted to an infringement[42] of Article 10 of the African Charter and of persons because they belong to opposition political parties amounted to a violation of Article 9 of the African Charter.[43]

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[41] Consolidated communication 105/93, 128/94, 130/94, 152/96 – Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda & Constitutional Rights Project/Nigeria; consolidated communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation & Media Rights Agenda/Nigeria; communication 212/98 – Amnesty International/Zambia; See also Thoma v Luxembourg (2003) 36 EHRR 21.

[42] See Yazar, Karatas, Aksoy & People's Labour Party (HEP) v Turkey (2003) 36 EHRR 6.

[43] Consolidated communication 48/90, 50/91, 52/91, 89/93 – Amnesty International, Comite Loosli Bacheland, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan.

Allegation of violation of Article 13(1) of the African Charter

105. The complainant equally alleged a violation of Article 13(1) of the African Charter which provides that "e*very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".*

106. It is submitted by the complainant that the alleged victims were abused because of their political opinions and affiliations, while some of the victims were members of political parties others were not affiliated to any political party but were assumed to support the opposition and therefore subjected to abuse.

107. The complainant argued that the right of people to participate in the government of their countries is not limited to the casting of votes. In addition to voting for representatives of their choice, people participate in the government of their country through uninhibited, robust and wide open communication on matters of government, politics and public issues[44] and by freely associating and forming associations for political ends, adding that, there must always be a general capacity for citizens to join, without interference, in associations in order to attain various ends[45].

STATE PARTY'S SUBMISSION ON THE MERITS

108. The State contended that there were many allegations in the Communication intended to give an impression of serious or massive violation of human rights which Zimbabwe proved to be false. The State indicated that there were many cases alleged to have been reported yet the Police did not have records of such cases. The State also noted that complainant did not avail any proof to the Commission that reports had been made to the Police, neither did complainant submit any medical reports of the injuries sustained by some of its clients as a result of the severe and life threatening assaults allegedly perpetrated on the victims.

109. The State also submitted that the complainant exaggerated the number of deaths some of which were in fact as a result of natural causes and other causes not related in any way to political violence during the period in question. That complainant even included people who were still alive and still had not submitted proof of the death of any of the 74 deceased persons. The State recognized its responsibility under the Charter to assist the Commission in arriving at the truth, provided the information on which cases had been reported, their reference numbers both Police and Court and progress made in the investigation of the matters in order to bring justice to the victims.

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[44] See New York Times v Sullivan 376 US 254 (1964) at 270; Reynolds v Times Newspapers Ltd [2001] AC 127.

[45] Communication 101/93 – Civil Liberties Organisation (In respect of the Nigerian Bar Association)/Nigeria.

110. The State also drew the Commission's attention to the fact that in the complainant's Submissions on Merits, they abandoned a number of allegations and had made brazen submissions in respect of some of the allegations. The State noted that with regards to freedom of expression for example, complainant's submissions had always been centered on freedom of the media and the enactment of laws such as the Access to Information and the Protection of Privacy Act (AIPPA). However, in its Submissions on Merits it does not make any reference to these allegations other than making reference to paragraph 58 of the Report of the UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Execution E/CN.4/2002/74 and paragraph 634 of E/CN.4/2002/74/Add.2, paragraphs 109-121 of E/CN.4/2002/75/Add.2. According to the State it should therefore be taken that complainant has abandoned its allegations in this regard.

111. The Respondent State informed the Commission that the Government of Zimbabwe had taken appropriate and effective measures to ensure that those who perpetrated the ascertainable violations specified in the communication been brought to book and as such had provided effective remedy to the aggrieved. The State indicated a number of measures taken to bring those accused of perpetrating violence to justice, including investigations conducted by the police, amendment of relevant legislation and the payment of compensation to victims.

Regarding the violations of specific provisions of the Charter, the Respondent State noted as follows

112. As regards allegations of violation of Article 1 of the African Charter, the Respondent State pointed out that it unreservedly accepts that its obligations under the Charter are to respect, protect and promote the rights guaranteed under the Charter. By respecting the rights, Zimbabwe was required to refrain from interfering with the enjoyment of the rights. The respondent state indicated that the State had enacted the necessary policy and legislation, had made provision for effective remedies and taken the necessary administrative measures to ensure that its people enjoy their rights.

113. The State contended that the Communication is essentially to determine whether the alleged violations of human rights can be imputed to the Government of Zimbabwe since the Complainant averred that the Government planned, committed or otherwise aided and abetted a campaign of terror and this was based on the perceived interlink between the Government, ZANU (PF) and the war veterans.

114. The State noted that it is responsible for the acts of its organs and officials undertaken in their official capacity and for their omissions even when these organs act outside the sphere of their authority or violate internal law.[46] The underscoring factor, according to the State, is that any such violation is imputable to the State only when the

[46] See ***Velasquer Rodrigues Case***, Inter-American Court of Human Rights, Judgment of 29 July, 1998 paragraphs 169 – 170.

act is by a public authority which uses its authority to perpetrate the violation.[47] The import of paragraph 172 of ***Velasquez Rodriguez Case*** is that even where the State agent acts outside his/her authority or violates the law, the agent must have held himself/herself to be exercising his authority as a State agent. In any other circumstance, the illegal act can only be imputable to a State if there is lack of diligence to prevent or respond to the violation as required by the Charter. The State concluded that where a State agent is on a frolicking of his own and commits acts considered of violation of rights, such acts will not be imputed to the State.

115. The State further noted that whilst Article 1 extends the obligation of a State Party to investigate acts of violation of rights guaranteed under the Charter, the duty to investigate, such as the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result, admitting however, the investigations must be undertaken in a serious manner and not as a mere formality. Referring to the ***Rodriguez Case,*** the State noted that the Inter-American Court of Human Rights was clear to what extent a State may become responsible for cases not intentionally or directly imputable to the State. The Court observed that:

> an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

116. The State emphasised that there is a clear distinction between the Government of Zimbabwe and ZANU (PF). The State maintained that whilst ZANU (PF) is the ruling party, the actions of the party cannot be attributed to the Government of Zimbabwe and added further that the actions of the war veterans cannot equally, be attributed to the Government of Zimbabwe. The Respondent State acknowledged that President Mugabe is the Patron of the war veterans, but that did not in any way imply that war veterans were controlled by the Government of Zimbabwe. ZANU (PF) is a political party and the war veterans (either individually or as an association) are not State organs. Therefore, according to the State, their illegal acts cannot be imputable to the Government of Zimbabwe. Neither can it be said that the violence alluded to in the Communication was an orchestrated policy of the Government of Zimbabwe. Submissions by complainant in this regard are palpably untenable and should be disregarded, submitted the State.

117. The State concluded by noting that it was improper to impose liability on the Government of Zimbabwe, or any Government for that matter, for actions of persons or organisations who were not part of the State machinery. The State's liability in such a situation should only attach where the State fails to exercise the duty to protect the

[47] Ibid para 172.

rights, welfare and interests of the people diligently or acts in complicity with such persons.

118. With regards to allegations of violation of Article 4, the right to life, the State noted that extra-judicial, arbitrary or summary executions are, under international law, generally attributable to State organs and officials in the ordinary exercise of governance. They entail, among other things, disregard of due process of the law by State entities or officials. The State referred to the *Principles on the Effective Prevention and Investigation of Extra – Legal, Arbitrary and Summary Executions Recommended by Economic and Social Council Resolution* 1989/65 of 24 May 1989 and the *U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (U.N. Doc. G/ST/CS DHA/12 (1991) which provide for definitions of e*xtra-Legal, Arbitrary and Summary Executions.*

119. The State noted further that apart from the case of Chiminya and Mabika out of the alleged seventy four (74) "extra-judicial executions", the complainant did not give an account of how the others happened. Therefore, the complainant's naked allegations did not assist in determining whether or not the alleged deaths actually happened. To buttress this point, the State argued that although complainant alleged that some of the victims were severely assaulted with objects such as "sticks, *sjamoks*, open hands, axe handles and hosepipes", not a single medical report was produced in support of such severe assaults. The State called on the Commission to distinguish the present Communication from Communications such as *Amnesty International/Sudan* 48/90, *Comite Loosli Bachelard/Sudan* 50/91, *Lawyers Committee for Human Rights/Sudan* 52/91 and *Association of Members of the Episcopal Conference of East Africa/Sudan* 89/93 where the communication was supported with not only personal accounts but also medical testimonies. The State concluded that throughout the Communication, there was evidence that the Complainant did not take steps to ascertain what had happened to the matters that were reported to the police.

120. As regards Joseph Mwale, who was alleged to have killed Chiminya and Mabika, and who was alleged to be a member of the Central Intelligent Organisation, the Respondent State submitted that his actions could not be imputed to the State as the alleged acts could not be said to have been committed in his official capacity, in other words, using their authority in the normal course of their duty. The death of Chiminya and Mabika, according to the State, was a case of an allegedly intentional and illicit deprivation of another's life which can and must be recognised and addressed in terms of the criminal law as murder.

121. Furthermore, the Respondent State submitted that the alleged or perceived inaction of the Police in relation to all the alleged violations cannot be said to be a contravention of the rights guaranteed by the Charter and in particular Article 1. The State insisted that the Police were deployed to deal with cases of violence and unrest, and to this end, suspects were arrested, investigations conducted and prosecutions effected. The State also reminded the Commission of the fact that the complainants had submitted at the 33rd Ordinary Session that in most cases the alleged victims of the alleged violence did not know who the perpetrators of the violence were and therefore

could not assist the Police in identifying the perpetrators of the violence and in a large number of cases, the alleged victims did not even report the alleged violations.

