

AFRICAN UNION

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African Commission on Human & Peoples'  
Rights



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Commission Africaine des Droits de l'Homme & des  
Peuples

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**EXECUTIVE COUNCIL**  
**Fifteenth Ordinary Session**  
**28 – 30 June 2009**  
**Sirte, Libya**

EX.CL/529 (XV)

**26th ACTIVITY REPORT OF THE AFRICAN  
COMMISSION ON HUMAN AND PEOPLES' RIGHTS  
(ACHPR) SUBMITTED IN ACCORDANCE WITH  
ARTICLE 54 OF THE AFRICAN CHARTER ON HUMAN  
AND PEOPLES' RIGHTS**

## INTRODUCTION

1. This is the Twenty-Sixth Activity Report of the African Commission on Human and Peoples' Rights (the "ACHPR").
2. The Report covers the period, December 2008 to May 2009, and includes the activities undertaken during the 45<sup>th</sup> Ordinary Session of the ACHPR, held from 13-27 May 2009, in Banjul, The Gambia.

## ATTENDANCE AT THE SESSION

3. The following members of the ACHPR attended the 45<sup>th</sup> Session:

- Commissioner **Sanji Mmasenono Monageng**, Chairperson
- Commissioner **Catherine Dupe Atoki**;
- Commissioner **Musa Ngary Bitaye**;
- Commissioner **Reine Alapini-Gansou**;
- Commissioner **Soyata Maiga**;
- Commissioner **Mumba Malila**;
- Commissioner **Bahame Tom Mukirya Nyanduga**;
- Commissioner **Kayitesi Zainabo Sylvie**;
- Commissioner **Pansy Tlakula**; and
- Commissioner **Yeung Kam John Yeung Sik Yuen**.

## EVENTS PRECEDING THE SESSION

4. Members and staff of the ACHPR participated in, and collaborated with other human rights organisations in a series of activities preceding, and on the margins of the Session, including the following:
  - i. 5 to 9 May, 2009, meeting jointly organised by the African Union Commission, Gender Directorate and the Government of The Gambia titled "The AU Experts Meeting on the Status of Reporting and Implementation of the Solemn Declaration on Gender Equality in Africa, and on African Women's Decade 2010 – 2020;
  - ii. 7 to 8 May 2009, consultations with the AUC team handling the Euro 55 million, Banjul, The Gambia;
  - iii. 8 to 9 May 2009, meeting of the Working Group on Indigenous People;
  - iv. 10 to 11 May, 2009, Validation Workshop organised by the Centre for Human Rights, University of Pretoria, to validate the Research conducted within the framework of the Joint ILO/ACHPR Project on the Constitutional,

Legislative and Administrative Provisions on the Rights of Indigenous Peoples and Communities in Africa.

- v. 9 to 11 May, 2009, NGO Forum organised by the African Centre for Democracy and Human Rights Studies(ACDHRS);
- vi. 12 May, 2009, meeting of the ACHPR with the Inter American Commission: organised by the Center for Human Rights in collaboration with the ACHPR;
- vii. 15 May, 2009, International Criminal Court Panel Discussion: organised by International Federation for Human Rights (FIDH);
- viii. 16 May, 2009, briefing by the head of the Gender Directorate: AU Gender Directorate.

### **AGENDA OF THE SESSION**

5. The Agenda of the 45<sup>th</sup> Ordinary Session was adopted on 13<sup>th</sup> May 2009 and is attached to this report as **Annex 1**.

### **THE OPENING CEREMONY**

6. A total of 402 participants attended the 45<sup>th</sup> Ordinary Session, including; 111 delegates from 31 States Parties to the African Charter ON Human and Peoples' Rights ("the African Charter"),14 representatives from 8 National Human Rights Institutions (NHRIs), 10 representatives from 2 International and Inter-Governmental Organizations, and 180 representatives from 136 African and International NGOs.
7. The following persons addressed the Opening Ceremony:
  - i. The Chairperson of the African Commission, Justice Sanji Mmasenono Monageng,
  - ii. Mr. Wadie Ben Cheikh, Representative of the Republic of Tunisia, on behalf of the African Union Member States.
  - iii. Dr. Gilbert Sebihogo, the Executive Director of the Network of African National Human Rights Institutions (NHRIs), on behalf of National Human Rights Institutions (NHRIs);
  - iv. Mrs. Hannah Foster, Executive Director of the African Centre for Democracy and Human Rights Studies, on behalf of NGOs;
  - v. Honourable Mrs. Awa Bah, the Acting Solicitor General and Legal

Secretary of the Republic of The Gambia, on behalf of the Honourable Attorney General and Minister of Justice of the Republic of The Gambia, Mrs. Marie Saine Firdaus.

## **HUMAN RIGHTS SITUATION IN AFRICA**

8. Statements were made by State Delegates from Algeria, Libya, Burkina Faso, Nigeria, Mali, Cote D'Ivoire, Egypt, Uganda, Sudan, Swaziland, Tunisia, and Zimbabwe on the human rights situations in their respective countries. The summarised texts of these statements are in the Session Report of the 45<sup>th</sup> Ordinary Session of the ACHPR.
9. Representatives of Intergovernmental and International Organisations spoke about various human rights issues on the continent, and the need to continue cooperation with the ACHPR, to better promote and protect human rights. These included the Directorate of the Women, Gender and Development of the AUC, the Special Representative of the UN Secretary General and Head of the UN Office for West Africa (UNOWA), International Organisations of the Francophonie (OIF), International Committee of the Red Cross (ICRC) and the Inter-American Commission on Human Rights (IACHR).
10. A total of forty three (43) Non-Governmental Organisations (NGOs), which have Observer Status before the ACHPR, also made statements under this item on the human rights situation in Africa.

## **COOPERATION AND RELATIONSHIP WITH NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs) AND NON-GOVERNMENTAL ORGANISATIONS (NGOs)**

11. The ACHPR considered applications by twelve (12) NGOs seeking Observer Status, and granted Observer Status to eleven (11) NGOs in accordance with the 1999 Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the Field of Human and Peoples' Rights, ACHPR /Res.33 (XXV) 99. The NGOs so granted Observer Status are:
  - i. International Baby Food Action Network (IBFAN), Swaziland;
  - ii. Tanganyika Law Society (TLS) ; Tanzania ;
  - iii. Plan International, INC. United States of America;
  - iv. Society Studies Center, Sudan;
  - v. CLEEN Foundation, Nigeria;
  - vi. Réseau Ouest-Africaine des défenseurs des droits de l'homme, Togo;
  - vii. La voix des sans voix pour les droits de l'homme, DRC;
  - viii. Centre d'accompagnement des autochtones pygmées et minoritaires vulnérable (CAMV), DRC;

- ix. Associacao Direitos Humanos em Rede (Connectas Human Rights), Brazil;
  - x. Association pour la liberté, la tolérance, l'expression et le respect des personnes de nature indigents, vulnérables ou exclues sociaux du Cameroun (ALTERNATIVE Cameroon), Cameroon; and
  - xi. Community Research and Development Services (CORDS), Tanzania.
12. This brings the total number of NGOs with Observer Status before the ACHPR to **four hundred and two (402)**.
  13. The ACHPR decided to defer the application for Observer Status by one NGO, namely, Coalition of African Lesbians (CAL), based in South Africa, to the next Ordinary Session, pending its consideration of a draft paper on Lesbians, Gays, Bisexuals and Trans - Sexual Persons' (LGBT) Rights.
  14. During the 45<sup>th</sup> Session, the ACHPR did not receive any application for Affiliate Status from any NHRI. The number of NHRIs with Affiliate Status with the ACHPR thus remains at **twenty-one (21)**.

## **STATE REPORTS**

15. The Republic of Mauritius, Republic of Uganda and Republic of Benin presented their Periodic Reports to the ACHPR, which considered them and adopted concluding observations in respect of each.

## **ACTIVITIES OF MEMBERS OF THE ACHPR DURING THE INTER-SESSION**

16. The Chairperson and members of the ACHPR presented reports on the activities that they undertook during the inter-session period between the 44<sup>th</sup> Ordinary Session in November 2008, and the 45<sup>th</sup> Session in May 2009. The reports covered activities undertaken in their capacities as members of the ACHPR, as Special Rapporteurs, and/or as members of Special Mechanisms. The activities were as set out hereunder;

### Commissioner Sanji Mmasenono Monageng - Chairperson

17. From 8 to 12 December 2008, at the invitation of H.E Bernard Kouchner, Minister of Foreign Affairs, France, she attended a Seminar commemorating the 60<sup>th</sup> Anniversary of the Universal Declaration for Human Rights. She presented a paper on the mandate of the African Commission.
18. From 23 to 24 March 2009, together with Commissioner Catherine Dupe Atoki, she attended a series of events in London, about human rights in Africa, at the invitation of the Foreign and Commonwealth Office and

- Chatham House. The events were aimed at raising the profile of the African Court, its operational modalities, the complementary relationship with the ACHPR, the Pan - African Parliament, Civil Society and Multinational Organisations such as the UN and European Union (EU). She presented a paper on the relationship between the ACHPR, the African Court and the Merged Court of Justice and Human Rights.
19. From 30 March to 3 April 2009, she presided over the 6<sup>th</sup> Extra-Ordinary Session of the ACHPR in Banjul, The Gambia, to consider Communications and outstanding Reports, among other urgent matters.
  20. On 6 April 2009, she attended a Conference in Pretoria, South Africa, at the invitation of the International Commission of Jurists (ICJ). She presented a paper entitled: "Paradigm Shift in the Fight Against Terrorism: Are African Governments Ready to Strengthen the Rule of Law?"
  21. From 9 to 11 May 2009, she participated in some of the activities of the NGO Forum preceding the 45<sup>th</sup> Ordinary Session, in Banjul.
  22. From 10 to 11 May 2009, in Banjul, she chaired a Meeting organized by the Centre for Human Rights, of the University of Pretoria, to validate the outcome of the Research conducted within the framework of the Joint ILO/ACHPR Project on the Constitutional, Legislative and Administrative Provisions on the Rights of Indigenous Peoples and Communities in Africa.
  23. On 12 May 2009, she participated in a Meeting organized by the Centre for Human Rights, of the University of Pretoria, and attended by a delegation from the Inter-American Commission and the ACHPR. The meeting was aimed at exchanging ideas and best practices to enhance understanding of both Institutions. The Meeting also considered the complementary relationship between the ACHPR and the African Court, and that of the Inter-American Commission and the Inter-American Court.
  24. She wrote a letter of Appeal to the Government of the Seychelles pending the seizure of a Complaint by the ACHPR.
  25. She also issued a Press Release addressing the unconstitutional change of government in Madagascar, and urging the new Government to ensure protection of human rights.
  26. In addition, the Chairperson provided policy guidance and overall oversight on the activities of the ACHPR and its Secretariat during the intersession.

## Commissioner Catherine Dupe Atoki

### *Activities as a Commissioner*

27. From 11 to 14 February 2009, she attended a conference in Cotonou the Republic of Benin, hosted by the ECOWAS. The aim of the Conference was to build on the gains of the establishment of a Network of National Human Rights Institutions in West Africa. She delivered a paper titled, "The State of Human Rights in West Africa, A Critical Perspective." This paper highlighted country situations with regards to human rights violations mainly from various indicators set out in the ECOWAS Protocol on Good Governance and the African Charter. Torture, cruel, inhuman degrading treatment and punishment, impunity and violation of women's rights were ranked high in the rights violated in the sub-region.
28. On 3 March 2009, as Commissioner in charge of Sudan, she participated in a National Television Programme in Abuja, Nigeria, on the issue surrounding Sudan and the warrant of arrest of President Al Bashir. This gave her the opportunity to discuss the Special Mechanisms of the ACHPR and to address the human rights situation in Sudan.
29. From 18 to 19 March 2009, she attended a Workshop at the invitation of the Kogi State Action Committee on AIDS in Nigeria and presented a paper titled "HIV/AIDS and Human Rights".
30. From 23 to 24 March 2009, together with the Chairperson of the ACHPR, she attended a series of events in London, the United Kingdom at the invitation Foreign and Commonwealth Office and Chatham House.
31. From 30 March to 3 April 2009, she attended the 6<sup>th</sup> Extra Ordinary Session held in Banjul, The Gambia.

### *Activities as Chairperson of the Follow-up Committee on the Robben Island Guidelines*

32. From 15 to 17 December 2008, together with the Vice-Chair of the Follow - Up Committee on the Robben Island Guidelines (RIG), she participated in a training of Civil Society Organisations on the implementation of RIG in Ouagadougou, Burkina Faso. The Meeting was the third of a series of training Sessions organized by the Association for the Prevention of Torture (APT). She made several presentations on the African Human Rights System, particularly with regards to torture. To conclude the visit, the delegation of the RIG Committee, together with APT and FIACAT, met with the Burkina Faso Minister of Human Rights.

33. From 26 to 27 January 2009, she attended a Workshop organized by Prisoners Rehabilitation and Welfare Action (PRAWA) in Enugu, Nigeria. The Workshop sought to enhance the importance of investigation and documentation in the prevention of torture. She addressed the Workshop and gave further visibility to the Guidelines and their implementation towards the prevention of torture.
34. From 28 to 29 January 2009, she chaired a public hearing on police abuse in Ibadan City, Nigeria, organized by the Network of Police Reforms, an NGO engaged in monitoring the activities of police in Nigeria. Victims publicly testified to the various violations of human rights suffered at the hands of the police whilst wrongfully detained. It was an opportunity to expose the acts of the police carried out mainly behind closed doors.
35. The Network of Police Reforms also held similar public hearings in two other cities in Nigeria, and she attended and presided over the one held in Abuja from 18 to 19 February 2009.
36. On 28 April 2009, she participated in a one day Workshop in Abuja, Nigeria, on the "Menace of Rape in the Society". Non-disclosure by victims was identified as a major challenge in the apprehension and punishment of violators. The Workshop presented an opportunity to educate participants on the African Charter and rape, as it constitutes torture and the importance of the RIG in the prevention of torture.
37. With the support of the UN Human Rights Council, the Follow-up Committee on the RIG and the APT completed the publication of a *User Manual* known as "The Practical Guide for the implementation of the RIG". The goal of the brochure is to provide national actors with suggested approaches for implementing the Guidelines.

#### Commissioner Musa Ngary Bitaye

##### *Activities as Commissioner*

38. He attended the 6<sup>th</sup> Extraordinary Session of the African Commission, in Banjul, The Gambia, from 30 March to 3 April 2009.
39. During the third week of March 2009, he attended the 10<sup>th</sup> Session of the UN Human Rights Council in Geneva, Switzerland. He had a meeting with HE Dr. Martin Uhomoibhi, the President of the 10<sup>th</sup> Session of the Human Rights Council.
40. He also met with Mr. Scott Campbell, Coordinator of the Africa Unit, Field Operations and Technical Cooperation Division, of the Office of the United Nations High Commissioner for Human Rights (OHCHR). During that

meeting, they discussed among other issues, the UN collaboration with the AU through its Regional Representative in Africa, on a Resolution on a Human Rights Strategy. The Resolution is scheduled to be passed by the end of this year.

41. He had a meeting with the Chief of Groups in Focus of the OHCHR, during which they discussed collaboration between the UN and the ACHPR.
42. From 10 to 11 May, 2009, he attended the validation workshop of the report of the ILO/ACHPR Project, involving a three year research on the constitutional and legislative protection of rights of indigenous populations in 24 African Countries.
43. On 12 May 2009, he participated in a meeting between the ACHPR, and the Inter American Commission on Human Rights.