122. The State also drew the attention of the Commission to the fact that some of the names of those alleged to have been assaulted did not appear in the records of the Registrar General and therefore their existence was questionable; that some of the deaths had been found not to have occurred at all; that in some cases members of either ZANU (PF) or MDC were driven from other areas to perpetrate acts of violence in different areas. (***Alouis Musarurwa Mudzingwa v Oswald Chitongo*** HH 73-2002); that some of the individuals alleged to have died in politically motivated violence, died of natural causes or other mishaps and not as a result of the alleged assaults and some well before the period in issue. The State noted that all the above came about as a result of investigations conducted by the Police following reports in the Press; that in the bulk of the cases the perpetrators had been identified, arrested, tried, convicted or acquitted and in some cases matters were still pending before the courts; that in other instances the police had carried out their investigations but had failed to identify the culprits; and that in other instances the Attorney General declined to prosecute due to lack of evidence.

123. The State submitted that given the concession by the Complainant and the fact that there had been prosecutions of some of the culprits, the Police had discharged their duties diligently in the circumstances, noting that the fact that the investigations did not always produced results satisfactory to the complainant did not amount to a breach of their duty. The State concluded that the fact that the situation in the country had stabilised was indicative of the Police's role in preventing further violations and containing the situation.

124. In the case of Chiminya and Mabika, the State submitted that the Attorney General had appraised the investigations conducted by the Police and had since issued instructions to the Police for the arrest and prosecution of Mwale and others for the murder of Chiminya and Mabika. According to the State, general indications were that the investigations were done in a professional and independent manner and had been effective.

125. The State concluded on this allegation by noting that in any event, the question of an independent investigator does not arise as the alleged executions could not in the strict sense be termed extra-judicial or summary executions.

126. Regarding allegations of torture, Inhuman and Degrading Treatment, the State noted that as in the case of extra-judicial or summary execution, torture, inhuman or degrading treatment must be inflicted:

> *"….. by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity*. (See Article 1 of the *Conventions Against Torture and other Cruel, Inhuman and Degrading Treatment*, 1984".

127. To this end the State noted that ZANU (PF) and war veterans are not synonymous with the Government of Zimbabwe and are not State institutions. Torture or ill treatment of a citizen by another citizen who is not in government service and/or whose behaviour is not sanctioned by government does not fall within the definition of the Convention. The respondent State argued that the Police investigated those cases that were reported and since in most of the cases the alleged victims could not identify the perpetrators, the Police could not pursue the matter any further.

128. On the allegation of arbitrary detention, the State submitted that its submissions on the right to life and freedom from torture equally applied in this context.

129. Regarding Freedom of Expression, Association and Assembly and discrimination, the State distinguished the communication from ***Amnesty International/Sudan*** 48/90, ***Comite Loosli Bachelard/Sudan*** 50/91, ***Lawyers Committee for Human Rights/Sudan*** 52/91 and ***Association of Members of the Episcopal Conference of East Africa/Sudan*** 89/93 noting that in the latter cases government institutions perpetrated the violations. Although complainant made reference to "parties", the list of persons assaulted was either ZANU (PF) or MDC or they were said not to be affiliated to any political party. The State pointed out that what was clear was that the violation was not directly attributed to the Government. The State further noted that the Government had taken the necessary measures to ensure that those who have perpetrated the violations were brought to book. And that there was no policy by the Government of Zimbabwe to trample on the rights of any individual to freely associate with a political party of his or her choice. The State reiterated the same argument with regard to allegations of violation of the right to participate freely in one's government.

130. Regarding Equal Protection of the law, the State refuted the claim that the alleged victims had been denied this protection in the manner and to the extent averred by the complainant and denied that there was an outright denial of Police protection for complainant's clients.

131. On the Clemency Order No. 1 of 2000, the Respondent State emphasised that the prerogative of clemency or amnesty is recognised as an integral part of constitutional democracies. To ensure that those who had committed more serious offences did not go unpunished, the Clemency Order excluded crimes such as murder, rape, robbery, indecent assault, statutory rape, theft and possession of arms. The State further noted that a decision by the Commission that the Clemency Order was an abdication of Zimbabwe's obligations under the Charter would amount to undermining the whole notion of the clemency prerogative worldwide adding that Clemency Orders are the prerogatives of the Head of State and this discretion was exercised reasonably under Clemency Order No 1 of 2000.

132. On the report issued by the Special Rapporteur on Extra-judicial, Summary or Arbitrary Execution's Report E/CN.4/2001/9/Add.1, the State submitted that her appeal to the Government of Zimbabwe was based on reports that she had received on the alleged violation of human rights, and it was, according to the State, apparent from the report that:

(i) the alleged violations were by the supporters of the ruling party and war veterans and not by the Government of Zimbabwe; and

(ii) that Zimbabwe responded to the Special Rapporteur's appeal that all incidents were being investigated.

133. In conclusion, the State stated that the Special Rapporteur's report was supportive of its submissions that the Government of Zimbabwe did not have a policy to violate the rights if its people and also that it took its obligations on human rights seriously.

Issues for determination and decision of the African Commission on the merits

134. The present communication raises several issues that must be addressed by the African Commission to determine whether the Respondent State has or has not violated the rights of the victims as alleged by the complainant. The African Commission is called upon to determine:

- what non-state actors are and whether the Zimbabwe African National Union-Patriotic Front - ZANU (PF) and the Zimbabwe Liberation War Veterans Association (War Veterans) can be termed non-state actors;

- the extent of a State's responsibility for human rights violations or acts committed by non-state actors; and

- whether the Clemency Order No. 1 of 2000 resulted to a violation of the Respondent State's obligations under Article 1 of the Charter.

Issue One: What are non-state actors under international law?

135. Traditionally, international human rights law mostly talked to and about national governments or States. The need to look beyond the State or its agents as the primary subject of international law and the sole possible actor capable of impairing the enjoyment of the human rights of others, requires a term that captures the very many different kinds of individuals, groups or institutions whose behaviour, actions or policies have an effect on the enjoyment of human rights, and who can either be directly called to answer by the international system or for whom the government will be called to answer.

136. The term 'non-state actors' has therefore been adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the State and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures

of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.[48]

Issue Two: Are the Zimbabwe African National Union-Patriotic Front - ZANU (PF) and the Zimbabwe Liberation War Veterans Association (War Veterans) non-state actors

137. By its submission of 23 February 2004, the complainant argued that the Government of Zimbabwe planned, committed or otherwise aided and abetted a campaign of terror and violence…and stated further that the War Veterans and the supporters of the governing ZANU (PF) with endorsement and support of the government unlawfully occupied commercial farms… which were turned into torture and re-education camps. The complainant argued further that "under the current political arrangement in Zimbabwe, ZANU (PF) is government and the government is ZANU (PF) and with respect to the war veterans, the complainant submitted that "at all material times the government of Zimbabwe exercised extensive *de jure* and *de facto* control over the war veterans", noting that the Chairperson of the Zimbabwe Liberation War Veteran Association, Dr. Hunzvi made a statement in court to the effect that President Mugabe had control over the war veterans. The complainant was therefore implying that the ZANU (PF) and the War Veterans were either State apparatus or were controlled by the Government. In its submission of 23 February 2004 the complainant argued further that even if it were found that ZANU (PF) supporters and war veterans were not agents of the government, read together with the general obligation under Article 1 of the African Charter, the government could still be held liable for a violation of the Charter, noting that under Article 1 of the Charter, the government is required to take all necessary measures to ensure that people within its jurisdiction are treated in accordance with international norms and standards.

138. In the opinion of this Commission, the ZANU (PF) is a political party (the ruling party) in Zimbabwe and just like any other party in the country, distinct from the government. It has an independent identity from the government with its own structures and administrative machinery, even though some of the members of the Zimbabwe Government - cabinet ministers, also hold top ranking positions in the party. For example, President Robert Mugabe is the President and First Secretary General of the Party.[49] This Commission also holds that the War Veterans Association is a group of ex-combatants of the Zimbabwe liberation struggle. President Mugabe was the Patron during the period under consideration.

139. Given what this Commission will call the "mixed membership", it would appear that there is a very thin line to be drawn between the Government and the ZANU (PF), the Government and War Veterans and between the ZANU (PF) and the War Veterans. There are members of government who are members of the party and members of the

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[48] See African Commission decision on Communication 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria.

[49] Seventeen members of the Zimbabwe Cabinet are also members of the ZANU (PF) Politburo, the decision making organ of the Party.

party who are war veterans. However thin the line of distinction may seem, it is not the view of the African Commission that the ZANU (PF) and the Zimbabwe Liberation War Veterans Association are structures of the Government or organs of the State. The complainant did not supply the African Commission with documentary evidence to prove this relationship. Even if President Mugabe is Patron of the War Veterans and exercises control over the group, this does not make the war veteran association part of government or State machinery.

140. It must also be noted that during oral submissions by both parties at the 35th Ordinary Session of the African Commission, the complainant dropped its argument that the ZANU (PF) and the Zimbabwe Liberation War Veterans Association were structures of the government or organs of the State. The complainant noted in its submission of 26 August 2004 that " *the assertion that the Respondent State acquiesced to the gross violations of human rights is based not on agency but a failure to effectively protect its citizens from the harmful conduct of third parties*". In the African Commission's view therefore, the complainant has admitted not only that ZANU (PF) and the War Veterans are not government structures or organs of the State, but is also accepting the State's argument that it had nothing to do with their alleged actions. The complainant is simply concerned with the fact that the State has a responsibility to effectively protect its citizens from the harmful conduct of third parties, a responsibility, which, according to the complainant, the Respondent State failed to discharge. It is therefore the view of the African Commission that both ZANU (PF) and the Zimbabwe Liberation War Veterans Association are organisations outside the government or State structures and as such, non-state actors.

141. Having established that ZANU (PF) and the Zimbabwe liberation War Veterans Association are *non-state actors*, the Commission will proceed to deal with the complainant's major concern – the state's responsibility to effectively protect its citizens from the harmful conduct of third parties (non-state actors), can the violence and atrocities alleged to have been committed by these *non-state actors* be attributed to the Respondent State or put differently, can the Respondent State be held responsible for the violations committed by these non-State actors?

Issue Three: Extent of a State's responsibility for acts of non-state actors

142. Article 1 of the African Charter is essential in determining whether a violation of the human rights recognised by the Charter can be imputed to a State Party or not. That Article charges the States Parties with the fundamental duty to "recognize the rights … and undertake to adopt legislative or other measures to give effect to them". Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the African Charter.

143. Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of

others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of *due diligence*[50] to prevent the violation or for not taking the necessary steps to provide the victims with reparation.

144. The Inter American Court of Human Rights has issued a judgment in the case of *Velásquez Rodríguez v Honduras*[51] which articulates one of the most significant assertions of State responsibility for acts by private individuals. The Court stated that a State "has failed to comply with [its] duty ... when the State allows "private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention".[52] In the same case, the Inter American Court reaffirmed that States are "obliged to investigate every situation involving a violation of the rights protected by [international law]". Moreover, the Court required Governments to: "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[53] This represents an authoritative interpretation of an international standard on State duty. The opinion of the Court could also be applied, by extension, to Article 1 of the African Charter of Human and Peoples' Rights, which requires States parties to "recognize the rights, duties and freedoms enshrined in the Charter and … undertake to adopt legislative and other measures to give effect to them". Thus, what would otherwise be wholly private conduct is transformed into a constructive act of State, "because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]".

145. The Inter-American Court of Human Rights in the *Velàsquez Rodriguez Case*, thus affirmed that: "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due

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50 In human rights jurisprudence this standard was first articulated by a regional court, the Inter-American Court of Human Rights, in looking at the obligations of the State of Honduras under the American Convention on Human Rights - *Velasquez-Rodriguez*, ser. C.,No.4, 9 Hum. Rts.I.J. 212 (1988). The standard of *due diligence* has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity.

51 Series. C.,No.4, 9 Human . Rights .Law Journal. 212 (1988)

52 Velásquez Rodríguez case para 176.

53 Id. Para 174.

diligence to prevent the violation or to respond to it as required by the Convention [or the African Charter]."[54]

146. The established standard of *due diligence* in the *Rodriguez Case* provides a way to measure whether a State has acted with sufficient effort and political will to fulfil its human rights obligations. Under this obligation, States must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law. Moreover, if possible, it must attempt to restore the right violated and provide appropriate compensation for resulting damage.

147. In fact, international[55] and regional[56] human rights standards expressly require States to regulate the conduct of non-state actors containing explicit obligations for States to take effective measures to prevent private violations of human rights. The doctrine of *due diligence* is therefore a way to describe the threshold of action and effort which a State must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights. A failure to exercise *due diligence* to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to State responsibility even if committed by private individuals. This standard developed in regard to the protection of aliens has subsequently been applied in regard to acts against nationals of the State. The doctrine of due diligence requires the State to "organize the governmental apparatus, and in general, all the structures through which

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[54] Id. Para 172.

[55] The Covenant on Civil and Political Rights (ICCPR), in its Article 2 (3a), imposes a duty on each Party to ensure an effective remedy to any person whose rights or freedoms are violated, whether or not by persons acting in an official capacity. Further, as far as the definition of Torture is involved, the Human Rights Committee in its General Comment No 20 on art 7 of the ICCPR stated that: "It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Under Article 2 (e) States undertake "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". The CEDAW supervising Commission further stated that: "Discrimination under the Convention is not restricted to action by or on behalf of Governments … Under general international law and specific human rights Covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation. (…)" Article 4(c) of the UN Declaration on the Elimination of Violence Against Women obliges states to "[E]xercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women whether those acts are perpetrated by the State or by private persons".

[56] Article 2, 3, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establish a positive obligation on the State (including through legislative means). Article 1 of the American Convention provides that "the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".[57]

148. From the foregoing, can it be argued that the Respondent State's actions to deal with the allegations or the violence alleged to have been committed by individuals and non-state actors during the period under consideration meet the *due diligence* test?

149. To fully conceptualize a State's responsibility in terms of the due diligence doctrine, it must be made clear who is responsible and to what degree, where that responsibility arises from, towards whom such responsibility exists, and how such responsibility is asserted.[58] Thus, in this context, the task is not only to identify the responsibilities, but also to reflect on whether and under what conditions the State can be responsible for violations by private actors. The underlying aspect is that it is up to States, and States alone, to carry out obligations established by international human rights treaties.

150. State responsibility in general terms denotes a situation which occurs following a breach by a State of its legal obligations. Such obligations can be negative or positive, and can give rise to direct and indirect responsibilities**.**[59] In all of its aspects therefore the question of responsibility must also be related to the element of breach – breach of a duty to respect, protect, promote or fulfil the rights of persons under its jurisdiction.

151. In its decision in ***Communication No 155/96***,[60] the African Commission noted that internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely, the duty to *respect, protect, promote*, and *fulfil* .

152. At a primary level, the obligation to *respect* entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-

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[57] Velasquez-Rodriguez's case para 166.

[58] In general, see The Dutch Branches of Amnesty International and Pax Christi International, *Multinational Enterprises and Human Rights*, Utrecht, November 1998, chapter III, <www.paxchristi.nl/mne.html> (15 January 2002). Although any complete set of peremptory human rights has not been agreed upon, discussions frequently mention: genocide, crimes against humanity, piracy, torture, slavery, and war crimes. See e.g. Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework", in M. Cherif Bassiouni, *International Criminal Law* (2 ed.), vol. I, 3-125, at 41, and Ian Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, 2001, Intersentia – Hart, at 66-121.

[59] Scott, Craig / Hart / In: Torture as Tort : Comparative Perspectives on the Development of Transnational Human Rights Litigation / ed. by Craig Scott, ISBN 1841130605 / 2001, pp. 47-48.

[60] Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria.

holders, their freedoms, autonomy, resources, and liberty of their action.[61] At a secondary level, the State is required to ensure others also respect their rights. This is what is called the State's obligation to *protect* right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework of an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to *promote* the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures. The last layer of obligation requires the State to *fulfil* the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.

153. In ***Communication 74/92***,[62] the African Commission held that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This illustrates the positive action expected of governments in fulfilling their obligation under human rights instruments. This obligation of the State is further emphasised in the practice of the European Court of Human Rights, in ***X and Y v. Netherlands.***[63] In this particular case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

154. In the present communication, the Respondent State has an obligation to make sure the rights of persons under its jurisdiction are not interfered with by third parties. The State argues that during the riots the police were deployed in areas where violence was reported and cases of alleged abuses were duly investigated. The State added that however, due to the circumstances prevailing at the time, the nature of the violence and the fact that some victims could not identify their alleged perpetrators, the police were not able to investigate all cases referred to them.

155. The extent of a State's responsibility must not be determined in the abstract. Each case must be treated on its own merits depending on the specific circumstances of the case and the rights violated. This follows therefore that, in choosing how to provide effective protection of human rights, there are different means at a State's disposal.[64]

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[61] Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Raija Hanski and Markku Suksi (Eds.), Second Revised Edition, *An Introduction to the International Protection of Human Rights: A Textbook* (1999), p. 31.

[62] Union des Jeunes Avocats /Chad.

[63] 91 ECHR (1985) (Ser. A) at 32.

[64] Plattform 'Ärzte für das Leben' v. Austria, (21 June 1988), Publications of the European Court of Human Rights, Series A, vol. 139, para. 34: "…while it is the duty of the Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully,

This is still a disputed element but the International Court of Justice (ICJ) has held *due diligence* in terms of "means at the disposal" of the State.[65] Nevertheless, this need not be inconsistent with maintaining some minimum requirements.[66] It could well be assumed that for non-derogable human rights the positive obligations of States would go further than in other areas.

156. An analysis of the feasibility of effective State action must also be undertaken. A finding that no reasonable diligence could have prevented the event has contributed to denials of responsibility.[67] In the present communication, the Respondent State contended that the Police did their best to investigate the allegations brought to them.

157. Could the Respondent State have foreseen the violence and taken measures to prevent it? Even though it is not always possible for a State to know beforehand how a non-state actor is going to act, States have the responsibility, not only to protect human rights, but also to prevent the violation of human rights. The question to be addressed here is not necessarily who violated the rights, but whether under the present communication, the state took the necessary measures to prevent violations from happening at all, or having realized violations had taken place, took steps to ensure the protection of the rights of the victims.

158. A single violation of human rights or just one investigation with an ineffective result does not establish a lack of due diligence by a State.[68] Rather, the test is whether the State undertakes its duties seriously.[69] Such seriousness can be evaluated through the actions of both State agencies and private actors on a case-by-case basis.

159. The due diligence requirement encompasses the obligation both to provide and enforce sufficient remedies to survivors of private violence. In general terms, the Human

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they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used".

65 Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran), Judgment, ICJ Reports 1980.

66 Brian Smith, State Responsibility and the Marine Environment; The Rules of Decision, Oxford University Press, 1988, at 32.

67 Sornarajah, "Linking State Responsibility for Certain Harms Cause by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States", and Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, 1989, at 159.

68 Commission on Human Rights, Fifty-second session, February 1996, Report of the Special Rapporteur on violence against women, its causes and consequences, "FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION ALTERNATIVE APPROACHES AND WAYS AND MEANS WITHIN THE UNITED NATIONS SYSTEM FOR IMPROVING THE EFFECTIVE ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS", submitted in accordance with Commission on Human Rights Resolution 1995/85.