*Activities as Chairperson of the Working Group on Indigenous Populations/Communities in Africa*

44. He undertook a country mission to Rwanda from 1 to 5 December 2008. The mission was undertaken with Dr. Melakou Tegegn, expert member of the Working Group and was supported by Mr. Francis Ngarhodjim from the Secretariat of the ACHPR.
45. He chaired the regular meeting of the Working Group, which took place from 8 to 9 May 2009 in Banjul, The Gambia, to discuss activities undertaken during the preceding six month inter-session period, and to plan for the Group's future activities.

Commissioner Reine Alapini Gansou

*Activities as Commissioner*

46. On 27 November, 2008, she participated in the 14<sup>th</sup> annual campaign on gender - based violence. The theme of this annual campaign was "Domestic Violence and its Effects". She gave a detailed account of gender based violence in Benin.
47. From 5 to 7 December, 2008, from 14 to 20 December 2008, and from 5 to 15 January 2009, she participated in the presentation and defence of the 2009 ACHPR budget, in Addis Ababa, Ethiopia.
48. From 12 to 14 February, 2009, she participated in the follow-up meeting of the Network of National Human Rights Institutions in ECOWAS States.

49. From 23 to 25 February, 2009, she attended an international meeting in Cotonou, Benin, on the theme: "Good Governance, Accountability, and Responsibility". The meeting was organised by the Human Rights Institute for the Promotion of Democracy and Democracy and Everyday Life, and was financed by the UNDF.
50. On 26 February, 2009, she had a working session with the High Commission for Collective Governance (HCGC) in Benin. The main objective of the meeting was to establish contacts with this authority and to continue the National Dialogue on Human Rights in Benin.
51. From 4 to 6 March, 2009, she attended a regional seminar on Human Rights for Francophone African Parliamentarians. The seminar was jointly organised by the Inter-Parliamentary Union, the United Nations High Commission for Human Rights and the Gabonese Parliament. The theme of the seminar was: "Promoting Cooperation at the Regional Level between Parliaments and Organs with a Human Rights Mandate".
52. From 19 to 22 March, 2009, she attended the Harmonisation and Validation Workshop on the Analytic Study to Identify Gender Specific Discriminatory Clauses and Gender Equality Disparities in the National Laws of ECOWAS Member Countries. The Workshop was organised by the ECOWAS Gender Centre (EGDC), in Banjul, The Gambia, to validate the study reports prepared by national experts commissioned by the EGDC, from November to December, 2008.
53. From 30 March to 3 April, 2009, she attended the 6<sup>th</sup> Extraordinary Session of the ACHPR, in Banjul, The Gambia.
54. From 9 to 11 May 2009, she participated in the NGO Forum organised by the African Centre for Democracy and Human Rights Studies. On the sidelines of the Forum, she participated in a working session organised by the Centre for Human Rights of the University of Pretoria.
55. On 12 May, 2009, she participated in the meeting of representatives of the Inter-American Commission for Human Rights. The objective of this meeting was to inform members of the ACHPR and its Secretariat of the mandate and functioning of the Inter-American Human Rights Commission.

*Activities as a member of the Focal Point on Elderly Persons*

56. On the sidelines of the 6th Extraordinary Session, she was involved in laying the groundwork leading to the establishment of a Mechanism for Elderly Persons and Persons with Disability in Africa. Together with Commissioner Yeung Sik Yuen they had an advert posted on the website of the ACHPR, calling for applications from experts to become members of

the proposed Working Group. As a result, a number of applications had been received and tabled before the ACHPR during the 45<sup>th</sup> Session, for consideration and adoption.

*Activities as Special Rapporteur on Human Rights Defenders in Africa*

57. On 10 December, 2008, she jointly organised a one-day National Dialogue in Benin with the Beninese Association for the Right to Development (ABDD) funded by the Open Society Initiative for West Africa (OSIWA). This activity was conducted under the second phase of a project launched in commemoration of the 60th Anniversary of the Universal Declaration of Human Rights.
58. During this occasion, she published a declaration jointly with the other mechanisms responsible for the promotion and protection of the rights of human rights defenders (United Nations, European Union, and Inter American Commission for Human Rights).
59. From 21 to 24 January 2009, she attended a workshop organised by the (*Human Rights Commission for Lesbian, Gays, Bisexual and Intersexual, HRCLGBT*) in Cape Town, Republic of South Africa. The objective of the workshop was to evolve legal strategies for the protection of the rights of LGBTI in Africa.
60. On 9 February, 2009, under the capacity building programme, the Toolkit for Human Rights Defenders developed during the workshop held in August- September, 2008, in Benin was launched. The launching was funded by the Embassy of the Federal Republic of Germany, in Benin.
61. From 9 to 10 March 2009, she attended a symposium organised by the Open Society Initiative for West Africa (OSIWA), in Abuja, Federal Republic of Nigeria, on the theme “Justice and Migrations”. She chaired a panel of the ACHPR on the promotion and protection of persons and target groups striving to give effect to economic, social, and cultural rights. The discussions also covered other issues of importance pertaining to the public interest.
62. From 13 to 17 April, 2009, at the invitation of the Association for Justice, Peace and Democracy, (l’Association pour la Justice, la Paix et la Démocratie) (*AJPD*) in Luanda, Republic of Angola, she moderated over a training seminar for some twenty representatives of human rights defenders’ organisations on the legal instruments for the protection and promotion of the rights of women in Africa. She participated in the launching of the report by the Observatory of the FIDH/ OMCT on the human rights situation in the world, for the year 2007.

63. From 20 to 23 April 2009, she chaired the Conference of Human Rights Defenders, held in commemoration of the sixtieth anniversary of the United Nations Declaration on Human Rights and the 1998 Inaugural Pan - African Conference of Human Rights Defenders. The objectives of this Conference was to take stock of the activities of Human Rights Defenders during the past decade and to identify factors which impede the effective implementation of the rights of human rights defenders in Africa.
64. From 9 to 11 May, 2009, she participated in the NGO Forum, where Commissioners and participants, and especially the network of human rights defenders, considered the situation of human rights defenders in Africa.
65. During the intersession, she issued three Press Releases following the assassination of three human rights defenders in Kenya, Congo and Burundi. She published two Press Releases concerning Gabon, one denouncing human rights violations and another commending the State for responding positively by desisting from such acts. A sixth Press Release condemned the closure of three human rights NGOs in the Sudan last May.
66. Regarding the protection of human rights defenders, she sent more than twenty seven (27) letters to nineteen (19) States Parties, on cases of human rights violations which occur in those States.

#### Commissioner Soyata Maiga

##### *Activities as Commissioner*

67. From 1 to 5 December 2008, she undertook a Promotional Mission to Congo, where she had discussions with representatives of the Government and Institutions on the general human rights situation in the country and, in particular, on the status of implementation of the the African Charter and other relevant African human rights legal instruments that Congo has ratified. During the Mission, she also presented a paper to students at the Marien N’Gouabi University on the theme: “The African Charter on Human and Peoples’ Rights: Present Situation and Prospects” in commemoration of the 60th Anniversary of the Universal Declaration of Human Rights.
68. On 10 December 2008, she was part of the Special Panel of the “Espace d’Interpellation Démocratique” (Democratic Forum) in Mali, organised on the 10th of December of each year. It offers an opportunity to all Malian citizens to question Members from the various Ministerial Departments on cases of human rights violations. This exercise helps to address the concerns of the citizens in the areas of good governance, land

management and bottlenecks in justice delivery within the Public Service.

69. On 22 December 2008, she attended a Conference organised by the National Law Institute of Mali, where she made a presentation “The African Charter on Human and Peoples’ Rights: Vision, Practice and Jurisprudence”.
70. On 28 December 2008, she moderated a Conference on “The African Commission on Human and Peoples’ Rights,” attended by NGOs and students in commemoration of the 60th anniversary of the Universal Declaration of Human Rights organised by the Ministry of Justice, in Mali.
71. On 17 March 2009, she participated in a one-day discussion and experience sharing forum with the members of the National Human Rights Commission of Mali (NHRC), and the Pivot Group/Rights and Citizenship of Women, a coalition of Women’s NGOs involved in the protection of the rights of women, on the country’s proposed Gender Equality Policy.
72. From 30 March to 3 April, 2009, she participated in the 6<sup>th</sup> Extraordinary Session of the African Commission, in Banjul, The Gambia.
73. From 9 to 10 May 2009, she participated in the Validation Workshop organised by the International Labour Organisation (ILO) in collaboration with the Centre for Human Rights and the ACHPR
74. From 10 to 11 May 2009, she participated in the NGO Forum, where she moderated on the theme “Women’s Rights”. In the same Forum at the invitation of People Opposing Women Abuse (POWA), she launched a book titled “State Accountability for Homophobic Violence.”
75. On 12 May 2009, she participated in a Meeting organised by the Centre for Human Rights of the University of Pretoria for the Inter-American Commission and the ACHPR.

*Activities as a Member of the Working Group on Indigenous Populations/  
Communities*

76. From 2 to 6 February 2009 she undertook a joint Promotion Mission on the rights of indigenous populations to Burkina Faso with Commissioner Kayitesi Zainabo Sylvie, who was on a promotional mission as Commissioner responsible for Burkina Faso.

*Activities as Special Rapporteur on the Rights of Women in Africa*

77. From 6 to 8 January 2009, she attended the 2<sup>nd</sup> Forum of Sudanese Women on Darfur, in Addis Ababa, Ethiopia, organised and facilitated by *Femme Africa Solidarité*.
78. On 24 January 2009, she organised a one-day meeting with women leaders of Malian NGOs and Women's Associations in Bamako, Mali, on the Solemn Declaration on Gender Equality in Africa. The Meeting provided the opportunity to discuss the strides made in the implementation of this important instrument in Mali, and to identify obstacles and challenges to equal opportunities, in the areas of health, education, peace, security, economic growth and governance.
79. From 27 to 28 January 2009, she participated in the 13<sup>th</sup> Consultative Meeting on Gender Mainstreaming at the AU, in Addis Ababa, organised by the *Femme Africa Solidarité* in collaboration with "Gender is My Agenda" Campaign (GIMAC)."
80. From 16 to 18 February 2009, she facilitated a Sub - Regional Seminar in Lomé, Togo jointly organised by the Inter-Parliamentary Union, UNDP and the National Assembly of Togo, on the theme "Towards Improved Promotion of Women's Rights: The Role of Parliaments and Parliamentarians in the West African Sub - Region." The aim of the Seminar was, among others, to sensitise Parliamentarians from Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo on the regional and international instruments on women's rights.
81. During the Seminar, she presented a paper on the "African Charter on Human and Peoples' Rights," and another on the "Progress Made and Obstacles to the Application of the Maputo Protocol in the Sub - Region."
82. From 6 to 9 March 2009, she participated in the International Women's Colloquium organised by H.E. the President of Liberia, Ellen Johnson Sirleaf, and H.E. the President of Finland, Tarja Halonen, on the theme "Women's Empowerment, Leadership, Development, Peace and Security." The Colloquium discussed the implementation of the UN Security Council Resolution 1325, and the rights of women in countries which are in a conflict and post-conflict situations.
83. On 25 March 2009, she gave a lecture, at the invitation of the International Association of Women Judges, Quebec Chapter in Montreal, Canada, on the theme "The Mandate of the Special Rapporteur on the Rights of Women in Africa : Obstacles to and Progress in the Protection of Women's Rights."

84. On 8 March 2009, in commemoration of the International Women's Day, she published a Press Statement on the theme "Shared Responsibilities of Men and Women and Provision of Care in the Context of HIV and AIDS."
85. She forwarded Notes Verbale to the Republics of Niger and Gabon seeking authorisation for Promotional missions.
86. She also sent a Note Verbale to H.E. **Abdullahi Yusuf Ahmed**, President of the Republic of Somalia, regarding the execution by stoning of the 13 year-old girl, Aisha Ibrahim Duhulow on 27 October 2008, expressing her profound concern about this incident which constitutes an infringement of the rights enshrined in the African Charter, particularly Article 4.
87. She also reported on the progress and challenges concerning the situation of women's rights in Africa and made comprehensive recommendations to States Parties and to the ACHPR.

#### Commissioner Mumba Malila

##### *Activities as Commissioner*

88. On 10 December 2008, he took part in a Panel Discussion organised by the Zambian Human Rights Commission and the University of Zambia to commemorate the International Human Rights Day in Lusaka. The discussion was attended by University students, private citizens and members of the diplomatic corps. He made a presentation on "The Achievements of the African Commission on Human and Peoples' Rights in the Last Twenty Years".
89. On 9 March 2009, he took part in the nearly 10kms walk organised to mark the International Women's Day in solidarity with hundreds of women in Zambia.
90. From 30 March to 3 April 2009, he attended the 6<sup>th</sup> Extra- Ordinary Session of the ACHPR which was held in Banjul, The Gambia.
91. From 15 to 16 April 2009, on behalf of the Chairperson of the ACHPR, he attended the AU Executive Council Meeting which took place in Tripoli, Libya. The Meeting deliberated on the decision of the Summit to transform the AU into an Authority, and to work out modalities for that transformation.

##### *Activities as Special Rapporteur on Prisons and Conditions of Detention in Africa*

92. On 28 November 2008, he participated at the launch of the Zambia National Parole Board and presented a paper entitled "An Overview of the

State of African Prisons.” In the presentation, he indicated that given the background of serious congestion which characterises African prisons, the move to amend the Zambian Prisons Act to provide for parole in the manner that it did, in addition to the Presidential prerogative of mercy, was a laudable step which would go a long way in helping address the problem of prison congestion in the country.

93. On 14 January 2009, he met with Professor Lukas Mutingh from the Civil Society Prison Reform Initiative, Community Law Centre of the University of Western Cape, South Africa. During the meeting, they discussed ways in which the Centre and the ACHPR could collaborate and synergise efforts in the protection of prisoners’ rights.
94. Commissioner Malila continued to receive reports about the state of prisons and conditions of detention in many African countries including Mozambique, Liberia, Cameroon, Zimbabwe and South Africa. He also continued to maintain links with partners and potential partners including Penal Reform International through Ms. Mary Murray, the UN Special Rapporteur on Enforced Disappearance, Prof. Jeremy Sarkins and representatives of the APT.

#### Commissioner Bahame Tom Mukirya Nyanduga

##### *Activities as Commissioner*

95. From 25 January to 3 February 2009, he represented the Chairperson of the ACHPR at the meetings of the PRC, the Executive Council and the Assembly of Heads of State and Government, which took place in Addis Ababa, Ethiopia, where he presented the 25<sup>th</sup> Activity report of the ACHPR.
96. From 1 to 8 March 2009, he undertook a promotional mission to the Republic of Seychelles.
97. On 20 March 2009, he presented a paper to the 3<sup>rd</sup> East African Civil Society Organizations’ Forum, in Arusha, Tanzania, on the topic “Comparative Analysis of Civil Society Influence within the Regional Economic Communities and the African Union”. His presentation introduced the African Human Rights System and Mechanisms to the representatives of Civil Society Organizations from the five member states of the East African Community (Burundi, Kenya, Rwanda, Tanzania and Uganda).
98. From 30 March to 3 April 2009, he participated in the 6<sup>th</sup> Extra Ordinary Session of the African Commission, which took place in Banjul.