69. Ibid.

Rights Committee has held, for example, that the existence of legal rules does not suffice to fulfil a condition of reasonable measures. The rules must also be implemented and applied (entailing for instance, investigations and judicial proceedings) and victims must have effective remedy.[70] Thus, the existence of a legal system criminalizing and providing sanctions for assault and violence would not in itself be sufficient; the Government would have to perform its functions to "effectively ensure" that such incidents of violence are actually investigated and punished. For example, actions by State employees, the police, justice, health and welfare departments, or the existence of government programmes to prevent and protect victims of violence are all concrete indications for measuring due diligence. Individual cases of policy failure or sporadic incidents of non-punishment would not meet the standard to warrant international action.

160. It follows from the above that, by definition, a State can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights. However, unlike for direct State action, the standard for establishing State responsibility in violations committed by private actors is more relative. Responsibility must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action. Where States do not actively engage in acts of violence or routinely disregard evidence of murder, rape or assault, States generally fail to take the minimum steps necessary to protect their citizens' rights to physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished. To avoid such complicity, States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.

161. In the present communication, the State indicated measures that it took to deal with the alleged human rights violations, including amendment of legislation, arrest and prosecution of alleged perpetrators, payment of compensation to some victims and ensuring that it investigated most of the allegations brought to its attention. The complainant did not dispute these actions claimed to have been taken by the Respondent State but contends instead that the actions were not sufficient and were not taken early enough to be diligent.

162. The question to be asked is whether these measures taken by the State were sufficient for the Commission to come to the conclusion that the State had discharged its duty?

163. The complainant did not dispute these actions claimed to have been taken by the Respondent State but contended instead that the actions were not sufficient and were not taken early enough to be diligent. The complainant also did not demonstrate collusion by the State to either aid or abet the non-state actors in committing the violence, and equally failed to show that the State remained indifferent to the violence that took place. This view is supported by the conclusion of the Report of the this Commission's Fact-Finding Mission to the Respondent State which noted that "*there*

[70] E, Klein, "The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights", in Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (Colloquium, Potsdam, 1-3 July 1999), 2000.

were allegations that the human rights violations that occurred were in many instances at the hands of ZANU PF party activists. The Mission [was] however not able to find definitively that this was part of an orchestrated policy of the government of the Republic of Zimbabwe. There were enough assurances from the Head of State, Cabinet Ministers and the leadership of the ruling party that there has never been any plan or policy of violence, disruption or any form of human rights violations, orchestrated by the State."

164. Given the above, the African Commission cannot find that with regards to the violence perpetrated by the non-state actors, the Respondent State failed to comply with its duty under Article 1 of the African Charter to "…adopt other measures to give effect to [the rights]" and to that extent cannot find the State to have violated Article 1 of the African Charter.

Allegation of violation of specific provisions of the African Charter

165. Apart from alleging that the Respondent State has breached its fundamental duty under Article 1 of the African Charter, the complainant also alleged the violations of several other provisions of the African Charter namely, Articles 2,3,4,5,9,10,11 and 13.

166. Before addressing itself to whether the State has violated any of the provisions of the African Charter, the African Commission would like to rule on the matter raised by the Respondent State that because the complainant did not mention some of the rights during its submission on the merits, it means they have abandoned their allegations of violation of those rights.

167. The African Commission would like to state that the failure by the complainant to indicate the particular articles or the rights of the African Charter alleged to have been violated is not fatal, to the extent of regarding the communication inadmissible or unmeritorious. He or she does not need to indicate the remedy sought. It is for the African Commission, after consideration of all the facts at its disposal, to make a pronouncement on the rights violated and recommend the appropriate remedy to reinstate the complainant to his or her right.

168. With respect to allegations of violation of Article 2 and 3(2) **-** complainant submits that the Respondent State denied the victims their rights as guaranteed by the African Charter on the basis of their political opinions. Article 2 of the African Charter provides that

> *Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Article 3(2) provides that "every individual shall be entitled to equal protection of the law".*

169. Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights. As Shestack has observed, equality and non-discrimination "are central to the human rights movement."[71] The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation. The African Commission has held in ***Communication 211/98***[72] that the right protected in Article 2 is an important entitlement as the availability or lack thereof affects the capacity of one to enjoy many other rights.[73]

170. Discrimination can be defined as applying any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.[74] From the definition of discrimination provided above, we can conclude that a universal 'composite concept of discrimination' can contain the following elements, stipulates a difference in treatment, has a certain effect and is based on a certain prohibited ground.

171. The general obligation is on States Parties to the different human rights treaties to ensure through relevant means that persons under their jurisdiction are not discriminated on any of the grounds in the relevant treaty. Obligations under international human rights law are generally addressed in the first instance to States. Their obligations are at least threefold: to respect, to ensure and to fulfil the rights under international human rights treaties. A State complies with the obligation to respect the recognised rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfil the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value. Article 1 of the African Charter requires States to ensure that effective and enforceable remedies are available to individuals in case of discrimination.

172. The complainant in the present communication concedes in their submission that the violence and alleged human rights violations were carried out by non-state actors including supporters of ZANU (PF), the War Veterans and some members of the MDC. The complainant has not shown that there was any deliberate policy of the government to encourage this violence and by so doing discriminate against persons holding an alternative political view. The Respondent State provided the Commission with proof

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71 Jerome Shestack, " The Jurisprudence of Human Rights", in Theodore Meron (ed), *Human Rights in **International Law**: Legal and Policy Issues,* 1984, p. 101.

72 Legal Resources Foundation/Zambia.

73 Ibid.

74 See The Human Rights Committee General Comment No. 18.

that it did investigate some of the allegations and the complainant did not challenge the fact the State investigated some of the allegations. Based on the evidence before it, the African Commission could not establish whether there was a discriminatory pattern in the way the police conducted investigations on the alleged violations. However, the legislative and other measures taken by the government to deal with the violence does not suggest, in the opinion of the African Commission, a discriminatory pattern.

173. Sometimes a law may be neutral on its face, yet have a disparate impact on a group of people due to its application. For example, in **Yick Wo v. Hopkins**,[75] Justice Stanley Matthews commented on the disparity in law enforcement by saying:

> though the law itself be fair on its face and impartial in appearance, yet, if applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, and the denial of equal justice is still within the prohibition of the [Charter]

174. For there to be equal protection of the law, the law must not only be fairly applied but must be seen to be fairly applied. Paragraph 9 (3) (a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[76] provides that everyone must be given the right

> to complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay.

175. The complainant in the present communication claims that the police selectively enforced the law to the prejudice of the victims - that the police refused to record and investigate complaints filed by the victims. Due to the above behaviour of the Police, the complainant concludes that the conduct amounted unequal protection of the law in a violation of Article 3(2) of the Charter. The State on its part holds that the police was deployed in all areas where violence was reported and because of the widespread nature of the violence and the scanty information provided to the police by the victims, the police could not effectively investigate all the allegations. The complainant provided

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[75] 118 U.S.356 (1886).

[76] UN General Assembly resolution 53/144.

unsigned statements to the Commission of persons who reported their cases to the police but were either turned away or the cases were not investigated.

176. While the African Commission cannot dispute the fact that the alleged victims did complain to the police or that they made declarations to the complainant about the alleged conduct of the police and while the African Commission cannot confirm or deny the allegations against the police, the fact that the declarations submitted by the complainant were not made under oath or corroborated by sworn affidavits makes it difficult to ascertain their authenticity. This Commission cannot accept the complainant's submission that the newspaper articles attached to the communication as appendix two corroborate the statements allegedly made by the alleged victims. The African Commission can therefore not rely on these declarations to conclude that the alleged victims were victimised, discriminated or denied equal protection of the law.

177. With respect to allegations of violation of articles 4 and 5 of the African Charter, the complainant alleges that extra-judicial executions and torture were perpetrated by supporters of the ZANU (PF) and the war veterans.

178. The Respondent State noted on the other hand that for it to be held responsible, the violations must be inflicted .. by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. [77]

179. Citing the UN Principles on the Effective Prevention and Investigation of Extra – Legal, Arbitrary and Summary Executions,[78] the State noted that generally extra-judicial executions are attributable to State organs and officials in the ordinary exercise of governance. This is supported by the U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.[79] The introductory paragraph of the 1991 United Nations Manual provides that such executions include: (a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention; (c) death resulting from enforced "disappearances"; (d) deaths resulting from the excessive use of force by law-enforcement personnel; (e) executions without due process; and (f) acts of genocide. The six circumstances of extra-judicial executions mentioned in the UN Manual point to the fact that under international law, such executions can only be carried out by the State or through its agents or acquiescence.

180. The UN Fact Sheet No.11 provides that the "situations of extrajudicial, summary or arbitrary execution" which the Special Rapporteur is requested to examine include all acts and omissions of *State representatives* that constitute a violation of the general recognition of the right to life embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[80] This view is also

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77 See Article 1 of the Conventions Against Torture and other Cruel, Inhuman and Degrading Treatment, 1984.

78 Recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989.

79 U.N. Doc. G/ST/CS DHA/12 (1991).

80 Fact Sheet No.11 (Rev.1), Extrajudicial, Summary or Arbitrary Executions.

supported by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms which s*tresses* that the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State.[81] This is in line with Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that " the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*…".