*Activities as Special Rapporteur for Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa (IDPs)*

99. He did not undertake any activities during the period under review, because the planned activities could not materialise (for example, the scheduled fact finding missions to Kenya and South Africa).
100. In March 2009 he published a press release following the 4<sup>th</sup> March 2009, ICC indictment of President Omar El Bashir of Sudan, and the subsequent expulsion of international and national NGOs from Darfur.
101. He took the opportunity of the Session to address the issues of concern covered by the mechanism, and gave an overview for the entire period of the mechanism. He expressed particular concern over the human rights situation of refugees and IDPs in Somalia, Democratic Republic of Congo, and the Sudan.
102. He noted that the continuing armed conflict between the forces of the TFG and Al Shabab in Somalia, coupled with the drought affecting the Horn of Africa has caused massive displacement of refugees into Kenya and about 1 million IDPs. He commended the Republic of Kenya for hosting the refugees. He stated that Somalia is experiencing a serious humanitarian crisis. He condemned the violation of human rights of the civilian population in particular women and children and the disregard of International Humanitarian Law in Somalia. He called upon the United Nations, and other members of the International Community to support the TFG and AMISOM in their efforts to stabilize Somalia after two decades of lawlessness and anarchy. He commended Uganda and Burundi for backstopping AMISOM.
103. He expressed his concern about developments in the Great Lakes Region, in particular the Democratic Republic of Congo (DRC), where the killing, maiming and displacement of the civilian population has continued, in spite of the presence of the MONUC, and the recent joint operations by the Uganda and DRC forces against the LRA, and the DRC/Rwanda against the Interahamwe/FDLR forces. He called upon the government of DRC, the African Union and the United Nations to ensure that all those responsible for violation of human rights, and IHL in DRC are brought to justice.
104. He recalled his report to the 44<sup>th</sup> Ordinary Session, on the adoption of the draft African Union Convention on IDPs, by Ministers responsible for Refugees and Displacement Issues in Africa, in November 2008. He informed participants that a Special Summit of the Assembly of the African Union on Refugees and Displacement Issues, due to be held later this year, is expected to adopt the Convention. He urged all Member States to sign and ratify the Convention, once it is adopted by the Assembly.

## Commissioner Kayitesi Zainabo Sylvie

### *Activities as Commissioner*

105. From 2 to 6 February 2009, she conducted a joint promotion mission to Burkina Faso, with Commissioner Soyata Maïga and Mr. Mohammed Khattali, Members of the Working Group on Indigenous Peoples/Communities in Africa, to promote human rights of indigenous populations/communities and the work of the ACHPR. The delegation held meetings with all stakeholders, including Government officials, civil society organisations, trade unions, international organisations, etc. to discuss the human rights situation in Burkina Faso and measures taken to improve the situation.
106. From 29 to 30 January 2009, she participated in a Round Table discussion on the theme “The Paris Principles and Good Practices in the Establishment of National Human Rights Institutions” organized by the United Nations High Commission on Human Rights in Bujumbura, Burundi. She made two presentations, one on the “African Commission as a African Mechanism for the Promotion and Protection of Human Rights in Africa”, and the other on “National Human Rights Institutions- Competence, Missions and Powers”.
107. From 30 March to 3 April 2009, she took part in the 6<sup>th</sup> Extraordinary Session of the African Commission held in Banjul, The Gambia.

### *Activities as Chairperson of the Working Group on the Death Penalty*

108. During the intersession, members of the Working Group on the Death Penalty discussed a paper on the “Abolition of the Death Penalty in Africa” which was consolidated on the sidelines of the 44<sup>th</sup> Ordinary Session in November 2008 in Abuja. The paper will be examined at the Regional Conference on the Death Penalty, which is scheduled for September 2009. This Conference will be the first of its kind on the theme.
109. During the Session, she reported on the situation of the abolition of the death penalty in Africa. She called on Member States which still retain the death penalty, to observe a moratorium in line with the Resolution adopted by the ACHPR during its 44<sup>th</sup> Ordinary Session, and to take measures on the abolition of the death penalty.
110. She also reported that due to the budgetary constraints faced by the ACHPR, the Working Group on the Death Penalty in Africa could not meet as usual before every Ordinary Session.

*Activities as Member of the Working Group on the Specific Issues Relevant to the Work of the ACHPR.*

111. She recalled that the Interim Rules of Procedure of the ACHPR were finalized and adopted at the 44<sup>th</sup> Ordinary Session held in Abuja, Nigeria, in November 2008. In adopting the Interim Rules of Procedure, the ACHPR decided that partners should be invited to comment on the same before their final adoption by the ACHPR. During the intersession, comments were received from States Parties as well as NGOs and Academic Institutions. She added that the ACHPR would discuss the various contributions during its Private Session.

Commissioner Pansy Tlakula

*Report of Activities as Commissioner*

112. On 2 February 2009, she delivered the keynote address at the opening ceremony of the LLM (Human Rights and Democratisation in Africa) 2009 class, at the Centre for Human Rights, Faculty of Law of the University of Pretoria.

*Activities as Special Rapporteur on Freedom of Expression in Africa*

113. During the intersession, she had received the response of the Government of The Gambia to the Letter of Appeal she had sent to the Government, calling for the release of Chief Ebrimma Manneh. She reported that the Government of The Gambia had granted her authorisation to undertake a Promotional Mission to The Gambia.
114. In November 2008, she sent a Letter of Appeal to the Republic of Senegal, expressing concern about reports of the deteriorating situation of Freedom of Expression in the country.
115. She welcomed reports of the announcement by Senegal, of its intention to amend existing legislation so as to decriminalize press offenses, and urged the Government to ensure that the process is initiated without delay.
116. During the inter- session that she received numerous reports, alleging violation of freedom of expression and access to information in various States Parties including Democratic Republic of Congo, Niger, Ivory Coast, Zimbabwe, Cameroon, Kenya, Sierra Leone, Liberia, Tunisia and Eritrea. She indicated that she was in the process of bringing the details of the allegations to the States Parties in question.
117. She called on States Parties to repeal all criminal defamation laws and amend all defamation laws, investigate and punish perpetrators of murder, kidnapping, torture, harassment and intimidation of journalists, and to

protect journalists working in States where there are ongoing internal conflicts in accordance with the *Declaration of Principles on Freedom of Expression in Africa*, which supplements the provisions of Article 9 of the Charter on Freedom of Expression.

118. She reiterated her call for States Parties to sign and ratify the *African Charter on Democracy, Elections and Governance* to ensure the coming into force of this Instrument without further delay. She further called on States Parties scheduled to hold elections to ensure the protection of journalists and media practitioners, and for those who have signed this Charter to comply with the provisions of Article 17.

#### Commissioner Y.K.J. Yeung Sik Yuen

##### *Activities as a Commissioner*

119. From 23 to 26 March 2009, he participated in a Conference organised by the World Jurists in Kiev, Ukraine. The theme of the Conference was “The Independence of the Judiciary and the Role of the Judiciary to Uphold and Protect Human Rights”.
120. During the Conference, he sat on an all - African Panel composed of the Chief Justice of Mozambique and a former Judge from South Africa in a Mock Trial. The Mock Trial was based on the legality of the possession and threat of the use of nuclear weapons, with special emphasis on the violation of basic human rights and humanitarian law.
121. On 12 May 2009, he took part in the Meeting organised by the Centre for Human Rights of the University of Pretoria, between members of the Inter American Commission and members and staff of the ACHPR.

##### *Activities as Focal Point on the Rights of Older Persons*

122. As the Chairperson of the Focal Point on the Rights of Older Persons in Africa, during the intersession, he was involved in laying the groundwork leading to the establishment of a Special Mechanism for Elderly Persons and Persons with Disability in Africa. Together with Commissioner Reine Alapini Gansou, they had an advert posted on the website of the ACHPR, calling for applications from experts to become members of the proposed Working Group. As a result, a number of applications had been received and tabled before the ACHPR during the 45<sup>th</sup> Session, for consideration and adoption.

**PRIVATE SESSION**  
**REPORT OF THE SECRETARY, INCLUDING ADMINISTRATIVE AND**  
**FINANCIAL MATTERS**

123. The Secretary to the ACHPR, Dr. Mary Maboreke, presented her Report to the ACHPR. The Secretary's Report set out the activities undertaken with the Secretariat's assistance during the six-month inter-session period between the 44<sup>th</sup> Ordinary Session of the ACHPR held in November 2008, in Abuja, Nigeria, and the 45<sup>th</sup> Ordinary Session in Banjul, The Gambia.
124. The Report reviewed the activities planned for 2009 in relation to those outlined in the Strategic Plan of the ACHPR; it addressed administrative and budgetary matters, as well as staffing issues; it analyzed some of the challenges faced, and also made recommendations for the way forward.
125. On budgetary matters, the Report indicated that the ACHPR's 2009 budget had been cut to almost half of the budget allocated to it in 2008 (from USD6,003,000.00 in 2008 to USD3,671,000.0 for 2009). The Report observed that, while the budgetary cut was based on the budget execution rate for the 2008 fiscal year, this reduction would have a very negative impact on the overall work of the ACHPR, and the ACHPR's capacity to deliver on its mandate efficiently and effectively.
126. She explained that this was because the temporary assistance budget line was drastically reduced, despite the fact that temporary assistance is the mainstay of ACHPR operations. On account of the continuing staffing constraints, combined with the fact that the 2009 Budget specifically provided that the new structure approved for the ACHPR had to be phased over a five-year period, with recruitment only starting in 2010.
127. The Secretary also reported that the ACHPR had been audited by the internal auditors as well as the external auditors, and informed the Commissioners that the major recommendation of these audits was the need to match the budget and activities of the ACHPR with the capacity of the Secretariat to provide the necessary support to the Commissioners in line with the relevant Rules and Regulations.
128. The Report also touched on the increasing workload of the ACHPR, and in particular, the rising backlog of Periodic State Reports, Mission Reports (Promotional, Special Mechanism and Fact-finding), as well as Communications. In that regard, the Secretary to the ACHPR recalled the decision of the Assembly in Sharm-el-Sheikh, requesting the ACHPR to identify possible ways of overcoming shortcomings in the functioning of its Communications Handling Mechanism that might result from, *inter alia*,

human and financial resource constraints, and present a report on the same to the AU Policy Organs.<sup>1</sup>

129. This problem, which is inherited from the past and has its historical origins in the lack of human and financial resources, is not going to go away unless and until these twin challenges have been adequately addressed, and the ACHPR's modus operandi has been reviewed. She stressed that there is need to propose ways of managing the ACHPR's expanding workload in general, and, in particular, expediting the ACHPR's consideration of Communications. She explained that the Secretariat of the ACHPR is currently preparing a "*Report on the Challenges faced by the ACHPR in Handling Communications*", for consideration by the ACHPR, and thereafter submission to the Executive Council.
130. The Secretary's Report also touched on the issue of honorarium and allowances for ACHPR Commissioners, which has been outstanding for quite some time. Allowances and honorarium for ACHPR Commissioners were set a long time back, and are now way out of line to current circumstances. The ACHPR prepared a paper on the matter in 2008, and forwarded it for submission to the relevant AU Organs for consideration, which was still to take place.
131. The STC's Report called for a meeting between the ACHPR and PRC, trusting that increased and continued dialogue between the ACHPR and the AU Decision makers would greatly enhance the efficiency and effectiveness of the ACHPR.
132. The STC also reported that, as is the practice, the Secretariat had written to the Office of the Legal Counsel regarding the upcoming vacancies within the ACHPR, so that the necessary processes for the (re-)election of Commissioners during the Executive Council and Assembly meetings in Sirte, Libya, in June/July 2009, could be set in motion, which had been duly done.

## **CONSIDERATION OF STATE REPORTS UNDER ARTICLE 62 OF THE CHARTER**

133. The Republics of Uganda, Benin and Mauritius presented their respective Periodic Reports to the ACHPR in accordance with Article 62 of the African Charter. The ACHPR examined the Reports and engaged in constructive dialogue with the three States Parties.

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<sup>1</sup> Paragraph 11 of Assembly Decision Assembly/AU/Dec.200(XI)

## STATUS OF SUBMISSION OF STATE PARTY REPORTS

134. The status of submission and presentation of the Periodic Reports of States Parties as at the 45<sup>th</sup> Ordinary Session of the Commission stood as follows:<sup>2</sup>

No.	Category	Number of States
1.	States which have submitted and presented all Reports	12
2.	States which have submitted all their Reports and will present the next Report at the 46 <sup>th</sup> Ordinary Session of the African Commission	6
3.	States which have submitted one (1) or two (2) Reports but still owe more Reports	23
4.	States which have not submitted any Report	12

a) States which have **submitted** and **presented** all their Reports:

No.	State Party
1.	Algeria
2.	Benin
3.	Kenya
4.	Mauritius
5.	Nigeria
6.	Rwanda
7.	Sudan
8.	Tanzania
9.	Tunisia
10.	Uganda
11.	Zambia
12.	Zimbabwe

<sup>2</sup>

Updated: May 2009

b) States which have **submitted all** their Reports **and will present the latest one at the 46<sup>th</sup> Ordinary Session of the ACHPR:**

No.	State Party
1.	Botswana
2	Cameroon
3.	DRC
4.	Ethiopia
5.	Madagascar
6.	Congo

c) States which have **submitted two or more reports but owe more:**

No.	State Party	Status
1.	Burkina Faso	1 overdue Report
2.	Gambia	6 overdue Reports
3.	Ghana	3 overdue Reports
4.	Namibia	2 overdue Reports
5.	Senegal	1 overdue Report
6.	Togo	2 overdue Reports

d) States which have **submitted one report but owe more:**

No.	State Party	Status
1.	Angola	5 overdue Reports
2..	Burundi	3 overdue Reports
3..	Cape Verde	5 overdue Reports
4.	Central African Republic	1 overdue Report
5.	Chad	4 overdue Reports
6.	Egypt	1 overdue Report
7.	Guinea Republic	5 overdue Reports
8.	Lesotho	3 overdue Reports
9.	Libya	1 overdue Report
10.	Mali	4 overdue Reports
11.	Mauritania	2 overdue Reports
12.	Mozambique	5 overdue Reports
13.	Niger	2 overdue Reports
14.	Saharawi Arab Democratic Rep	2 overdue Reports
15.	Seychelles	2 overdue Reports
16.	South Africa	1 overdue Report
17.	Swaziland	3 overdue Reports

e) States which have **not submitted** any reports:

No.	State Party	Status
1.	Comoros	10 overdue Reports
2.	Côte d'Ivoire	7 overdue Reports
3.	Djibouti	8 overdue Reports
4.	Equatorial Guinea	10 overdue Reports
5.	Eritrea	4 overdue Reports
6.	Gabon	10 overdue Reports
7.	Guinea Bissau	11 overdue Reports
8.	Liberia	12 overdue Reports
9.	Malawi	9 overdue Reports
10.	Sao Tome & Principe	10 overdue Reports
11.	Sierra Leone	12 overdue Reports
12.	Somalia	11 overdue Reports

### PROTECTION ACTIVITIES

135. During the inter – session period between the 44<sup>th</sup> and the 45<sup>th</sup> Ordinary Sessions, the ACHPR undertook several measures pursuant to Articles 46 to 59 of the African Charter, to ensure the protection of human and peoples' rights on the continent. These included, among others, writing Urgent Appeals in reaction to allegations of human rights violations received from stakeholders, and Press Releases addressing human rights violations.
136. In addition, during the 45<sup>th</sup> Ordinary Session, a total of **eighty (80)** Communications were tabled before the ACHPR: **five (5)** on Seizure; **fifty three (53)** on Admissibility; **twenty one (21)** on the Merits; and **one (1)** for review.
137. The following Communications were seized of by the ACHPR;
- i. **Communication 350/2007** – Sizalobuhle Moyo Mpofu v. Zimbabwe
  - ii. **Communication 351/ 2007** – Givemore Chari v. Zimbabwe
  - iii. **Communication 352/2007** – Sarah Mwatenga v. Zimbabwe
  - iv. **Communication 374/2009** – Morin Family v. Seychelles
  - v. **Communication 375/2009** – Acleo Kalinga (represented by REDRESS, OMCT and IRCT) v. Uganda.
138. The parties concerned (States Parties and Complainants), have been duly informed of the decisions of the ACHPR.
139. The ACHPR considered and adopted decisions on the merits of five (5) Communications, two of which were consolidated. These are:

- i. **Communication 276/2003** – Centre for Minority Rights Development on behalf of Endorois Community v. Kenya;
  - ii. **Communication 266/2003** – Kevin Mgwanga Gumne et al v. Cameroon ;
  - iii. **Communication 235/2000** – Dr. Curtis Doebbler v. Sudan ;
  - iv. **Communication 279/03 and 296/05** – Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. The Sudan.
140. One of these Communications, **266/2003 - Kevin Mgwanga Gumne et al v. Cameroon**, is attached to this Report as **Annex IV**. The other four Communications are being finalized, and will be transmitted to the parties (States Parties and the Complainants), after which they will be attached to the twenty- seventh (27<sup>th</sup>) Activity Report of the ACHPR to the AU Heads of State and Government in accordance with Articles 54 and 59 of the African Charter.
141. Consideration of **seventy one (71)** Communications was **deferred** to the 46<sup>th</sup> Ordinary Session, for various reasons, including time constraints and lack of response from one or both parties.
142. **Communication 262/2002 – Ivorian Human Rights Movement (MIDH) /Côte d'Ivoire** and **Communication 281/2003 - Mr. Marcel Wetsh'okonda Koso and others/Democratic Republic of Congo**, decided during the 42<sup>nd</sup> and 44<sup>th</sup> Ordinary Sessions respectively, are attached to this report as **Annex 2**.

#### **ADOPTION OF MISSION REPORTS**

143. During the Session, the ACHPR adopted the following Mission Reports:
- i. Promotion Mission to the Republic of **Benin**;
  - ii. Promotion Mission to the Republic of **Ethiopia**;
  - iii. Promotion Mission to the Republic of **Liberia**;
  - iv. Promotion Mission to the Republic of **Seychelles**;
  - v. Joint Promotion Mission to Republic of **Togo**;
  - vi. Promotion Mission to the Republic of **Tunisia**;
  - vii. Joint Mission of the Special Rapporteur on the Rights of Women in Africa and the Special Rapporteur on the Rights of Human Rights Defenders in Africa, to **Libya**.

## **REPORT OF THE ADVISORY COMMITTEE ON BUDGET AND STAFF MATTERS**

144. During the 6<sup>th</sup> Extraordinary Session, the ACHPR decided to set up an Advisory Committee on Budget and Staff Matters, consisting of four Commissioners and three staff of the Secretariat, to facilitate the preparation and implementation of the programmes budget of the ACHPR. The Advisory Committee presented its report to the ACHPR during the Private Session, and was tasked with immediately working on the year 2010 Programmes Budget of the ACHPR, and implementation of the approved structure of the ACHPR.

### **RULES OF PROCEDURE**

145. During the inter-session, the ACHPR transmitted its Interim Rules of Procedure to all States Parties, and also posted them on its website, together with an invitation to all its partners, to make comments on the Interim Rules. Several comments were made by some partners including States Parties, NGOs, NHRIs and Academic institutions. The comments were collated by the Secretariat, which placed them before the ACHPR for consideration. However, because the deadline for submission of comments on the Rules was 31 May 2009, it was not possible for the ACHPR to finalise consideration of the comments during its 45<sup>th</sup> Session. This task will, therefore, be carried over unto the next inter-session period and possibly into the 46<sup>th</sup> Ordinary Session.

### **CONCLUDING OBSERVATIONS**

146. The ACHPR adopted Concluding Observations on the Periodic Reports of the Republics of Uganda, Benin, the Sudan and Mauritius. The Concluding Observations are being finalised and will be transmitted to the States Parties shortly, and subsequently be posted on the ACHPR Website.

### **RESOLUTIONS**

147. During the 45<sup>th</sup> Ordinary Session, the ACHPR adopted the following three Resolutions, which are attached hereto as **Annex V**:
- i. Resolution on the Cooperation between the ACHPR and the African Committee of Experts on the Rights and Welfare of the Child in Africa;
  - ii. Resolution on the Establishment of an Advisory Committee on Budgetary and Staff Matters;

- iii. Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People With Disabilities in Africa.

## **SESSION REPORTS**

148. The ACHPR adopted the Reports of its 43<sup>rd</sup>, 44<sup>th</sup> and 45<sup>th</sup> Ordinary Sessions as well as the 6<sup>th</sup> Extra Ordinary Session.

### **6<sup>TH</sup> EXTRA- ORDINARY SESSION**

149. The ACHPR held its 6<sup>th</sup> Extra-Ordinary Session from 30 March to 3 April 2009 in Banjul, The Gambia. All the members of the ACHPR attended the Session, except two.

150. The Extra - Ordinary Session was convened, amongst other things, to deal with the backlog of work including Communications, and to discuss the budget and programme activities of the ACHPR for the year 2009.

151. During the Extra-Ordinary Session, the following Communications were finalised on the merits by the ACHPR:

- i. **Communication 294/2004** - Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v. Zimbabwe;
- ii. **Communication 297/2005** - Scanlen and Holderness v. Zimbabwe;
- iii. **Communication 284/2004** – Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe.

152. The decisions of the ACHPR on each of these Communications have been forwarded to the respective parties, and the same are attached hereto as **Annex III**.

153. Also during the 6<sup>th</sup> Extra - Ordinary Session, the following Communications were seized of by the ACHPR:

- i. **Communication 367/09** – Socio Economic Rights and Accountability Project (SERAP) v. Nigeria;
- ii. **Communication 368/09** - Abdelhadi Ali Radi and Others v. Sudan;
- iii. **Communication 369/09** - Leke Theodore Mutengene Tow v. Cameroon;

- iv. **Communication 370/09** - Social and Economic Rights Action Centre (SERAC) v. Nigeria;
  - v. **Communication 371/09** - Emmanuel Niyonzima v. Burundi;
  - vi. **Communication 372/09** - Adolfo Samuel Beira (represented by Zelda de Vasconcelos) v. Mozambique
154. All the parties were duly informed of the action taken by the ACHPR in relation to their respective cases.

#### **DATES AND VENUE OF THE 46<sup>th</sup> ORDINARY SESSION**

155. The ACHPR decided that the 46<sup>th</sup> Ordinary Session will be held from 11 to 25 November 2009, at a venue still to be determined.

#### **ADOPTION OF THE 26<sup>TH</sup> ACTIVITY REPORT**

156. In accordance with Article 54 of the African Charter on Human and Peoples' Rights, the ACHPR submits the present 26<sup>th</sup> Activity Report to the 15<sup>th</sup> Ordinary Session of the Executive Council of the African Union, for consideration and onward transmission to the 14<sup>th</sup> Summit of the AU Heads of State and Government.

## **ANNEXES**

**Annex 1- Agenda of the 45<sup>th</sup> Ordinary Session**

**Annex 2 – Communications adopted during 42<sup>nd</sup> and 44<sup>th</sup> Ordinary Sessions**

**Annex 3 – Communications decided during the 6<sup>th</sup> Extra –Ordinary Session**

**Annex 4 – Communication decided the 45<sup>th</sup> Ordinary Session**

**Annex 5 – Resolutions adopted during the 45<sup>th</sup> Ordinary Session**

## **ANNEX 1: AGENDA OF THE 45<sup>TH</sup> ORDINARY SESSION**

<b>AFRICAN UNION</b>		<b>UNION AFRICAINE</b>
<b>الاتحاد الأفريقي</b> <b>African Commission on Human &amp; Peoples' Rights</b>		<b>UNIÃO AFRICANA</b> <i><u>Commission Africaine des Droits de l'Homme et des Peuples</u></i>
48, Kairaba Avenue, P. O. Box 673, Banjul, The Gambia Tel: (220) 4 392 962 Fax: (220) 4390 764 E-mail: <a href="mailto:achpr@achpr.org">achpr@achpr.org</a> Web: <a href="http://www.achpr.org">www.achpr.org</a>		

**Rev.5**

### **AGENDA OF THE 45<sup>th</sup> ORDINARY SESSION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS** *(13<sup>th</sup> – 27<sup>th</sup> May 2009, Banjul, The Gambia)*

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

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

**Item 3: Organisation of Work** (Private Session)

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

- a) Statements by State Delegates;
- b) Statement by African Union Organs with Human Rights mandate;
- c) Statements by Intergovernmental and International Organizations;
- d) Statements by National Human Rights Institutions;
- e) Statements by NGOs.

**Item 5: Cooperation and Relationship with National Human Rights Institutions (NHRIs) and Non-Governmental Organizations (NGOs)**  
(Public Session)

- a) Relationship between the ACHPR and NHRIs
- b) Cooperation between the ACHPR and NGOs:
  - i. Relationship with NGOs;
  - ii. Consideration of Applications for Observer Status from NGOs.

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

- a) Status of Submission of State Party Reports
- b) Consideration of the :
  - i. Combined Periodic Report of Republic of Mauritius;
  - ii. Periodic Report of the Republic of Uganda; and
  - iii. Periodic Report of the Republic of Benin;

**Item 7: Activity Reports of Members of the Commission & Special Mechanisms (Public Session)**

- a) Presentation of the Activity Reports of the Chairperson, Vice-Chairperson and Members of the ACHPR;
- b) Presentation of the Activity Reports of Special Mechanisms of the ACHPR:
  - i. Special Rapporteur on Prisons and Conditions of Detention in Africa;
  - ii. Special Rapporteur on the Rights of Women in Africa;
  - iii. Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa;
  - iv. Special Rapporteur on Human Rights Defenders in Africa;
  - v. Special Rapporteur on Freedom of Expression and Access to Information in Africa;
  - vi. Chairperson of the Working Group on the Implementation of the Robben Island Guidelines;
  - vii. Chairperson of the Working Group on the Situation of Indigenous Peoples/Communities in Africa;
  - viii. Chairperson of the Working Group on Economic, Social and Cultural Rights in Africa;
  - ix. Chairperson of the Working Group on the Death Penalty;
  - x. Chairperson of the Working Group on Specific Issues Relevant to the Work of the African Commission;
  - xi. Chairperson of the Focal Point on the Rights of Older Persons.

**Item 8: Consideration of (Private Session)**

- a) Draft Paper on Sexual orientation in Africa;
- b) Final ACHPR / ILO Research Report;
- c) Comments on ACHPR Rules of Procedure;
- d) The Report of the Committee on Budget and Staff Matters;
- e) Appointment of Members of the Working Group on the Rights of Older Persons & Persons with Disability.

**Item 9: Consideration and Adoption of Draft Reports of** (Private Session)

a) Promotional Missions to the:

- i. Federal Democratic Republic of Ethiopia;
- ii. Great Socialist People's Libya Arab Jamahiriya;
- iii. Republic of Liberia;
- iv. Republic of Benin;
- v. Republic of Seychelles;
- vi. Republic of Tunisia;
- vii. Republic of Tanzania; and
- viii. Republic of Togo.

b) Information and Research Visit to the Republic of Gabon.

**Item 10: Consideration of Communications:** (Private Session)

**Item 11: Report of the Secretary:** (Private Session)

**Item 12: Consideration and Adoption of** (Private Session)

- a) Recommendations, Resolutions and Decisions;
- b) Concluding Observations on the Periodic Report of the:
  - Sudan;
  - Republic of Benin;
  - Republic of Uganda; and
  - Republic of Mauritius;

**Item 13: Dates and Venue of the 46<sup>th</sup> Ordinary Session of the ACHPR** (Private Session)

**Item 14: Any Other Business** (Private Session)

**Item 15: Adoption of:** (Private Session)

- a) 26<sup>th</sup> Activity Report;
- b) Final Communiqué of the 45<sup>th</sup> Ordinary Session;
- c) Report of the 43<sup>rd</sup> Ordinary Session
- d) Report of the 44<sup>th</sup> Ordinary Session;
- e) Report of the 45<sup>th</sup> Ordinary Session; and
- f) Report of the 6<sup>th</sup> Extraordinary Session.

**Item 16: Reading of the Final Communiqué and Closing Ceremony** (Public Session)

**Item 17: Press Conference** (Public Session)

**Annex 2 – Communications adopted during 42<sup>nd</sup> and 44<sup>th</sup>  
Ordinary Sessions**

**a. COMMUNICATION 262/2002 - IVORIAN HUMAN RIGHTS  
MOVEMENT (MIDH) /CÔTE D'IVOIRE**

**b. COMMUNICATION 281/2003 - MR. MARCEL WETSH'OKONDA  
KOSO AND OTHERS/DEMOCRATIC REPUBLIC OF CONGO**

## **Communication 262/2002 – Ivorian Human Rights Movement (MIDH) /Côte d’Ivoire**

### **Summary of the Facts:**

1. On the 24<sup>th</sup> October 2002, the Secretariat of the African Commission on Human and Peoples’ Rights received from Mr. Zoro Bi Ballo Epiphane, President of the Ivorian Human Rights Movement (MIDH)<sup>1</sup>, a Communication presented on behalf of this NGO, in application of Article 55 of the African Charter on Human and Peoples’ Rights (the African Charter).
2. The Communication is instituted against the Republic of Côte d’Ivoire (State Party<sup>2</sup> to the African Charter and hereinafter referred to as Côte d’Ivoire) and the MIDH alleges that the current policy of denial of identity which has been in force for several years in Côte d’Ivoire and which some people call “Ivoirité”, has led to the passing of laws by the State which are of an unprecedented discriminatory nature in the country.
3. Alluding to the Constitution currently in force in Côte d’Ivoire and which is said to prevent a certain category of Ivorians from acceding to certain public offices including that of President of the Republic, due to their origin as well as the law on the identification of Ivorians which in reality is said to be intended to deprive some Ivorians of their nationality for political reasons, the Communication alleges specifically that the Law No. 98-750 of the 23<sup>rd</sup> December 1998 establishing the regulation of Rural Land Ownership, in its Article 26, paragraphs 1 and 2, is in contradiction with the relevant provisions of the African Charter on Human and Peoples’ Rights.

### **The Complaint:**

4. The MIDH contends that the Law No. 98-750 of the 23<sup>rd</sup> December 1998 establishing the regulation of Rural Land Ownership, in its Article 26, paragraphs 1 and 2 is in contradiction with Articles 14 and 2 of the African Charter on Human and Peoples’ Rights.
5. The MIDH therefore requests the African Commission to recommend the review of the Law No. 98-750 of the 23<sup>rd</sup> December 1998 establishing the regulation of the Rural Land Ownership in its Article 26, paragraphs 1 and 2 to Côte d’Ivoire.

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<sup>1</sup> The MIDH is an NGO based in Côte d’Ivoire and which enjoys Observer Status with the African Commission on Human and Peoples’ Rights since October 2001 (30<sup>th</sup> Ordinary Session).

<sup>2</sup> Côte d’Ivoire ratified the African Charter on the 6<sup>th</sup> January 1992.