181. The above international human rights instruments support the State's argument that extra-judicial executions and torture are caused by the State or through its agents or acquiescence. In the present communication, the complainant alleges that killings were committed by ZANU (PF) supporters and war veterans. The Respondent State maintains that to fulfil its obligations under international law, it investigated allegations of suspected deaths and the perpetrators were charged with the criminal law crime of murder. Some of them have been found guilty while some are still being prosecuted. The complainant does not dispute the fact that such investigations had been undertaken but argue they were not effective. From the above reasoning, the Respondent State cannot be liable for extrajudicial executions as alleged by the complainants, and accordingly cannot be said to have violated Article 4 of the African Charter.

182. In the specific case of the killing of Chiminya and Makiba, the Respondent State in its oral submission at the 35th Ordinary Session of the African stated that investigations into the murder was initiated immediately and three of the alleged perpetrators, Webster Gwamba, Bernard Makuwe and Morris Kainosi were arrested and remanded into custody and the Police was still looking for Mr. Mwale. The State noted further that the three accused have been charged and are awaiting trial. Based on the fact that the matter is still before the Courts in Zimbabwe, the African Commission decided not to make a decision on it at the admissibility stage. It will therefore not pronounce on it at this stage as well.

183. Regarding the allegation of torture, the complainant did not adduce any evidence to show that State organs were responsible or that the government or State organs connived with ZANU (PF) supporters and War Veterans to inflict pain on others. The State can also not be held responsible because it has demonstrated that it investigated allegations brought to its attention. Under international law, responsibility can lie directly to the individuals and non-state actors for their acts.

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[81] UN General Assembly Resolution 53/144.

184. Regarding allegations of arbitrary detention, the complainant argues that the victims were abducted or kidnapped and detained by war veterans and ZANU (PF) supporters. Article 6 of the African Charter provides for the right to liberty and protection from arbitrary detention.

185. Under international law, arbitrary detention or arrest refers to detention that is not consistent with due process of the law established by the State or international human rights norms. The UN Working Group on Arbitrary Detention in its opinion on the arbitrary detention of Dr. Wang in ***Case No 10/2003***[82] declared that

> Wang, during his first five months in detention, did not have knowledge of the charges, the right to legal counsel, or the right to judicial review of the arrest and detention; and that, after that date, he did not benefit from the right to the presumption of innocence, the right to adequate time and facilities for defense, the right to a fair trial before an independent and impartial tribunal, the right to a speedy trial and the right to cross-examine witnesses

186. These fair trial procedures required by the UN are only available within a State setup and a person held by other individuals or non-state actors such as ZANU (PF) or the War veterans cannot be required to invoke a violation of these fair trial requirements because they do not exist under those circumstances. The situation would have been different if the non-state actors were holding the victims on behalf of the State, but the complainant has not shown such agency. The Respondent State can therefore not be said to have violated article 6 of the African Charter because unlike ***communications 140/94, 141/94 and 145/95*** where the violations were perpetrated by the policemen and security personnel of the Federal Republic of Nigeria, the current communication alleges violations caused by organisations and individuals not associated with the State. These individuals and organizations can, under international law, be held personally liable for human rights violations and under national law be charged with common law offences. The State becomes liable only when it is informed of such acts and it fails to take action, which in the present instance, the State claimed to have investigated.

187. With respect to allegations of violation of Articles 9, 10, 11 and 13 of the African Charter guaranteeing freedoms of expression, association and assembly, the right to participate freely in the government of one's country, respectively, the complainant argues that the victims were forced by supporters of the ruling party to surrender their party campaign material and that the victims were prevented from communicating to others. In **Communications 137/94, 139/94, 154/96** and **161/97**[83] the African

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[82] *Wang v People's Republic of China*, regarding the continuing detention of Dr. Wang Bingzhang, and the past detentions of Yue Wu, and Zhang Qi. The so-called "Democracy Three" were kidnapped on the Vietnamese border and taken by force into China, where they were subsequently detained by the government.

[83] International PEN and Others on behalf of Ken Saro-Wiwa Jr./Nigeria, October 1998

Commission held that there is a close relationship between the right to freedom of expression and the rights to association and assembly. Because of that relationship, the actions of the government not only violated the rights to freedom of assembly and association, but also implicitly violated the right to freedom of expression. In the above communications, the actions that occasioned the violations were the direct consequence of the State action. However, in the present communication, the violations alleged to have been committed were done by individuals or organisations not directly connected to the State Party. For this reason, the State cannot be said to have violated Articles 9, 10, 11 and 13 of the African Charter.

Issue Four: The Clemency Order and the Respondent's State's human rights obligations under the African Charter

188. The complainant submits that by virtue of Clemency Order No 1 of 2000, the victims of human rights abuses could not seek redress for the human rights violations they suffered because they could not challenge the Clemency order. The Clemency Order granted pardon *to every person liable to criminal prosecution for any politically motivated crime* committed between January and July 2000. The Respondent State emphasised that the prerogative of clemency is recognised as an integral part of constitutional democracies. To ensure that those who had committed more serious offences do not go unpunished, the Clemency Order excluded crimes such as murder, rape, robbery, indecent assault, statutory rape, theft and possession of arms. The Respondent State further noted that a decision by the African Commission that the Clemency Order is an abdication of Zimbabwe's obligations under the African Charter would amount to undermining the whole notion of the clemency prerogative worldwide.

189. The African Commission would like to first of all address the assertion by the Respondent State that *"a decision by the African Commission that the Clemency Order is an abdication of Zimbabwe's obligations under the Charter would amount to undermining the whole notion of the clemency prerogative worldwide".* This assertion by the Respondent State seems to imply that the African Commission lacks the competence to make a determination on this matter.

190. The African Commission was established to monitor and ensure the protection of all human rights enshrined in the African Charter. It does this through among other things, making sure that policies and legislation adopted by States Parties to the African Charter do not contravene the provisions of the African Charter. The fact that the doctrine of clemency is universally recognized does not preclude the African Commission from making a determination on it, especially if it is believed that its use has been abused to the extent that human rights as contained in the African Charter have been violated. The African Commission would also like to emphasise the point that the African Charter is an International Treaty and it is customary in international law that where domestic legislation, including a national constitution is in conflict with international law, the latter prevails. The African Commission is therefore competent to make a determination on any domestic legislation, including a domestic legislation in a constitutional democracy that grants the Executive absolute discretion.

191. Having concluded that it has the competence to rule on the question of the Clemency Order, the African Commission would now determine whether the Clemency Order as issued by the Respondent State violated the latter's obligation under the African Charter. The Clemency Order granted pardon to *every person liable to criminal prosecution for any politically motivated crime committed* between January and July 2000.

192. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. In terms of the Clemency Order, "a politically motivated crime" is defined as -:

(b) Any offence motivated by the object of supporting or opposing any political purpose and committed in connection with

(iii) The Constitutional referendum held on the 12th and 13th of February 2000; or
(iv) The general Parliamentary elections held on 24th and 25th June 2000;
whether committed before, during or after the said referendum or elections."

193. The only crimes exempted from the Clemency Order were murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

194. The Clemency Order under review in the present communication relates to a situation where non-state actors are alleged to have violated human rights, a situation of genaralised violence which according to the state was politically motivated, a situation which resulted in loss of life and property. In a bid to reconcile the population the Respondent State passed Decree No. 1 of 2000 adopting executive clemency to absolve perpetrators of violence if the latter related to "any offence motivated by the object of supporting or opposing any political purpose". The question for the African Commission is to determine whether the clemency order in question is a negation of the State's responsibility under Article 1 of the African Charter.

195. The term clemency is a general term for the power of an executive to intervene in the sentencing of a criminal defendant to prevent injustice from occurring.[84] The exercise of executive clemency is inherent in many, if not, all constitutional democracies of the world. National governments have chosen to implement clemency for a number of reasons. For instance, executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always just or certainly considerate of circumstances which may properly mitigate guilt. To afford remedy, it has

[84] Allison Madden, "Clemency for Battered Women who kill their abusers: finding a just forum" 4 Hastings Women's L.J 1, 50 (1993).

always been thought essential to vest in some authority other that the courts, power to ameliorate or avoid particular criminal judgments.[85]

196. Clemency embraces the constitutional authority of the President to remit punishment using the distinct vehicles of pardons, amnesties, commutations, reprieves, and remissions of fines. An amnesty is granted to a group of people who commit political offences, e.g. during a civil war, during armed conflicts or during a domestic insurrection. A pardon may lessen a defendant's sentence or set it altogether. One may be pardoned even before being formally accused or convicted. While a pardon attempts to restore a person's reputation, a commutation of sentence is a more limited form of clemency. It does not remove the criminal stigma associated with the crime, it merely substitutes a milder sentence. A reprieve on its part postpones a scheduled execution.

197. Clemency orders are not peculiar to Zimbabwe. These are resorted to the world over generally in the interest of peace and security. In the history of Zimbabwe, it is a well known fact that Clemency orders have been resorted to as a process of easing tension and creating a new beginning. For instance, at Independence in 1979/80, amnesty was resorted to by former colonial regime in order to create an environment for the new independent dispensation and to reduce the tension between the nationalists and the former white rules. In the process, members of the former white regime who had been guilty of massive killings were beneficiaries of clemency. In another incident, following the civil war in the southern part of Zimbabwe involving two former nationalists movements, ZANU (PF) and the opposition (PF) ZAPU, an amnesty was resorted to in order to create an environment for a Peace Accord in 1987, which brought about permanent peace to Zimbabwe. The result was the release of several thousands of people including those who were guilty of massive human rights violations including murder, treason, and terrorism. Also generally, clemency is granted annually to serving prisoners for the purpose of giving them a new beginning, including those released on the humanitarian grounds.

198. Generally however, a Clemency power is used in a situation where the President believes that the public welfare will be better served by the pardon, or to people who have served part of their sentences and lived within the law, or a belief that a sentence was excessive or unjust or again for personal circumstances that warrant compassion. In all these situations, the President exercises a near absolute discretion.