### **The Procedure:**

6. By letter ACHPR/COMM 262/2002 of the 30<sup>th</sup> October 2002, the Secretariat of the African Commission acknowledged receipt of the Communication to the MIDH specifying that this Communication would be recorded in the Agenda of the Commission which would consider it for seizure at its 33<sup>rd</sup> Ordinary Session scheduled for the 5<sup>th</sup> to 19<sup>th</sup> May in Niamey, Niger.
7. During its 33<sup>rd</sup> Ordinary Session which took place from 15<sup>th</sup> to 29<sup>th</sup> May 2003 in Niamey, Niger, the Commission examined this Communication and decided to be seized of it.
8. By Note Verbale ACHPR/COMM/262/2002 of the 11<sup>th</sup> June 2002, the Secretariat of the Commission wrote to the Respondent State informing it of the decision and requesting it to convey its arguments on the admissibility of the case to the Commission within three months. A copy of the complaint had been attached to this memo. It is important to recall that the copy of this complaint had been handed to the delegate of the Respondent State during the 33<sup>rd</sup> Ordinary Session of the Commission which had taken place in May 2003 in Niamey, Niger.
9. By letter ACHPR/COMM/262/2002 of even date, the Secretariat of the Commission informed the Complainant of the Commission's decision and requesting it to convey to the latter its arguments on the admissibility of the case within three months.
10. During its 34<sup>th</sup> Ordinary Session which was held from 6<sup>th</sup> to 19<sup>th</sup> November 2003 in Banjul, The Gambia, the delegation from the Respondent State presented Côte d'Ivoire's reaction to the Communication. The delegation further delivered to the African Commission a written memo in which figured the said observations and arguments pertaining to the admissibility of the Communication.
11. At its 35<sup>th</sup> Ordinary Session which was held from 21<sup>st</sup> May to 4<sup>th</sup> June in Banjul, The Gambia, the African Commission considered the Communication and deferred its decision on the admissibility of the Complaint to its 36<sup>th</sup> Ordinary Session.
12. By letters dated 21<sup>st</sup> June 2004 the Secretariat of the African Commission communicated this decision to all the Parties to the Communication and requesting them to convey to the Commission, for all intents and purposes, any extra arguments they may have on admissibility.

13. On the 27<sup>th</sup> September 2004, the Secretariat of the African Commission received a letter from the Complainant in which it outlined its reaction to the arguments put forward by the Respondent State with regard to the admissibility of the Complaint.
14. On the 11<sup>th</sup> October 2004, the Secretariat conveyed this memo to the Respondent State.
15. At its 36<sup>th</sup> Ordinary Session which took place from 23<sup>rd</sup> November to 7<sup>th</sup> December 2004 in Dakar, Senegal, the African Commission examined the Complaint and declared it admissible.
16. By Note Verbale of the 20<sup>th</sup> December 2004, the Secretariat conveyed this decision to the Respondent State and invited it to submit its arguments on the merits within three months, to enable it examine the Complaint at this stage during the 37<sup>th</sup> Ordinary Session.
17. On this same date a letter had been sent to the Complainant informing it of the African Commission's decision and requesting its arguments on the merits of the Complaint.
18. During its 37<sup>th</sup> Ordinary Session which took place from the 27<sup>th</sup> April to 11<sup>th</sup> May 2005 in Banjul, The Gambia, the African Commission examined the Complaint and, granting the request of the Respondent State, decided to defer its ruling on the merits of the Communication to its 38<sup>th</sup> Ordinary Session.
19. This decision had been conveyed to the Parties to the Complaint on the 30<sup>th</sup> June 2005. On this occasion, the Secretariat had notably reminded the Respondent State that its arguments on the merits of the case were still pending.
20. On the 12<sup>th</sup> September 2005, in the absence of any reaction from the Respondent State, a reminder letter had been sent to it.
21. On the 7<sup>th</sup> November 2005, the Respondent State conveyed its arguments on the merits of the Communication to the Secretariat.
22. On the 10<sup>th</sup> November 2005, the Secretariat acknowledged receipt and conveyed the said arguments to the Complainant for its reaction.
23. During the 38<sup>th</sup> Ordinary Session which was held from 21<sup>st</sup> November to 5<sup>th</sup> December 2005 in Banjul, The Gambia, the African Commission examined the Complaint and, in the absence of any reaction from the Complainant with regard to the supplementary arguments submitted by the Respondent

- State on the merits of the Complaint, decided to defer the case to its 39<sup>th</sup> Session.
24. On the 10<sup>th</sup> January 2006, the Secretariat informed the Parties of this decision.
  25. On the 23<sup>rd</sup> March 2006, the Secretariat sent a reminder to the Complainant for its reaction to the memo from the Respondent State on the merits of the case. A copy of the document had been attached to the reminder letter, for all intents and purposes.
  26. During its 39<sup>th</sup> Ordinary Session held in Banjul from 11<sup>th</sup> to 25<sup>th</sup> May 2006, the Commission decided to defer its decision on the merits to its 40<sup>th</sup> Ordinary Session and so informed the Parties by letter ACHPR/LPROT/COMM 262/2002/RK dated 30<sup>th</sup> June 2006.
  27. On the 28<sup>th</sup> September 2006, the Secretariat of the African Commission wrote a letter ACHPR/LPROT/COMM 262/2002/VC to the Complainant reminding it that its reaction to the arguments of the Respondent State was still pending.
  28. The Complainant has not reacted to the arguments submitted by the Respondent State on the merits of the Complaint. Another reminder had again been sent to it in September 2006 and this also has remained without response. The African Commission gave a last chance to the Complainant to react to the arguments submitted by the Respondent State and deferred its consideration of the merits of the Complaint to the 41<sup>st</sup> Ordinary Session.
  29. The Complainant, by letter dated 17<sup>th</sup> November 2006 and sent to the Secretariat of the Commission on the 20<sup>th</sup> November 2006, indicated that it did not have any new arguments to submit following the Memorandum on the merits presented by the Ivorian Government.
  30. During its 41<sup>st</sup> Ordinary Session held in Accra, in May 2007, the African Commission registered the request submitted by one of the Parties, notably the Ivorian State, which consisted in requesting the ACHPR to defer its decision on the merits on the grounds that the current reconciliation process in Côte d'Ivoire would take care of the subject of the dispute which opposed the MIDH (IHRM) and the Ivorian State in the context of an amicable settlement.
  31. The African Commission, at its 41<sup>st</sup> Ordinary Session held in Accra, Ghana in May 2007, had decided to grant the request submitted by the Respondent State and had deferred its decision on the merits to the 42<sup>nd</sup>

Ordinary Session scheduled to take place in Brazzaville, Congo, from 14<sup>th</sup> to 28<sup>th</sup> November 2007.

32. Since its decision on deferment taken at its 41<sup>st</sup> Ordinary Session in Accra, Ghana, up to the 42nd Session held in Brazzaville, Congo, the African Commission has not received any other comment or request from the two Parties, namely neither from the Complainant Party, the MIDH (IHRM), nor the Ivorian State
33. However, during the 42st Ordinary Session, in Brazzaville, Congo, the African Commission ha received an new letter from the Ivorian State which request the ACHPR to defer again its decision on the merits on the grounds that the current reconciliation process in Ivory Coast..
34. In this same letter received by the ACHPR during its 42st Ordinary Session, the Ivorian State provides some annexes showing how the negotiations between the State and one association, specially the Association of the Malians in Ivory Coast, are going in process and also promises to send in the next future others evidences of the process of the negotiations in Ivory Coast, specially between Open Society Justice and the MIDH.

**The Law:**

**Admissibility:**

35. The African Charter on Human and Peoples' Rights stipulates in its Article 56 that the Communications referred to in Article 55, to be considered, should necessarily be sent after exhaustion of local remedies, if any, unless the procedure of exhaustion of local remedies is unduly prolonged. It is important to examine the applicability of the conditions governing the exhaustion of local remedies in the present Communication.
36. In this case, the Complainant indicates that *"In Côte d'Ivoire, the remedies against the laws should be brought before the Constitutional Council. Whereas according to Article 77 of the Ivorian Constitution laws can only be brought before the Constitutional Council before they are promulgated"*. It concludes therefore that *"the law in question can no longer be brought before the Ivorian Constitutional Council as it has already been promulgated, indeed as well as all of its decrees of application"*.
37. The Complainant further contends that it could not have had recourse to a local remedy in this case as Article 77 of the Constitution of Côte d'Ivoire stipulates that laws can only be brought before the Constitutional Council by the Speaker of the National Assembly, or by at least one tenth of the National Assembly Members, or by Parliamentary Groups, or by the Human Rights Defender Associations which are legally established and

- only where it is a question of laws which are relative to public liberties where the said Associations are concerned; which is obviously not the case of the contentious law currently being called into question.
38. The MIDH concludes therefore that the obligation for the exhaustion of local remedies beforehand is not, as a result, applicable to the present Complaint.
  39. In its memorandum conveyed to the African Commission in November 2003, the Respondent State argues that, for its part, the Communication is inadmissible due to the “non-exhaustion of local remedies and to the disparaging and insulting nature of the said Communication”.
  40. The Respondent State points out that pertaining to the non-exhaustion of local remedies, contrary to the affirmation of the Complainant, there is, by virtue of the provisions of Article 96 of the Ivorian Constitution, the possibility for any Complainant to invoke a plea on the unconstitutionality of a law, since the modalities for the implementation of this remedy are governed by law. The fact that the Complainant did not use this remedy, contends the Respondent State, shows that it has not exhausted local remedies and that the Communication should therefore be declared inadmissible.
  41. Reacting to this argument in a counter memorandum addressed to the African Commission in September 2004, the Complainant argues that no local remedy had been available in this case, even if other parties had access to such a remedy. The Complainant further observed that before the African Commission, the condition for the exhaustion of local remedies should be assessed in relation to the plaintiff (in this case the MIDH) and to the plaintiff alone, and not in relation to third parties who may be entitled to complain about the alleged violation.
  42. Thus, the Complainant argues that the recourse to a plea of unconstitutionality invoked by the Respondent State to say that a final remedy exists locally is not available to it as it is only possible to invoke a plea of the unconstitutionality of a law during a hearing. Whereas the MIDH, a legal entity which does not own property in the domain of rural landownership, cannot be the object of a suit of expropriation or dispute, making possible the application of the law in question and where the possibility of the remedy alluded to by the Respondent State could be implemented. The very fact that the MIDH cannot initiate the remedy of a plea of unconstitutionality shows, argues the Complainant, that this remedy is not available to it.
  43. Furthermore, concludes the Complainant, the implementation of the recourse to a plea of unconstitutionality by foreign individuals, owners of

land in the rural real estate is “illusory” given the context which currently prevails in Côte d’Ivoire where “any questioning of decisions by the public Authorities is seen as an act of belligerence”.

44. With regard to the “disparaging and insulting nature” of the Communication, the Respondent State indicates that the Complainant referred to Côte d’Ivoire as “*a xenophobic and exclusionist country*” and where “*foreigners are called invaders*”, the nationals as “*Ivorians of extraction*” and “*appropriate Ivorians*” in the name of a “*policy of denial of identity*”. The Respondent State considers, in particular, that the use of these terms is insulting towards Côte d’Ivoire which has more than 26% of foreigners within its entire population.
45. Moreover, the Respondent State contends that the use of the words like “*xenophobia*” and “*exclusionist*” to qualify Cote d’Ivoire or to lead people to believe that this country is trying to establish a policy of “*denial of identity*” is an insult. The Respondent State concludes that the Communication, for the above-mentioned reasons, should be declared inadmissible.
46. The Complainant reacts to these arguments by saying that the words quoted are not used to qualify the State or its Institutions but simply to describe a situation which is “*much sadder*” where large-scale assassinations of individuals had been perpetrated “just because of their nationality or presumed nationality of origin”.

*The disparaging and insulting nature of the words used in the Communication:*

47. The Respondent State contends that the words used by the Complainant in the Communication are disparaging and insulting for Cote d’Ivoire. Indeed, words like “*xenophobia*”, “*exclusionist*”, “*discriminatory*”, are used in the Communication but the African Commission considers that these words are not used in an insulting and disparaging context for the Respondent State but rather have been used to describe a situation which has been condemned and it would be difficult to describe it differently.
48. The African Commission therefore does not accept the argument that the words used in the Communication are disparaging and insulting against the Respondent State.

*The non-exhaustion of local remedies:*

49. According to the arguments submitted by the Parties to this Complaint the African Commission observes that local remedies exist against the law being challenged but it would appear that the Complainant does not have the necessary qualifications to exercise this remedy.

50. In effect, the remedy consisting in bringing the disputed law before the Constitutional Council is only available for a certain category of citizens, in this case, the President of the Republic of Côte d'Ivoire and the Members of Parliament.
51. With regard to the remedy of a plea of unconstitutionality of the law in question, if it does exist, it is clear that the Complainant cannot use it. Not being a land owner in the rural real estate domain, the Complainant is indeed hardly likely to be a party to an eventual suit linked to the implementation of the law being challenged.
52. As a legal entity, the Complainant is well placed to question a legal provision of a State Party to the African Charter which is said to violate the said Charter without prejudice to the facility reserved to third parties to institute proceedings against the provision in question before the national courts.
53. Now, under the terms of Article 19 of the Law No. 2001-303 of the 5<sup>th</sup> June 2004 determining the organization and functioning of the Constitutional Council the proceedings for a plea of unconstitutionality take place during a hearing. Therefore it logically follows that the recourse to a plea of unconstitutionality is not available for the Complainant.
54. The African Commission accepts that remedies against the law in question exist locally but also notes that the Complainant cannot use them as it does not have the qualification/possibility to do so. Whereas the African Commission feels that the assessment of the capacity to use and exhaust local remedies is done in relation to the Complainant and to him alone.
55. In this context it is important to recall the jurisprudence of the African Commission pertaining to the condition of exhaustion of local remedies. In effect, the African Commission considers that local remedies should be available (for the Complainant), effective and sufficient. Thus, the African Commission considers that a local remedy is available if the plaintiff can institute a lawsuit without any obstacle; the remedy is effective if it offers the plaintiff a prospect of success and if this remedy is sufficient and capable of rectifying the alleged<sup>3</sup> violation.
56. Since in this particular case it appears clearly that the Complainant does not have the qualification/possibility to use the available local remedies, the African Commission considers that it is as if there is no local remedy available for the Complainant.

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<sup>3</sup> Grouped Communications 147/95 and 149/96 – Sir Dawda K. Jawara/The Gambia

**For these reasons, the African Commission declares the Communication admissible.**

**The Merits:**

57. The Respondent Party, in its arguments on the merits, challenges the MIDH's assertion that the law on rural land ownership is one of the major reasons for the civil war which is tearing Côte d'Ivoire apart.
58. The Respondent Party considers this assertion as serious and inaccurate. Serious because it insinuates that it is the foreigners, the only ones concerned by Article 26 of the Law being questioned, who have taken up arms against the State of Côte d'Ivoire. Inaccurate because this is not the cause being invoked by those who have taken up arms, and that besides, "112 persons are concerned by the effects of Article 26 out of which 40 are Companies and 112 are physical persons". The Respondent Party notes that the Communications from the Complainant are only stories of the undertaking, preparation and justification of violence.
59. After its preliminary observations on what it calls the "real reasons" of the Complainant, the Respondent Party was particularly anxious to send a copy of the *Official Gazette of the Republic of Côte d'Ivoire* containing the promulgation decree signed by the President of the Republic, of the new Law No. 2004-412 of the 14<sup>th</sup> August 2004 amending Article 26 of the Law No.98-750 of 23<sup>rd</sup> December 1998 relating to rural land ownership to the African Commission.
60. On the basis of this new Law No. 2004-412 which modifies the provisions of Article 26 of the former Law 98-750 on which the Complainant has based its Communication, the Ivorian Government requests the African Commission to declare the *Communication 262/2002* of the MIDH as groundless and to close this case by applying the principle of topicality which requires that all administrative or legal bodies assess the facts of the case in the condition in which they are on the day of ruling.
61. The Complainant considers it needless to submit fresh arguments since on the one hand the admissibility of the Communication has not been questioned, and on the other, because the Law No. 98-750 of 2<sup>nd</sup> December 1998, identified as being in violation of the provisions of Articles 2 and 14 of the African Charter on Human and Peoples' Rights has been judged prejudicial to the fundamental Human Rights by numerous Courts whose competence and respectability have been unanimously recognized.
62. Furthermore, the Complainant observes that the various peace negotiations on the Ivorian crisis have, after the MIDH, tackled the issue and recommended the modification of Article 26 of the Law 98-750 of 23<sup>rd</sup>

December 1998. The same is true for the Marcoussis Accords of 24<sup>th</sup> January 2003, in their Item IV – land property system, paragraph 2.