199. The reason the framers of national constitutions vest this broad power in the executive branch is to ensure that the President would have the freedom to do what he/she deems to be the right thing. In *Ex Parte Garland*,[86] the US Supreme Court characterized the scope of Executive Clemency thus:

> *the clemency power thus conferred is unlimited, with the exception (in the case of impeachment). It extends to every*

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[85] Linda Ammons, "Discretionary Justice: A legal and policy analysis of a Governor's use of the Clemency power in the cases of incarcerated battered women", 3 J.L & Policy 1, 30 (1994).

[86] 71 U.S. (4 Wall.) 333,380 (1866).

> *offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgement. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction*

200. Over the years however, this strict interpretation of Clemency powers have been the subject of considerable scrutiny by international human rights bodies and legal scholars. It is generally believed that the single most important factor in the proliferation and continuation of human rights violations is the persistence of impunity, be it of a de *jure* or *de facto* nature. Clemency, it is believed, encourages *de jure* as well as *de facto* impunity and leaves the victims without just compensation and effective remedy. De jure impunity generally arises where legislation provides indemnity from legal process in respect of acts to be committed in a particular context or exemption from legal responsibility in respect of acts that have in the past been committed, for example, as in the present case, by way of clemency (amnesty or pardon). *De facto* impunity occurs where those committing the acts in question are in practice insulated from the normal operation of the legal system. That seems to be the situation with the present case.

201. There has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law. In a report entitled *"Question of the impunity of perpetrators of human rights violations (civil and political)",* prepared by Mr. Louis Joinet for the Sub-commission on Prevention of Discrimination and Protection of Minorities, pursuant to Sub-commission decision 1996/119, it was noted that "amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy" and that "the right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them".[87]

202. In his report, Mr. Joinet drafted a set of principles for the protection and promotion of human rights through action to combat impunity, in which he stated that "there can be no just and lasting reconciliation unless the need for justice is effectively justified" and that "national and international measures must be taken ... with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity". The Report went on to state that "even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within certain bounds, namely: (a) the perpetrators of serious crimes under international law may not benefit from such

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[87] See E/CN.4/Sub.2/1997/20/Rev.1, paras. 32 and 27.

measures until such time as the State has met their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take acts to prevent the recurrence of such atrocities.[88]

203. In its General Comment No. 20 on Article 7of the ICCPR, the UN Human Rights Committee noted that “amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible".[89] In the case **of Hugo Rodríguez v. Uruguay**,[90] the Committee reaffirmed its position that amnesties for gross violations of human rights are incompatible with the obligations of the State party under the Covenant and expressed concern that in adopting the amnesty law in question, the State party contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations. The 1993 Vienna Declaration and Programme of Action supports this stand and stipulates that "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".[91]

204. Importantly, the international obligation to bring to justice and punish serious violations of human rights has been recognized and established in all regional human rights mechanisms. The Inter-American Commission and Court of Human Rights have also decided on the question of amnesty legislation. The Inter-American Commission on Human Rights has condemned amnesty laws issued by democratic successor Governments in the name of reconciliation, even if approved by a plebiscite, and has held them to be in breach of the 1969 American Convention on Human Rights, in particular the duty of the State to respect and ensure rights recognized in the Convention (article 1(1)), the right to due process of law (article 8) and the right to an effective judicial remedy (article 25). The Commission held further that amnesty laws extinguishing both criminal and civil liability disregarded the legitimate rights of the victims' next of kin to reparation and that such measures would do nothing to further reconciliation. Of particular interest are the findings by the Inter-American Commission on Human Rights that “amnesty” legislation enacted in Argentina and Uruguay violated basic provisions of the American Convention on Human Rights.[92] In these cases, the

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[88] Ibid. Principles 18 and 25.

[89] See Human Rights Committee General Comment No. 20 (44) on Article 7, para. 15 at www.unhchr.ch/tbs/doc.nsf/view40?SearchView.

[90] Rodríguez v. Uruguay, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

[91] See The Vienna Declaration and Programme of Action, Section II, para. 60, at www.unhchr.ch/huridocda/huridoca.nsf/Sym.../A..CONF.157.23.

[92] Annual Report of the Inter-American Commission on Human Rights, 1992-1993.

Inter-American Commission held that the legal consequences of the amnesty laws denied the victims the right to obtain a judicial remedy. The effect of the amnesty laws was that cases against those charged were thrown out, trials already in progress were closed, and no judicial avenue was left to present or continue cases. In consequence, the effects of the amnesty laws violated the right to judicial protection and to a fair trial, as recognized by the American Convention and in the present case, the African Charter.[93]

205. In Argentina, the national courts have found Argentina's *Full Stop Law*[94] and the *Due Obedience Law*[95] as incompatible with international law and in particular with Argentina's obligations to bring to justice and punish the perpetrators of gross human rights violations. This is because these two pieces of legislation had been enacted to prevent from prosecution low and high ranking military officials (government agents) who were involved in human rights violations and disappearances during the 1970s and 1980s.

206. The Inter-American Court stated in its first judgment that states must prevent, investigate and punish any violation of the rights recognized by the Convention.[96] This has been re-emphasized in subsequent cases. In the 'Street Children case', the Court reiterated 'that Guatemala is obliged to investigate the facts that generated the violations of the American Convention in the instant case, identify those responsible and punish them.'[97] The Inter-American Court of Human Rights, in the Barrios Altos Case, Chumbipuma Aguirre y otros v. Perú[98] held that amnesty provisions, prescription and the exclusion of responsibility which have the effect of impeding the investigation and punishment of those responsible for grave violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and enforced disappearances, are prohibited as contravening human rights of a non-derogable nature recognized by international human rights law. The Court held further that the self-amnesty laws lead to

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93 Ibid. See also Jayni Edelstein, Rights, Reparations and Reconciliation: Some comparative notes, Seminar No. 6, July 1994.

94 Law No 23,429 of 12 December 1986.

95 Law No. 23,521 of 4 June 1987. The Committee Against Torture took the view , in respect of these laws, that the passing of the "Full Stop" and "Due Obedience" Laws in Argentina by a "democratically elected" government for acts committed under a *de facto* government is "incompatible with the spirit and purpose of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]"" (Committee against Torture, Communications Nº 1/1988, 2/1988 and 3/1988, Argentina, decision dated 23 November 1989, paragraph 9.)

96 Velasquez Rodriguez v Hondura, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). para 166.

97 Hilaire, Constantine and Benjamin *et al.* Case, Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002) or t**he** "Street Children" Case, Judgment of May 26, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 77 (2001), para. 101 and operative clause 8.

98 *Caso Barrios Altos, Chumbipuma Aguirre y otros vs. Perú*, Inter-American Court of Human Rights, (Ser. C), No. 75 - Judgment of March 14, 2001.

victims being defenceless and to the perpetuation of impunity, and, for this reason, were manifestly incompatible with the letter and spirit of the American Convention. The Court concluded by stating that as a consequence of the manifest incompatibility of the amnesty laws with the Inter-American Convention on Human Rights, the laws concerned have no legal effect and may not continue representing an obstacle to the investigation of the facts of the case, nor for the identification and punishment of those responsible.[99]

207. The European Court of Human Rights on its part has recognized that where the alleged violations include acts of torture or arbitrary killings, the state is under a duty to undertake an investigation capable of leading to the identification and punishment of those responsible.[100]

208. The African Commission has also held amnesty laws to be incompatible with a State's human rights obligations.[101] Guideline No. 16 of the Robben Island Guidelines adopted by the African Commission during its 32nd session in October 2002 further states that 'in order to combat impunity States should: a) ensure that those responsible for acts of torture or ill-treatment are subject to legal process; and b) ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law'[102]

209. The UN Special Rapporteur on Torture has also expressed his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity. He called on States to refrain from granting or acquiescing in impunity at the national level, inter alia, by the granting of amnesties, such impunity itself constituting a violation of international law. As the International

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[99] Cited in the Interim Report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with paragraph 30 of General Assembly resolution 55/89. Interim Report A/56/156 3 July 2001.

[100] European Court of Human Rights Case Zeki Aksoy v. Turkey, 18 December 1996, para 98. See also, Aydin v. Turkey App. No. 23178/94 Judgment of 25 September 1997, para 103; Selç uk and Asker v. Turkey App. Nos. 23184/94 and 23185/94 udgment of 24 April 1998, para 96; Kurt v. Turkey App. No. 24276/94 Judgment of 25 May 1998, para 139; and Keenan v. United Kingdom App. No. 27229/95 Judgment of 3 April 2001, para 122.

[101] See also: Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98 and Jean Yokovi Degli on behalf of Corporal N. Bikagni, Union Interafricaine des Droits de l'Homme, Commission International de Juristes v Togo Communications 83/92, 88/93, 91/93.

[102] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. See also: Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98.

Criminal Tribunal for the former Yugoslavia Trial Chambers noted in the Celibici and Furundzija cases,[103] torture is prohibited by an absolute and non-derogable general rule of international law.

210. In the present communication, the African Commission has established that most of the atrocities, including human rights vioations, were pepetrated by non-state actors, that the State exercised due diligence in its response to the violence – investigated the allegations, amended some of its laws, and in some cases, paid compensation to victims. The fact that all the allegations could not be investigated does not make the State liable for the human rights violations alleged to have been committed by non-state actors. It suffices for the State to demonstrate that the measures taken were proportionate to deal with the situation, which in the present communication, the State seemed to have shown.

211. However, this Commission is of the opinion that by passing the Clemency Order No. 1 of 2000, prohibiting prosecution and setting free perpetrators of "politically motivated crimes", including alleged offences such as abductions, forced imprisonment, arson, destruction of property, kidnappings and other human rights violatins, the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation.