63. The Complainant all the same accepts that, like the Government of Côte d'Ivoire, following the Marcoussis Accords, the National Assembly of Côte d'Ivoire had passed a new Law No. 2004-412 dated 14<sup>th</sup> August 2004 on the amendment of Article 26 of the Law No. 98-750 of 23<sup>rd</sup> December 1998 and relative to rural land ownership.
64. The Complainant thus feels that it has scored a victory and requests the African Commission to mention this credit in its decision on the merits.

***Debate on the need to pursue consideration of the merits or otherwise***

65. The Commission takes note of the request from the Respondent Party to declare the Communication submitted by the MIDH as groundless, due to the fact that the provisions of Article 26 of the Law 98-750 being challenged by the Complainant had been modified by the new Law 2004-412 and that in consequence this modification gives the plaintiff satisfaction.
66. The Commission notes with interest the arguments raised by the Ivorian State to justify its request for declaring the Communication groundless and for closing the case, notably the principle of topicality which requires that all judicial or administrative bodies assess the facts of a case in the state in which they are on the day of its ruling.
67. The Commission further notes that the Ivorian State, in its arguments on the merits, alludes to the former jurisprudence of the Commission (notably *Communications 66/92 Lawyers Committee for Human Rights vs. Tanzania*, 22/88 *International Pen vs. Burkina Faso* and 16/88 *Cultural Committee for Democracy in Benin vs. Benin*). The Commission observes that the Respondent Party relies mainly on this said jurisprudence to base its request for the Communication to be pronounced groundless and for the closure of the case.
68. The Commission considers, furthermore, that the Complainant, in spite of the fact that it does not bring any new arguments following the conclusions drawn on the merits by the Ivorian Government, does not for all that renounce its suit before the Commission and does not withdraw its Complaint. Better still, the Complainant is asking the Commission to recognize, on making its decision, its credit for having been the first Organization to have drawn attention on the prejudicial nature of the Article 26 of the Law 98-750 on rural landownership to Human Rights.

69. The Commission moreover notes the concern expressed by the Complainant to ensure the effective implementation of the provisions of the Law 2004-412 amending Article 26 of the Law, and above all, acquisition of help in obtaining compensation for the prejudices suffered by numerous populations for six (6) years during which the Law No. 98-750 of the 23<sup>rd</sup> December had remained in force.

70. From the preceding arguments submitted by the two Parties, the Commission considers it its responsibility to determine whether or not to pursue the consideration of the merits of the present Communication.

**View of the Commission on the need to pursue consideration of the merits or otherwise**

71. The Commission considers that the *Communications 66/92, 22/88 and 16/88* invoked by the Respondent Party to justify its request to the Commission to declare the Communication groundless and to close the case, should be assessed on a case by case basis and can in no way constitute a constant jurisprudence of the Commission.

72. Relying on its jurisprudence, the Commission has always dealt with the Communications by ruling on the alleged facts at the time of the presentation of the Communication (see *Communication 27/89, 46/91 and 99/93 World Organization against Torture & al / Rwanda*). This jurisprudence had been confirmed by the more recent decisions relating to Communications *222/98 and 229/99 – Law Office of Ghazi Suleiman / Sudan*.

73. The Commission takes good note of the amendments to the Article 26 introduced by the new Law 2004-412 and which are geared towards better guaranteeing the right to property, but wishes to clarify that these new legislative provisions do not wipe out the violations caused by the application of the former Law 98-750 which produced effects for six (6) years, and therefore it was beholden, by virtue of its mandate of protection, to rule on *Communication 262/2002*.

74. The Commission thereby concludes that, even if the law had been amended since then, this change does not automatically draw a decision from the Commission to close the case. In consequence, the Commission decides to pursue consideration of the merits of *Communication 262/2002* submitted by the MIDH against the Republic of Côte d'Ivoire.

**Consideration of the Merits: Provisions of the Charter alleged to have been violated**

75. The Complainant alleges the violation of Article 2 of the African Charter on Human and Peoples' Rights which stipulates that:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized 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 or social origin, fortune, birth or other status".

76. The Complainant also alleges the violation of Article 14 of the African Charter on Human and Peoples' Rights which stipulates that:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the Community and this in accordance with the provisions of appropriate laws".

77. The Commission notes that in its observations on the merits, the Government of Côte d'Ivoire does not dispute the violations of Articles 2 and 14 of the African Charter by the Article 26 of the Law 98-750 on rural land ownership. On the contrary, it simply observes that its effects are limited as "the number of individuals concerned is from 112 of which 40 are Companies and 112 physical persons, and that among these, there is a very small minority of Africans".

78. As a result, the Commission considers that the provisions of Article 26 of the Law 98-750 are in violation of Articles 2 and 14 of the African Charter on Human and Peoples' Rights and notes that the argument that its effects are said to be limited to a certain number of persons and only concerns a very small minority of Africans is irrelevant from the legal point of view and therefore cannot stand. On the other hand, such an interpretation confirms the violation of Article 2 of the African Charter which guarantees the enjoyment of rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status. Furthermore, the Commission considers that the application of Article 26, paragraphs 1 and 2 of the Law 98-750 would give rise to the expropriation of their land from a category of the population, on the sole basis of their origin; whereas, it observes that the Ivorian Government, in its remarks on the merits, does not advance any argument linked to the "public need" or to "the general interest of the community" which could exceptionally justify a violation to the right to property as guaranteed by the Charter, specifically in its Article 14.

***For these reasons, the African Commission***

**Observes** that the Republic of Côte d'Ivoire is in violation of the provisions of Articles 2 and 14 of the African Charter on Human and Peoples' Rights.

**Observes** that, even if Article 26 of the Law 98-750 of 23<sup>rd</sup> December 1998 had been amended by the Law 2004-412 of the 14<sup>th</sup> August 2004, it has already shown its effects during the six (6) years of its application.

**Takes** note of the current reconciliation process and of the ongoing negotiations in Cote d'Ivoire.

**Recommends** to the Government of Côte d'Ivoire to ensure the effective application of the provisions of the new Law 2004-412 of 14<sup>th</sup> August 2004 amending Article 26 of the Law 98-750 of the 14<sup>th</sup> August 2004.

**Recommends** to the Government of Côte d'Ivoire to ensure, if this has not already been done, that all landowners who may have been deprived of their land by virtue of the application of the former provisions of Article 26 of the Law 98-750 are restored in their rights.

**Urges** the Government of Côte d'Ivoire, within the framework of the current drive to achieve national reconciliation, to evaluate, if this has not already been done, the damages that the victims may have suffered by virtue of the application of the provisions of Article 26 of the Law 98-750, and to pay, if need be, fair and equitable compensation on their behalf.

**Strongly urges** the Ivorian State to pursue, within the framework of the current national reconciliation process, the amicable settlement of all the disputes arising out of the application of the former discriminatory laws and to scrupulously ascertain that the principle of equality before the law, as stipulated in the African Charter, notably in its Article 2, is respected under all circumstances.

**Done at the 43<sup>rd</sup> Ordinary Session held in Ezulwini, Kingdom of Swaziland, from 7th to 22nd May 2008**

## 281/2003 - Marcel Wetsch'okonda Koso and others/Democratic Republic of Congo

### Summary of Facts:

1. On 23<sup>rd</sup> September 2003, the Secretariat of the African Commission on Human and Peoples' Rights received from Barrister Marcel Wetsch' Okonda Koso, solicitor of the Kinshasa-Gombe Bench and of the NGO "Campagne pour les Droits de l' Homme au Congo"<sup>6</sup>, from Barrister Izua Kembo, solicitor of the Kinshasa- Gombe Bench and member of the NGO "comite' des Observateurs des Droits de l' Homme"<sup>7</sup>, and from Barrister Odette Disu, solicitor and member of the Kinshasa- Gombe Bench, and of the NGO "ASMEBOKEN"<sup>8</sup> a Communication, introduced on behalf of 5 persons as follows:
  - Ngimbi Nkiama Gaby, Contractor, born on 19.04.1958 in Kinshasa
  - Bukasa musenga, Trade Inspector, born on 25.09.1967 in Kinshasa
  - Duza kade willy, Soldier, born on 30.10.1963 in Lisala
  - Issa Yaba, Femala Soldier, born on 10.04.1958 in Irebu, and
  - Musalinsa Manoy, Soldier, born on 10.05.1958
2. The Communication is introduced against the Democratic Republic of Congo, (State signatory<sup>9</sup> to the African Charter, and hereinafter referred to as DRC in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).
3. The Complainants allege that, on 23.07.1999, the said Ngimbo Nkiama placed an order for the supply of 3.5 cubic metres of petrol at ELF (a petroleum company) which he was supposed to collect on 26.06.1999 at SEP/Congo. But the said Ngimbi Nkiama was arrested by policemen who are said to have discovered a supply of 6 drums in surplus following his collection of 40 drums of fuel instead of the 34 drums of fuel he initially ordered for.
4. Besides, the Complainants maintain that on 04.08.1999 the said Ngimbi Nkiama was arrested and sent to the *Conseil National de Sécurité* quarters

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<sup>6</sup> CDHC- Asbl, 18 Avenue Basoko, commune of Ngaliema, Telephone: 00243 98186937

<sup>7</sup> African Commission on Human and Peoples' Rights since October, 2001 (30th Ordinary Session).

CODHO, Kinshasa-Gombe, commune of Kalamu, Telephone: 00243 9947822

<sup>8</sup> Association Benjamin Moloise and Ken Saro Wiwa for the Defence of Human Rights and the Development of Africa, 4251, Avenue Kabasele Tshamala- Kinshasa Barumbu Telephone 0024398212201; Email: [groupe\\_strategique@yahoo.co](mailto:groupe_strategique@yahoo.co), [disuodette@yahoo.fr](mailto:disuodette@yahoo.fr)

<sup>9</sup> The DRC ratified the African Charter on 20/07/1984)

together with four jointly – accused persons, Bukasa Musenga, Duza Kade Willy, Issa Yaba, and Muzaliwa Manoy.

5. According to the Complainants, on the 11.09.1999, the said Ngimbi Nkiama and the jointly – accused persons were arraigned before the Military Court of DRC for “ partaking, during war time, in the committing of acts of sabotage “by the diversion of 70 drums of gas-oil and of 40 drums of gas-oil belonging to the Congolese Armed Forces”.
6. And that the Military Court comprising 5 judges (among whom would be only one trained jurist) tried the said Ngimbi Nkiama and his jointly-accused accomplices for the evidence adduced against and sentenced them to a capital punishment, a “*decree on a ground without the least justification*” and the right to file an appeal against the decree; the decisions of the Military Court being not susceptible *either for a review or for an appeal* (decree No.091 of 23.08.1997 establishing the Military Court of *DRC*).

### **The Complaint:**

7. The Complainants allege that the above-mentioned facts constitute a violation by the DRC of Articles 7 (a) and 26 of the African Charter and of paragraph 3 of the *Provision for the right to the means of an appeal and of a fair trial*, adopted by the African Commission during its 11<sup>th</sup> Ordinary Session held in Tunis, Tunisia from 2 to 9 March 1992.
8. Furthermore, the Complainants maintain that the aforementioned facts constitute a violation by the DRC of the Article 14(1) of International Covenant on Civil and Political Rights.
9. Consequently, the Complainants request the African Commission to:
  - Declare Decree No. 019 of 23.08.1997, establishing a court for military order and its Article 5, contrary to the international commitments of the DRC as far as fair trial is concerned as stipulated in the African Charter;
  - Declare that the sole fact of submitting a dispute case to a Court the majority of whose members have no legal qualification whatsoever, constitutes a flagrant violation of Article 26 of the African Charter;
  - Declare that the judicial decisions on a *simple ground without the least justification* grossly breach the right and liberties acknowledged by the African Charter and violate the provisions of Article 7 of this latter;
  - Direct the immediate release of the sentenced persons and the reparation for all the prejudices they have suffered;
  - Request the DRC to harmonise all her legislation with the commitments this State subscribed to at international level and namely the African Charter and to initiate reforms so as to prevent further human right violations.

## **The Procedure:**

10. On 21.10.2003, the Secretariat of the African Commission acknowledged receipt of this Communication to the Complainants through a letter with reference No. ACHPR/COMM 281/ 2003.
11. During its 34<sup>th</sup> Ordinary Session held from the 6<sup>th</sup> to 19<sup>th</sup> November 2003 in Banjul, The Gambia, the African Commission examined this Communication and approved its seizure.
12. On the 14/12/2003, the African Commission notified the Respondent State of this decision by DHL, and at the same time conveyed to it a copy of the Complaint. The African Commission had also requested the Democratic Republic of Congo to provide it, in two months, with its reactions on this Complaint to enable it take a decision on its admissibility during its 35<sup>th</sup> Ordinary Session.
13. On the 12<sup>th</sup> February 2004 and in the absence of any reaction from the Respondent State, the African Commission sent a copy of the Complaint in question with an acknowledgement of receipt to the Ministry of Foreign Affairs, requesting its reaction as early as possible.
14. At its 35<sup>th</sup> Ordinary Session which was held from the 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered the Communication and deferred its decision on the admissibility of the case since the delegation of the Respondent State which had participated at the Session declared, contrary to all expectations, that the Complaint had not reached the DRC.
15. The Secretariat of the Commission prepared a complete dossier of all the pending Communications against the DRC, including Communication 281/2003, which it delivered in exchange for a receipt, to the DRC delegation.
16. By letter dated 21st June 2004, the Secretariat of the Commission informed the Parties to the Communication of the deferment of its decision on the admissibility of the Complaint to its 36<sup>th</sup> Session and requested them, once again, to provide it with their comments in this regard so as to allow the African Commission to rule on the admissibility during its 36<sup>th</sup> Session.
17. On the 16/09/2004, the Respondent State sent its comments on the admissibility of the Communication to the Secretariat of the Commission.

18. The Secretariat acknowledged receipt of it on the 11/10/2004, and sent the said comments to the Complainant requesting his reaction thereon as early as possible.
19. During the 36<sup>th</sup> Ordinary Session of the African Commission which was held in November/December 2004 in Dakar, Senegal, the Respondent State submitted its memorandum on the admissibility of the Complaint to the Secretariat of the African Commission.
20. On the 4<sup>th</sup> December 2004, the Secretariat of the African Commission acknowledged receipt of this memorandum and informed the Respondent State that the African Commission would take its decision on admissibility of the Complaint at its 37<sup>th</sup> Ordinary Session and would the arguments raised would be taken into account.
21. On the 23<sup>rd</sup> December 2004, the Secretariat of the African Commission conveyed the submission of the Respondent State on admissibility to the Complainant, and requested his reaction to the arguments submitted therein and further informed him that the African Commission would take its decision on the admissibility during its 37<sup>th</sup> Ordinary Session.
22. At its 37<sup>th</sup> Ordinary Session which took place from the 27<sup>th</sup> April to 11<sup>th</sup> May 2005 in Banjul, The Gambia, the African Commission heard the Complainant on the condition of the exhaustion of local remedies.
23. During this same Session, the African Commission declared the Communication admissible.
24. On the 6<sup>th</sup> June 2005, the Secretariat informed the Parties of this decision and requested them to transmit their arguments on the merits of the case.
25. On the 6<sup>th</sup> September 2005, the Complainant submitted his arguments on the merits of the Complaint.
26. The Secretariat conveyed these observations to the Respondent State on the 8<sup>th</sup> November 2005 at the same time requesting its own memorandum as early as possible.
27. During its 38<sup>th</sup> Ordinary Session, which was held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the complaint and, in the absence of the arguments of the Respondent State on the merits of the case, decided to differ its decision at this stage to its 39<sup>th</sup> Ordinary Session.