212. This act of the state constituted a violation of the victims' right to judicial protection and to have their cause heard under Article 7 (1) of the African Charter.

213. The protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard. Adopting laws such as the Clemency Order No. 1 of 2000, that have the effect of eroding this opportunity, renders the victims helpless and deprives them of justice. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man[104] provides in Article XVIII that every person has the right to "resort to the courts to ensure respect for [their] legal rights," and to have access to a "simple, brief procedure whereby the courts" will protect him or her "from acts of authority that … violate any fundamental constitutional rights." The right of access is a necessary aspect of the right to "resort to the courts" set forth in Article

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[103] IT-96-21-A, 20 February 2001, Appeals Chamber; *The Prosecutor* v. *Anto Furundzija* (IT-95-17/1-T), Trial Chamber II, Judgment, 10 December 1998 (121 ILR 218) 45, 47, 48, 49, 61, 316, 333, 334, 337, 340, 342, 402, 469.

[104] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

XVIII.[105] The right of access to judicial protection to ensure respect for a legal right requires available and effective recourse for the violation of a right protected under the Charter or the Constitution of the country concerned.

214. In yet another jurisdiction, the Canadian Human Rights Charter[106] provides a similar guarantee in section 24(1), which establishes that: "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". The effect of this right is to require the provision of a domestic remedy which enables the relevant judicial authority to deal with the substance of the complaint and grant appropriate relief where required. In addition to the explicit rights to judicial protection, implementation of the overarching objective of the Charter (ensuring the effectiveness of the fundamental rights and freedoms set forth), necessarily requires that judicial and other mechanisms are in place to provide recourse and remedies at the national level.

215. In light of the above, the African Commission holds that by enacting Decree No. 1 of 2000 which foreclosed access to any remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the Respondent State did not only prevent the victims from seeking redress, but also encouraged impunity, and thus renaged on its obligation in violation of Articles 1 and 7 (1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.[107]

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105 *See generally*, IACHR, Resolutions Nº 3/84, 4/84 and 5/85, Cases Nº 4563, 7848 and 8027, Paraguay, published in *Annual Report of the IACHR 1983-84*, OEA/Ser.L/V/II.63, doc. 10, 24 Sept. 1984, at pp. 57, 62, 67 (addressing lack of access to judicial protection in proceedings involving expulsion of nationals; linking right to freely enter and remain in one's own country under Article VIII of the Declaration to the rights to a fair trial and due process under Articles XVIII and XXVI). *See also*, Report Nº 47/96, Case 11.436, Cuba, in *Annual Report of the IACHR 1996*, OEA/Ser.L/V/ II.95, Doc. 7 rev., 14 March 1997, at para. 91, (citing *Annual Report of the IACHR 1994*, "Cuba," at p. 162, and addressing failure of State to observe freedom of movement of nationals under Article II via denial of exit permits from which no appeal is allowed). In the context of the American Convention, *see generally*, IACHR, Resolution Nº 30/81, Case 7378, Guatemala, in *Annual Report of the IACHR 1980-81*, OEA/Ser.L/V/II.54, doc. 9 rev. 1, 16 Oct. 1981, p. 60, at 62 (addressing denial of right to judicial protection in expulsion of foreigner absent any form of due process), Report Nº 49/99, Case 11.610, Mexico, *Annual Report of the IACHR 1998*, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Vol. II; *see also*, Eur. Ct. H.R., Ashingdane Case, Ser. A No. 93 (1985) para. 55.

106 ***The*** **Canadian Charter of Rights and Freedoms,** ***Ottawa,*** **Canada, April 17, 1982.**

107 See the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para C(d).

For these reasons, the African Commission:

Holds that the Republic of Zimbabwe is in violation of Articles 1 and 7 (1) of the African Charter;

Calls on the Republic of Zimbabwe to establish a Commission of Inquiry to investigate the causes of the violence which took place from February – June 2000 and bring those responsible for the violence to justice, and identify victims of the violence in order to provide them with just and adequate compensation.

Request the Republic of Zimbabwe to report to the African Commission on the implementation of this recommendation during the presentation of its next periodic report.

Adopted at its 39th Ordinary Session held from 11 – 15 May 2006 in Banjul, The Gambia

b. Zimbabwe's response to the African Commission's decision on communication 245/02 – Zimbabwe Human Rights NGO Forum/Zimbabwe

RESPONSE BY THE GOVERNMENT OF ZIMBABWE TO THE DECISION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS IN COMMUNICATION 245/ 2002: ZIMBABWE HUMAN RIGHTS NGO FORUM/ ZIMBABWE

1. **Introduction**

1.1 During its 39th Ordinary Session held in Banjul, the Gambia, the African Commission on Human and Peoples Rights (ACHPR) made a decision on Communication 245/ 2002. The Communication, filed by the Zimbabwe Human Rights NGO Forum in 2002 alleged that the Government of Zimbabwe had violated Articles 1, 2, 3, 4, 5, 6, 9, 10, 11 and 13 of the Charter.

1.2 The Articles which Zimbabwe was alleged to have violated are as follows:

1.2.1 Article 1 provides that State parties to the Charter recognise the rights, duties and freedoms enshrined in the Charter and take legislative or other measures to give effect to them.

1.2.2 Article 2 entitles everyone to enjoy rights and freedoms guaranteed in the Charter without any distinction/ discrimination.

1.2.3 Article 3 provides for the equality of all persons before the law.

1.2.4 Article 4 provides for the inviolability of human beings, the respect to life and integrity of the person and the prevention of arbitrary deprivation of this right.

1.2.5 Article 5 provides for the right to respect of the dignity inherent in a human being.

1.2.6 Article 6 provides for the right to liberty and to security of the person.

1.2.7 Article 9 provides for the freedom of information inherent in the right to receive and impart information.

1.2.8 Article 10 provides for the right of freedom of association.

1.2.9 Article 11 provides for the right to freedom of assembly.

1.2.10 Article 13 provides for the right to participate freely in the Government of one's country through the election of representatives of his/her choice according to law.

1.3 In its decision, the ACHPR cleared Zimbabwe from alleged violations of Articles 2,

3, 4, 5, 6, 9, 10, 11 and 13 of the Charter and ruled that Zimbabwe had however violated Articles 1 and 7 of the Charter.

1.4 In June 2006, the ACHPR's decision was submitted to the Assembly of Heads of State and Government of the African Union as part of the 19th Annual Activity report of the ACHPR as required by Article 54 of the Charter. Zimbabwe became aware of the decision after it had been submitted for the Executive Council's consideration, and not at the tie it was handed down by the ACHPR.

1.5 The Executive Council in its consideration of the report at Banjul in June 2006, directed that Zimbabwe be given an opportunity to respond to the decision within 60 days of the decision. Zimbabwe wrote to the ACHPR seeking extension of the period of submission of the response.

1.6 What follows below is Zimbabwe's response to the decision of the ACHPR in Communication 245/ 2002.

2.0 Background to the Communication

2.1 Communication 245/ 2002 was filed in 2002, close to two years after the alleged violations had taken place. A Fact-Finding mission (the Mission) of the ACHPR that came to Zimbabwe in June 2002 preceded the consideration of the Communication by the ACHPR. The report of the Fact -Finding mission was adopted by the ACHPR in 2004. The Government of Zimbabwe responded to the report, and both the report and the response have been in the public domain since 2005.

2.2 The Government of Zimbabwe acknowledges that it was availed with the opportunity, in accordance with the Commission's rules of procedure, to file submissions on the admissibility and merits of the Communication, and this process led to the Commission ruling that Zimbabwe did not violate Articles 2, 3, 4, 5, 6, 9, 10, 11 and 13 of the Charter.

2.3 In essence, a ruling that Zimbabwe is not in violation of the above-mentioned rights means that Zimbabwe did not violate Article 1 of the Charter as was found by the ACHPR. In essence, Zimbabwe was proven to have recognised the rights, duties and freedoms enshrined in the Charter and to have taken legislative or other measures to give effect to them.

2.4 The complainant did not allege violation of Article 7. However, the ACHPR found Zimbabwe to be in violation of Article 7(1), which provides for the right to have one's cause heard. In detail Article 7(1) provides:

"every individual shall have the right to have his cause heard. This comprises

(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proven guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal."

2.5 The sole reason for the ACHPR's finding of violation of Articles 1 and 7 is the General Amnesty, being Clemency Order No 1 of 2000 which was declared in respect of persons liable for criminal prosecution for certain categories of politically motivated crime committed between January and June 2000. The ACHPR was also influenced by the position that at the time of the consideration of the Communication, persons involved in the unlawful deaths of Talent Mabika and Tichaona Chiminya were still to be accounted for. The ACHPR ruled that the Government of Zimbabwe should " establish a Commission of enquiry to investigate the causes of violence which took place from February to June 2000 and bring those responsible for the violence to justice, and identify victims of the violence in order to provide them with just and adequate compensation" and ". to report to the ACHPR on the implementation of this recommendation during the presentation of its next periodic report."

2.6 As indicated earlier above, the ACHPR, prior to the consideration of the Communication, conducted a fact-finding mission to Zimbabwe. The Mission's visit was concerned with the events that took place during the same periods as covered by the Communication. The ACHPR considered the Report between June 2002 and June 2004 when it then adopted the report. It should be emphasized that the only difference between the Communication and the Mission's visit was that the Communication was in respect of a section of the wider population who were affected by the violence that took place between February and June 2000. The events were the same. The Fact Finding Mission's findings were that ". Zimbabwe's society is highly polarized. It is a divided society with deeply entrenched positions. It appears that at the heart is a society in search of means for change and decided about how best to achieve the change after two decades of dominance by a political party that carried the hopes and aspirations of the people of Zimbabwe through the liberation struggle into independence." The Commission further found that "There is no doubt from the perspective of the fact finding team that the land question is critical and that Zimbabweans, sooner or later, needed to address it. It appears to us that the Government of Zimbabwe has managed to bring this policy matter under the legal and constitutional system of the country".