28. On 10/01/2006, the Secretariat of the African Commission informed the parties of this decision and requested the Respondent State to forward its arguments on the merits of the communication.
29. In the absence of reaction from the Respondent State, the Secretariat sent a reminder on 28/03/2006. A copy of the submission of the Complainant on merits of the case was enclosed.
30. In a note verbale dated July 12, 2006, the Secretariat urged DRC to provide with its observations on the merits by no later than 30 August 2006. The Secretariat further reminded DRC of previous notes verbales sent respectively on June 06, 2005, November 08, 2005 and January 10, 2006 all of which still with no reaction from respondent State.
31. At its 40<sup>th</sup> ordinary session held in Banjul, the Gambia from 15 to 29 November 2006, the Commission deferred its decision on the merits to its 41<sup>st</sup> ordinary session scheduled to be held in Ghana from 16 to 30 May 2007 owing to the absence of arguments on the merits from the respondent State.
32. On 15 January 2007, the Secretariat informed DRC of the decision of the Commission to differ the complaint to its 41<sup>st</sup> ordinary session and reminded DRC of previous notes verbales in which DRC was invited to send its observations on the merits. However, DRC was given the last chance to formulate and send its observations on the merits before the end of February 2007, failing to do so would result in the Commission having to act in accordance with article 119 (4) of its rules of procedure.
33. On 16 January 2007, the Secretariat informed the Complainants of the postponement of its decision on the merits to the 41<sup>st</sup> ordinary session scheduled to be held from 16 to 30 May 2007 in Ghana. The Secretariat informed also the Complainants that DRC was given a last chance to provide the Commission with its arguments on the merits failing of which, the Commission would be obliged to act in accordance with article 119 (4) of its rules of procedure.
34. In a note verbale dated June 14 2007, the Secretariat of the Commission informed the Defendant State that the communication was deferred to the 42<sup>nd</sup> ordinary scheduled from 14 to 28 November 2007 in Brazzaville, Congo. The State was also reminded of previous note verbales in which it was urged to submit its arguments as regard to the merit of the communication and that failing to do so may result in the application of rule 119 (4) of the rule of procedure.. The respondent State is still yet to respond to these note verbales.

35. A letter dated June 15, 2007 the Secretariat informed the Complainant of the deferment of the communication to the 42nd ordinary session scheduled from 14 to 28 November 2007 in Brazzaville, Congo
36. In a note verbale dated 17 September 2007 and a letter dated 17 September, 2007 the Secretariat of the Commission African also sent a reminder both to the Complainant and the Defendant State.
37. By Note Verbale dated 20 March, 2008 and a letter dated 19 December, 2007 respectively, the parties were informed of the deferment of the communication to the 43<sup>rd</sup> ordinary session scheduled in Ezulwini, Swaziland from 7<sup>th</sup> to 22<sup>nd</sup> May, 2008 for the Commission to take into consideration in its decision on the merits, the conclusions submitted by the DRC on the merits.
38. In a Note verbale dated 20 March, 2008, and a letter dated 19 March, 2008, reminders were sent to the parties to inform them of the deferment of the communication to the 43<sup>rd</sup> ordinary session.
39. All attempts at getting responses from the Respondent State have been futile (or unsuccessful). Therefore, the Commission decided to consider the Communication on the Merits.
40. During its 5<sup>th</sup> Extra Ordinary Session, which took place in Banjul, The Gambia from 21 to 29 July 2008, the African Commission considered the Communication and finalized its decision on the Merits.

**The Law :**  
**Admissibility :**

**On the exhaustion of local remedies**

41. The African Charter on Human and Peoples' Rights stipulates in its Article 56 that the Communications referred to in Article 55 should, if they are to be considered, necessarily be sent after exhaustion of local remedies, if they exist, unless the procedure of exhaustion of local remedies is unduly prolonged.
42. In its memorandum on admissibility, the Respondent State contends that as far as it is concerned the Communication should be declared inadmissible. In support of this position the Respondent State affirms that the Complainant "does not provide evidence of having lodged an appeal against the ruling in dispute, whereas this means of recourse remains open, in conformity with Article 150, paragraph 3 of the Transitional Constitution in the Democratic Republic of Congo".

43. According to the Respondent State, it was possible for the complainants to lodge an appeal before the Supreme Court of Justice against all rulings by the Military Tribunal which are in dispute, and that, by not using this remedy, the Complainant has not exhausted the available remedies and therefore, it requests the African Commission to declare the Communication inadmissible for non exhaustion of local remedies.
44. In a memorandum conveyed to the Secretariat of the African Commission on the 17<sup>th</sup> April 2005, the Complainant insisted on the non existence of remedies at the time when the facts occurred. They contend that the sentences passed by the Military Tribunal with regard to them cannot be subjected to any remedies. In effect Article 5 of Decree 019 of the 23<sup>rd</sup> August, 1997 establishing the Military Tribunal stipulates that its rulings “can neither be opposed nor appealed”.
45. They contend that an eventual recourse to cancellation of the judgment in question, although provided for by Article 272 of the Law of 23<sup>rd</sup> August 1972 instituting the Code of Military Justice, cannot be implemented due lack of “jurisdictional competence”; insofar as they could have brought an appeal before the Supreme Court if the facts, which date back to 1999 were not prior to the Transitional Constitution which was adopted on 4<sup>th</sup> April 2003 and made it possible for citizens to appeal against the rulings of the Military Tribunal.
46. The Complainant contends that the Transitional Constitution Decree of the 9<sup>th</sup> April 1994 (in force at the time of the events – 1999) stipulates in its Article 102 that: “*The Supreme Court of Justice knows.....appeals lodged against rulings passed in the final jurisdiction by the Courts and Tribunals*” does not take into consideration the decisions of the Military Tribunal.
47. The Complainant considers therefore that local remedies were not available by the time the facts occurred.
48. At the 37<sup>th</sup> Ordinary Session of the African Commission which was held from the 27<sup>th</sup> April to 11<sup>th</sup> May 2005 in Banjul, The Gambia, the Complainant made an oral presentation before the African Commission in reiteration of these arguments.

#### **Position of the African Commission:**

49. The main question regarding the admissibility of the case under consideration is whether local remedies were in existence at the time when the facts occurred and, if yes, whether they have been exhausted pursuant to Article 56(6) of the African Charter on Human and Peoples’ Rights.

50. In effect, Article 56(6) provides that Communications *“are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter”*.
51. The African Commission is of the view that if such important facts are within the jurisdiction of an exceptional jurisdiction all legal guarantees shall be given to the accused persons for their defence in order to avoid any miscarriage of justice. That is the rationale for having remedies in all procedures, especially in criminal procedure. All the ordinary remedies shall be available to them.
52. An analysis of Article 150, paragraph 3 of the Transitional Constitution of 4<sup>th</sup> April 2003 on which the respondent State relies shows that the Transitional Constitution was passed after the facts and also after the decision sentencing the complainants. In such circumstances, the Commission is of the view that applying such a law of a general scope would violate the principle of non-retrospectiveness of the law, especially as the new Transitional Constitution Decree does not expressly provide for such remedy.
53. In the present Communication, it is the State that alleges that local remedies have not been exhausted and as such the burden is on it to show that local remedies exist. It observes that such remedy is available under Decree 019 of 23 August 1997 establishing the Military Tribunal; Article 5 of the expressly Decree provides that the rulings of the latter *“can neither be opposed nor appealed”*. Thus, it appears that the Decree includes a derogatory clause which precludes any opposition or appeal against the rulings of bodies such as the Military Tribunal. In other terms, the applicable law at the time the facts occurred does not provide any remedy. In a similar situation, the African Commission, drawing inspiration from its own well-established jurisprudence, already held, in Communications 102/93 Constitutional Rights Project/Nigeria, 129/94 Civil Liberties Organisation c/Nigeria and other communications,<sup>10</sup> that *“It is reasonable to assume that the local remedies would not only be prolonged, but they will produce any result”*.
54. Moreover, the same analysis can apply to the other common remedy, namely the lodging of an appeal with the Supreme Court. In terms of the Transitional Constitution Decree of 9<sup>th</sup> April 1994 (in force at the time the facts occurred - 1999), Article 102 of which provides that *“the Supreme Court of Justice could only know of appeals lodged against rulings passed in final jurisdiction by the Courts and Tribunals”*. is only available in common offences.

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<sup>10</sup> 102/93 Constitutional Rights Project, Civil Liberties Organisation/Nigeria, 129/94 Civil Liberties Organisation/Nigeria

55. In consequence, the African Commission rules that local remedies were not available to the Complainants. It will apply its jurisprudence on exhaustion of local remedies<sup>11</sup> without it necessarily seeking to establish the effectiveness of local remedies; the Commission is of the view that it was absolutely impossible for the victims to exhaust effective local remedies.

**56. On these grounds, the African Commission declares the Communication admissible.**

### **The Merits**

57. In accordance with rule 120 of the Rules of Procedure of the African Commission, where a communication submitted in accordance with article 55 of the Charter has been declared admissible, the Commission “shall consider the Communication in the light of all the information that the individual and the State party concerned have submitted in writing, it shall make known its observation on this issue.”

58. In the present case, the conclusions brought to the dossier by the two parties both in terms of the procedure and on the merits of the case enable the Commission to make pronouncements through the presentation and analysis of the arguments of the parties to the suit.

### **The arguments of the Complainants**

59. The Complainants submit the violation of the African Charter in its article 7(a) (b) and (d) and article 26. The Complainants contest the legal basis, the competence, and the procedure of the Military Court which contravenes the African Charter on Human and Peoples’ Rights to which the Respondent State is a party.

60. The Complainant avers that the establishment of the Military Court contravenes article 96 (1) of the Transitional Constitution which stipulates that “courts, tribunals and war councils shall only be established by the Law. No special commissions or tribunals shall be set up in any form whatsoever.”

61. The Complainant contends the incompetence of the said court due to its membership whose partiality was manifested by the inclusion of members of the military corps, what with their legendary regimentation and discipline, exacerbated by the fact that the latter lacked the qualities of a magistrate. To support these assertions, the Complainant recalled the decision of

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<sup>11</sup> Civil Liberties Organisation, Legal Defense Center and Assistance Project v. Nigeria

Communication 218/98<sup>12</sup> in which the African Commission decided that the “Military tribunal” should be bound by the norms of equity, transparency, justice, independent rules and respect for the legal process of other courts.”

62. The Complainant also avers that the procedural situation was exacerbated by the excessive powers of the members of the court who purportedly, followed a very arbitrary procedure in violation of article 137 of the Military Code of Justice, dated 25 September, according to which, “the procedure before military jurisdictions shall be that in force before the common law jurisdictions, in conformity with the provisions of the normal Criminal Code which are not incompatible with those of the present code.”
63. According to the Complainants, there is no possible redress allowing them to contest the decision of the court which sentenced the plaintiffs to death: according to article 5 of the decree-law establishing the said court, neither can the decisions be appealed against nor opposed. The Complainants contend that the sentencing of the plaintiffs to death without the possibility of appeal constitutes a violation of article 6 of the Guarantees for the Protection of persons sentenced to death. Article 6 stipulates that “any individual sentenced to death is entitled to file an appeal with a higher court, and measures should be taken to ensure that the appeals are mandatory.”
64. The Complainants also recalled the ruling of the Human Rights Committee in the case of **Arutynyam vs Uzbekistan** which states “sentencing to death following a trial during which the provisions of the Convention were not respected constitutes a violation of article 6 of the Convention where no further appeal can be brought against the verdict”<sup>13</sup>.
65. The Complainant further avers that the said ruling of the court was not reasoned considering that the authorities refused to convey to the plaintiffs the ruling pronouncing their sentence despite all the attempts to that effect.
66. Consequently, the Complainants call for the immediate release of the plaintiffs and prays the African Commission to call on the Government of the Democratic Republic of Congo to grant each victim the sum of 10, 000, 000 Congolese Francs as damages and to urge it to harmonise its legislation with its international commitments.

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<sup>12</sup> Civil liberties organisation, legal defense center, legal defense and assistance project c. Nigeria

<sup>13</sup> Report of the Human Rights Committee, vol.I, A/59/40 (voll), Nations Unies, New York, 2004 p.111

## **The arguments of the Respondent State**

67. The State refutes all the allegations of the Complainants. The State submits that all the said allegations are unfounded.
68. Pertaining to the establishment of the Military Court whose impartiality, independence and competence are being challenged by the Complainant, the DR Congolese State responded that the decision to establish a Military Court was in conformity with article 156 (2) of the Constitution which empowers the Head of State to suspend Common Law Courts in the some or all parts of the territory, and to replace them by Military Courts in times of war. As the Congolese state was engaged in an armed conflict situation following the armed aggression led by its neighbours, the State was merely implementing the said provisions of the Constitution.
69. The Respondent State observes that it is under these special circumstances that the plaintiffs were tried and sentenced in all legality and avers that the latter have not adduced any proof of their assertion that the ruling as passed was not reasoned.
70. Regarding the complaint brought by the Complainants pertaining to article 5 of the decree – law establishing the Military Court, the State Respondent alleges that the Complainants could have lodged an appeal to bring to the fore their allegations, in accordance with article 150 of the Transitional Constitution, which recognizes the competence of the Supreme Court to sit on decisions made by the lowest and highest courts.
71. The Respondent State concludes that there is no room for compensation as the plaintiffs were found guilty, and eventually released from custody.
72. The Congolese State further alleges that it has subsequently harmonized its laws with its international commitments.

## **Observations of the Commission.**

73. In the light of the observations of the Parties, it transpires that the main issue here relates to the guarantee mechanism, as provided for under articles 7 (1) and 26 of the Charter.
74. In terms of Article 7 of the African Charter on Human and Peoples' Rights:
- “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 recognised and guaranteed by the 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.”

75. Article 26 provides that:

“State Parties to the present charter shall have the duty to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

76. The general content of the guarantee of sound justice which is the subject of articles 7 and 26 brings two sorts of obligations to bear. The obligation of having an accessible and appropriate court and the obligation of a fair trial (the right to have one’s cause heard fairly). The right to a fair trial is a corollary of the concept of access to an appropriate court. The right to a fair trial requires that one’s cause be held by efficient and impartial courts.

77. In a similar case relating to **Communication 151/96 Civil Liberties Organisation v. Nigeria**, the Commission already read together Article 7 and Article 26 and held that Article 7 deals with the right to be heard by impartial courts, and Article 26 insists on the independence of courts; the Commission notes that States have the duty to put in place credible institutions for the promotion and protection of human rights. Article 26 being the necessary appendix of Article 7, one can expect a fair trial only before impartial courts.

78. In the present case, the establishment of the exceptional tribunal is a violation of the provisions of the Charter, as already decided by the African Commission in the above-mentioned similar cases.

79. According to the African Commission, the independence of a court refers to the independence of the court *vis-à-vis* the Executive. This implies the consideration of the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence: as the saying goes “justice must not only be done: it must be seen to be done”<sup>14</sup>.

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<sup>14</sup> Media Rights Agenda c. Nigeria, para.60,61; Amnesty International and Others c. Soudan, para 68,69; Malawi African Association and Others c. Mauritanie para. 98; Law Office of Ghazi Suleiman c. Soudan para 61-64.