2.7 The ACHPR's findings in that report exonerated the Government of Zimbabwe from personal liability over the unsavoury acts that took place during the material time. That finding is consistent with the finding of the ACHPR in exonerating the Government on allegations of violating Articles 2, 3, 4, 5, 6, 9, 10, 11 and 13 of the Charter referred to above. It is clear that the ACHPR during the Mission did ascertain the causes of the violence during the period in question. It is an indisputable fact that the report of the

ACHPR confirms that the causes are the land issue, political polarization of the Zimbabwean society at that time (especially foreign funded political parties which were opposed to government's land redistribution programme), and the intolerance by both sides of the political divide of the views and opinions of others. It is equally clear that the ACHPR found that the measures that Government had taken would resolve the challenges that Zimbabwe faced. Indeed, all these issues have long since been addressed, and following the conclusion of the land acquisition programme there is peace and order in Zimbabwe.

2.8 It has never been disputed that the events of February to June 2000 affected countless Zimbabweans from all walks of life, and on all sides of the political divide, nationwide. Zimbabwe admitted in the consideration stage of the Communication that she was challenged by the wave of violence that erupted between February and June 2000. As the ACHPR found in the present decision, the Government of Zimbabwe did not sanction or condone the alleged acts of violence. Evidence submitted by the Government of Zimbabwe, and which the Complainants did not dispute clearly shows the measures Government took to address the situation that prevailed at the time, or that resulted from the events that prevailed at the time. These measures included the investigation of allegations of violations, the prosecution of offenders, the awards for compensation for people affected by the events that took place between February and October 2000. This includes, but is not limited to people who were referred to in the Communication, as long as their cases were proven to be authentic.

2.9 The Amnesty was a measure intended to safeguard the safety of the citizens, and also their liberty. It followed investigations, and an assessment of the effects of imprisoning or prosecuting half the population. Government declared the amnesty order as a form of reconciliation, and not to prevent reparation. The Clemency Order was intended to promote unity of the people, and to diffuse the said polarisation. Both objectives were achieved as is evident in Zimbabwe today. The judiciary following civil claims that were brought by aggrieved parties before the courts has successfully and conclusively dealt with the issue of compensation.

3.0. Clemency Order No 1 of 2000

3.1 Clemency Order No 1 of 2000 provided for any person who was either charged or convicted of politically motivated crime during the period 1st January 2000 and 31st July 2000. Persons convicted or charged with the commission of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms, and any offence involving fraud or dishonesty, or for being an accessory or for conspiring to commit any of the offences after the fact to any of the specified offences were not entitled to benefit under the amnesty.

3.2 In essence, the categories of persons who benefited from the Amnesty were only those who did not commit any of the specified offences.

3.3 It should be underscored that the level of violence that was experienced in Zimbabwe during the period February to June 2000 was unprecedented. It is an

experience, which any well-intentioned person would not wish to see revisited, as it does not bring any benefit to the people of Zimbabwe. A Commission of Enquiry would amount to the Government engaging in witch hunting where it has decided to forgive and encouraged reconciliation of the people.

3.4 The ACHPR in its decision found that the exclusion of certain categories of offences from benefiting under the Amnesty was a "hoodwink", and further that no one was ever prosecuted for the excluded categories of offences. Zimbabwe submits that this is not correct. The Amnesty was a measure intended to safeguard the safety of the citizens, and also their liberty. It followed investigations, and an assessment of the effects of imprisoning or prosecuting half the population. Government declared the Amnesty Order as a form of reconciliation, and not to prevent reparation. The Clemency Order was intended to promote unity of the people, and to diffuse the said polarization. Both objectives were achieved as is evident in Zimbabwe today. The Judiciary following civil claims that were brought by aggrieved parties before the courts has successfully and conclusively dealt with the issue of compensation.

3.5 The issue of the Amnesty was not blind action on the part of the Government, but it was done in good faith. The Amnesty was based on the recognition of the need for the people of Zimbabwe to peacefully co-exist. The Government of Zimbabwe has achieved this collectively with her people. The amnesty was not the first to be declared, and was therefore informed by a careful analysis of methods that have been resorted to in the past to defuse tension and resolve conflicts in Zimbabwe. Such methods have worked in he past, and continue to work.

3.6 Evidence submitted during consideration of the Communication included lists of persons arrested for the specified offences, as well as civil matters that had been lodged before the Courts, and had either been finalized, or were being considered. The number of criminal cases that have been concluded, and the convicts that are serving terms of imprisonment at the country's prisons since the declaration of the Amnesty proves that the Government of Zimbabwe disproves the claim that accused persons were not convicted of the offences, or alternatively that the Amnesty denied the victims access to remedies.

3.7 The total number of persons arrested and detained in prison between February and December 2000 for the politically motivated specified offences is 6290. Table 1 below show the numbers of people arrested and convicted of politically motivated offences of rape, indecent assault, murder, attempted murder, robbery, malicious injury to property during the period covered by the Amnesty countrywide. Table 2 categorizes the number of people arrested and convicted in each province for each category of specified offence.

Table 1

Province	Number of convicted persons
Mashonaland	1 403
Manicaland	489
Midlands/ Masvingo	933
Matabeleland (2 provinces comprising of North and South)	1 632

Table 2

Offence	Matabeleland	Mashonaland	Manicaland	Midlands/Masvingo
Murder	20	8	33	29
Attempted murder	17	3	20	56
Ass.GBH	203	255	16	548
Rape	178	74	253	285
Att. Rape	18	47	44	55
Common Assault	245	238	59	183
Indecent assault	27	25	24	35

3.8 Due to the complexities of conducting nationwide investigations of cases where the accused is not known, it took longer to identify perpetrators in other cases. However, the Zimbabwe Republic Police have since the consideration of the Communication, accounted for 1833 accused persons who are remanded in custody awaiting trial for the offences committed during the period in issue. The arrests in some cases date back to the period the Amnesty. Other accused persons were arrested after the Amnesty. This proves that persons accused of offences like rape, murder, robbery, indecent assault, statutory rape, theft, possession of arms of war, and any offence involving fraud or dishonesty were actually prosecuted or are in custody awaiting prosecution. This is contrary to the claim that the state let criminals go scot-free. No one was therefore protected from the full wrath of the law.

3.9 Zimbabwe totally rejects the notion that by declaring the clemency order, there was any foreclosure of the victims' access to remedies as proven by the fact that people did pursue remedies countrywide. This information was submitted on merits, and cases still continued to be brought before the courts hence there is no truth in saying the clemency order did foreclose the access to remedies. Prosecution is not the sole remedy covered under Article 1 of the Charter.

3.10 The innumerable persons who were personally affected have pursued and accessed remedies through the courts of Zimbabwe. At the time of the lodgment of the Communication, and its subsequent consideration, the bulk of the cases had not passed through the courts. This was construed to mean that the Government had reneged on its duty to protect its people. There was no reflection on the challenge that the cases posed to the justice delivery machinery in Zimbabwe. According to the ACHPR, not enough had been done to afford compensation to the affected people. However, the position has drastically changed as persons have accessed, and still continue to access remedies for the wrongs suffered on their person or property. It is undisputed that Zimbabwe's primary obligation is to protect, and promote the rights of the people of Zimbabwe. The effect of the pardons on national security and reconciliation went a long way towards the realization of those obligations.

3.11 The fact that there has not been any further widespread violence in Zimbabwe to date shows that the object sought was achieved. The proof thereof is the tranquility that has been present and is prevalent in Zimbabwe since then.

4. **Conclusion**

4.1 Zimbabwe voluntarily became a state party to the African Charter on Human and Peoples rights and holds in high esteem organs of the AU that are mandated with the protection and promotion of human rights to which Zimbabwe remains committed.

4.2 Zimbabwe further believes in the good faith of the ACHPR. While there may have been misunderstandings between the Government of Zimbabwe and the ACHPR, Zimbabwe believes that such relationship is counter productive and contrary to the needs of the people of Zimbabwe.

4.3 Zimbabwe believes that the ACHPR should at least understand the position of Zimbabwe, and in making its decisions and recommendation should be alive to the international human rights principles of margin of appreciation and make decisions that are both capable of practicable application and beneficial for the parties concerned. Zimbabwe submits that the present decision in as far as it requires Zimbabwe to set up a Commission of enquiry is tantamount to unforgiving those that had been forgiven. It is a retrogressive move which no good intentioned Zimbabwean citizen desires, and which shall not be resorted to by the Government of Zimbabwe.

4.4 In addition Zimbabwe recalls the fundamental principle of justice, as echoed in the Charter that no one should be ruled according to a law that was not in place when the act took place. In this regard, while Zimbabwe does not question the ability, and competency of the ACHPR to adopt rules, guidelines and principles, it holds that the AU declaration on general amnesties does not, and should not apply in this case as the same were pronounced some 2 years after the amnesty had been declared.

4.5 Zimbabwe completed the land reform programme and therefore put to rest a matter, which was at the centre of not only the protracted liberation war, but also the violence

that erupted between February and June 2000. The country is currently consolidating the gains of such programme, and concentrating resources in addressing challenges in some areas of the economy. The Government should be allowed to consolidate those gains and be enabled to advance the economic, social and cultural rights of her people instead of being called upon to evoke the memories of her people on the events of February to June 2000.

Harare, Zimbabwe, September 30 2006

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