80. The obligation to be independent is one and the same as the obligation to be impartial. Impartiality may be perceived in a subjective and objective manner. In a subjective manner, the impartiality of a judge is gauged by his internal inclinations. Since it is impossible to infer from this inclination objectively, it was simpler to conclude that subjective impartiality be assumed until proven otherwise<sup>15</sup>.
81. However, appearances cannot be ignored while gauging the impartiality of a jurisdiction<sup>16</sup>.
82. The obligation of having a jurisdiction established by the law, capable of passing a judgement cannot be clearly disassociated from the above. The ability of a court to rule depends on the competence of the Court to hear a case, and also depends on the calibre of its members. In the case of **Amnesty International Versus Sudan**, the Commission decided **that the definition of the word, “ competence” is particularly sensitive since ..... depriving courts of qualified staff to guarantee their impartiality, infringes on the right to have one’s cause heard by competent organs ..... constitutes a violation of articles 7(1) (d) and 26 of the Charter**”. The requirement of a fair trial presupposes that the parties to the suit are able to present their respective cases without prejudice to either party. The flaws of a trial can be detected where a certain number of elements combined together have not been respected viz. the right to equality of means and the need for dissenting views. The requirements of a fair trial also presupposes that the courts are able to allow persons subject to trial to review the ruling passed. The principle of a two-tier court system is recognised by all. In the present case, there is a discriminatory justice system in the same that Article 5 applies differently depending on the persons concerned.
83. In the present case, the Military Court was established by a decree-law in accordance with article 156(2) of the Constitution of Congo which authorizes the President of the Republic to suspend the Common Law courts and replace them with Military Tribunals, in times of war. Its competence includes knowing of the deeds of civilians.
84. Regarding such situations, the Commission already stated several times its Resolution No ACHPR/Res.41(XXVI)99 on the right to a fair trial. In the **Forum of Conscience versus Sierra Leone** case, for instance, the Commission quoted the preceding Resolution as follows: **“In many African countries, Military Tribunals and Special Courts co-exist with ordinary legal institutions. The objective of the military tribunals is to**

<sup>15</sup> European Court for Human Rights, Van Leuren and Meyere

<sup>16</sup> CEDH, Delcourt c. Belgique, Decree of the 17th January 1970, A,N 11 para31; also of the relevant jurisprudence of the Commission: Law office of Ghazi Suleiman c. Soudan (para 63,64), International Pen and Others c. Nigeria para86 ; Constitutional Rights Projects c. Nigeria, para.14

**adjudicate on offences of a purely military nature perpetrated by military personnel. In the dispatch of these duties, the military tribunals should abide by the norms governing a fair trial”.**

85. Consequently, in this particular case, the fact that civilians and soldiers accused of civilian offences are tried by a Military Court presided over by military officers for the theft of drums of gas oil is a flagrant violation of the above-mentioned requirements of good justice.
86. Furthermore, in its ruling on the **Media Rights Agenda versus Nigeria** case, the Commission decided as follows: **“the appearance, sentencing and conviction of Malaolu, a civilian, by a special military court, presided over by military officers in active duty is nothing short of a violation of the fundamental tenets of free trial as stipulated under article 7 of the Charter.”**
87. Consequently, in the present case, the trial of both civilian and militaries by a military tribunal presided over by a military officer on matters of a civilian nature constitutes an infringement of the requirements of a fair justice as mentioned earlier.
88. The Respondent State does not challenge these arguments in its statement of defence. In the absence of any facts to the contrary, the Commission cannot invalidate the submission by the complainants regarding the inexistence of of a fair justice system.
89. The Commission therefore finds that the verdict of the Military Court which consisted solely of Army Officers with no qualities of a Magistrate, did not offer the guarantees of independence, impartiality and equity and constitute a violation of its Resolution No ACHPR/Res.41(XXVI)99 on the Right to a Fair Trial and Legal Aid in Africa.
90. The Complainants allege that the verdict of the military court against the plaintiffs was not reasoned and that to compound matters, the authorities refused to serve them with a copy of the judgement. The Respondent State begs to differ and avers that the Complainant has no proof to back this allegation. In this case, the burden of proof is on the Defendant to show that the allegations of the Complainants are unfounded by providing the Commission with the said judgement, which proof is yet to be provided. The Commission has always deplored lack or inadequacy of motives for a legal decisions as a violation of the right to a fair trial. In the judgement on the **Pinkey versus Canada** case, the Human Rights Committee ruled: “the exercise of an appellant’s right of appeal had been prejudiced because the transcript of the lower court’s proceedings had taken two-and-a-half years to be produced.”

91. It is important to note that the Complainants skew the doctrinal meaning of the expression “effective redress”. This expression “effective redress” is clearly referred to in article 13 of the European Convention on Human Rights. **“Redress” should not be considered as “the process whereby a new decision is obtained in a dispute where an authority has already given a ruling. The word redress shall comprise of all processes through which a constitutive act or an alleged violation of the Convention is brought before a qualified body to seek, as the case maybe, suspension of the act, its annulment, amendment or compensation.**<sup>17</sup> It is the case in the present Communication, even though it is happening at the African regional level.
92. In addition, the complainants recall that they could not exhaust adequate local remedies as already dealt with at the admissibility stage.
93. Regarding Article 14 (5) of the International Covenant on Civil and Political rights which stipulates that “any person found guilty of an offence shall have the right to have the verdict examined by a higher court, in accordance with the law”, the Commission could refer to it in terms of Article 60 of the African Charter on Human and Peoples’ Rights. However, nothing in the dossier shows that the respondent State adopted and ratified the Covenant. The Commission can therefore not examine the request.
- 57 Finally, there is no evidence that the victims were released from prison; in the same vein, there is no evidence that the respondent State has already harmonised its legislation with its international commitments. However, the fact that the mere fact of recognising that its legislation is not in line with its international commitments is a confession of its culpability.

**On these grounds, the Commission,**

94. Consequently, declares, the Democratic Republic of Congo has violated the relevant provisions of the African Charter on Human and Peoples’ Rights, namely articles 7 (a) (b) (d) and 26.
95. Finds that the establishment of a Military Court, albeit legally, whose competence extends to hearing civil acts perpetrated by civilians is a flagrant ignorance of the Article 7 of the African Charter on Human and Peoples’ Rights.

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<sup>17</sup> PETTITI Louis-Edmond, DECAUX Emmanuel, IMBERT Pierre-Henri (directed by), *The European Convention for Human Rights, observations, article by article*, Paris, Economica, 1999 P.467

96. Recommends that the Government of the Republic of Congo guarantees the independence of the tribunals and improves on the appropriate national institutions charged with the promotion and protection of the rights and freedoms enshrined in the African Charter on Human and Peoples' Rights.
97. Urges the Government of the DRC to grant the victims a fair and equitable amount as compensation for the moral wrong suffered.
98. Recommends to the Government of the DRC to harmonise its legislation with its international commitments, if that has not yet been done.

**Done in Abuja, the Federal Republic of Nigeria, on 24<sup>th</sup> November 2008.**

**Annex 3 – Communications decided during the  
6<sup>th</sup> Extra –Ordinary Session**

**a. COMMUNICATION 284/2004 – ZIMBABWE LAWYERS  
FOR HUMAN RIGHTS AND ASSOCIATED NEWSPAPERS  
OF ZIMBABWE/ ZIMBABWE**

**b. COMMUNICATION 294/2004 – ZIMBABWE LAWYERS  
FOR HUMAN RIGHTS AND INSTITUTE FOR HUMAN  
RIGHTS AND DEVELOPMENT IN AFRICA( ON BEHALF  
OF ANDREW BARCLAY MELDRUM) / ZIMBABWE**

**c. COMMUNICATION 297/2005 – SCANLEN AND  
HOLDERNESS/ ZIMBABWE**

## **284/2003 - Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Republic of Zimbabwe**

### **Summary of Facts:**

1. This Communication is jointly submitted by *Associated Newspapers of Zimbabwe (PVT) Ltd (ANZ)* and *Zimbabwe Lawyers for Human Rights* (the Complainants) against the Republic of Zimbabwe (the Respondent State).
2. ANZ is a Company registered under the laws of Zimbabwe whose primary business is newspapers publishing. Since 1999, they have been publishing the Daily News, which is the largest-selling newspaper independent of government control in Zimbabwe.
3. The Complainants state that a new media law - the Access to Information and Protection of Privacy Act (AIPPA) was enacted in 2002 by the Respondent State. They claim that section 66 of AIPPA read together with section 72 purports to prohibit "mass media services" from operating until they have registered with the Media and Information Commission (MIC).
4. ANZ filed an application challenging the constitutionality of the provisions requiring it to register with the MIC. ANZ therefore declined to register until the question of the constitutionality of the AIPPA provisions it was challenging had been determined by the Supreme Court
5. In its judgement of 11 September 2003, the Supreme Court ruled that by not registering with the MIC, the ANZ had openly defied the law and as such were operating outside the law.
6. The Complainants claim that the Supreme Court declined to rule on whether or not the aforementioned provisions of the AIPPA were consistent with the Constitution but instead maintained that every law enacted in Zimbabwe remains valid and should be complied with until it is either repealed by an Act of Parliament or declared unconstitutional by the Supreme Court. In its ruling, the Supreme Court stated that 'The applicant is operating outside the law and this Court will only hear the applicant on the merits once the applicant has submitted itself to the law'.
7. It is further alleged that following the Supreme Court decision, the Daily News was forcibly closed on 12 September 2003, ANZ assets were seized and several ANZ officials were arrested, while others were threatened with arrest and criminal charges.

8. Consequently, ANZ submitted its application for registration with the MIC on 15 September 2003 and on 18 September 2003, the High Court pending determination of the matter by MIC granted permission to the ANZ to publish the Daily News. The High Court also ordered the return of all the equipment seized and demanded an end to police interference with ANZ business activities.
9. On 19 September 2003, the MIC refused ANZ's application based on the Supreme Court finding that ANZ had been unlawfully operating its media business. ANZ appealed against the MIC's decision to the Administrative Court and on 24 October 2003, the Administrative Court unanimously set aside MIC's decision and held that the MIC was biased and improperly constituted. The Administrative Court also ordered the Board of the MIC to issue ANZ with a certificate of registration by 30 November 2003 failing which, ANZ would be deemed registered as from that date.
10. The Complainants state that following publication of the Daily News on 25 October 2003, police immediately moved back into the ANZ offices, stopped their work and prevented all further publication.
11. The Complainants argue further that since then, the authorities have prevented the re-opening of the newspaper offices. The computers and other equipment of the Company remain in the hands of the police and ANZ employees have been arrested and charged with criminal offences.
12. The Complainants argue that the current closure of the paper is causing irreparable harm to the freedom of expression and information and many other associative rights as delineated in the African Charter. They add that the closure is costing the ANZ 38 million Zimbabwean dollars per day in lost sales and advertising

### **Complaint**

13. The Complainants allege that Articles 3, 7, 9, 14 and 15 of the African Charter on Human and Peoples' Rights have been violated.

### **Procedure before the African Commission**

14. The Communication was hand-delivered to the Secretariat of the African Commission on 12 November 2003.
15. On 4 December 2003, the Secretariat acknowledged receipt of the Communication and informed the Complainants that the matter would be scheduled for consideration by the African Commission at its 35<sup>th</sup> Ordinary Session.

16. At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 21 May - 4 June 2004, the African Commission decided to be seized of the Communication.
17. By Note Verbale of 15 June 2004 addressed to the Respondent State and by letter of the same date addressed to the Complainant, the African Commission invited both parties to submit arguments on the admissibility of the Communication
18. By Note Verbale dated 16 September 2004 addressed to the Responding State and by letter of the same date addressed to the Complainant the Secretariat of the African Commission reminded both parties to submit their arguments on admissibility.
19. On 20 September 2004 the Secretariat of the African Commission received a Note Verbale from the Respondent State requesting that it be allowed to submit its arguments on admissibility by 30 October 2004.
20. By Note Verbale dated 23 September 2004, the Secretariat of the African Commission accepted the Respondent State's request that it submit its arguments on admissibility by 30 October 2004.
21. On 4 October 2004, the Secretariat received a supplementary brief and arguments on admissibility on the Communication from the complainant
22. By letter dated 7 October the Secretariat of the African Commission acknowledged receipt of the supplementary brief and arguments on admissibility submitted by the Complainant and by Note Verbale of the same date the Secretariat sent a copy of the said document to the Respondent State.
23. On 28 October 2004, the Secretariat of the African Commission received a Note Verbale from the Respondent State dated 25 October 2004 indicating that it received the supplementary brief of the complainant only on 20 October and it may not be able to submit its arguments by 30 October 2004 since the Supplementary Brief raises issues on the merits.
24. By Note Verbale dated 29 October 2004, the Secretariat wrote to the Respondent State informing it that as the matter is still at the admissibility stage, the Respondent State can submit its argument on admissibility for consideration by the African Commission at the 36<sup>th</sup> Ordinary Session.
25. On 29 October 2004, the Secretariat received the submission from the Respondent State and by Note Verbale of 3 November 2004 acknowledged receipt thereof.

26. By letter of 3 November 2004, the Secretariat of the African Commission forwarded the response of the State to the Complainant.
27. On 24 November 2004 the Complainant submitted a rejoinder to the State's response and this was also hand-delivered to the State delegation attending the 36<sup>th</sup> Ordinary Session of the Commission.
28. At its 36<sup>th</sup> Ordinary Session held in Dakar, Senegal, the African Commission heard both parties on the question of provisional measures and decided to grant the Complainants' request for provisional measures which called on the Respondent State to return the seized equipment of ANZ. The African Commission deferred its decision on admissibility pending the State's response to the complainant's rejoinder which was handed to the State during the session.
29. By Note Verbale of 25 December 2004, the State wrote to the Secretariat seeking clarification on the deadline it was expected to make its submission. By Note Verbale of 16 December 2004, the Secretariat informed the State that the communication will be considered at the 37<sup>th</sup> Ordinary Session of the African Commission.
30. By letter of 16 December 2004, the Secretariat informed the complainant of the African Commission's decision taken at its 36<sup>th</sup> Ordinary Session in Dakar, Senegal.
31. By Note Verbale of 16 February 2005, the Secretariat reminded the State to submit its arguments on admissibility before 16 March 2005.
32. By letter of 14 March 2005, the Officer of the Attorney General of Zimbabwe requested the African Commission for an extension to allow the State submit its arguments by 31 March 2005.
33. By letter of 18 March 2005 addressed to the Attorney General, the Secretariat granted the State an extension of thirty days and requested it to submit its arguments by 18 April 2005.
34. At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, the African Commission deferred consideration on admissibility of the Communication after receiving a Supreme Court ruling dated 15 March 2005 from the Respondent State in which the latter claims the complainant's grievances were addressed in the Court ruling.
35. By Note Verbale of 24 May 2005, the Respondent State was notified of the Commission's decision and requested to submit its arguments within three

- months of the notification. By letter of the same date, the Complainants were notified of the Commission's decision.
36. On 14 June 2005, the Secretariat of the African Commission received a letter from the Complainant in which the latter expressed concern at the Commission's decision to postpone consideration on admissibility of the Communication. The Complainant also expressed concern at the Commission's inaction on the State's failure to abide by its request for provisional measures.
  37. On 7 July 2005, the Secretariat acknowledged receipt of the Complainants' letter of 14 June 2005 and informed the Complainant why the Communication was deferred.
  38. At its 38<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 21 November - 5 December 2005, the African Commission considered the Communication and declared it admissible.
  39. By Note Verbale dated 15 December 2005 and by letter of the same date, the State and the Complainants were notified of the African Commission's decision and requested to submit their arguments on the merits within three months of the date of notification.
  40. By letter of 21 December 2005, the Complainant acknowledged receipt of the Secretariat's letter of 15 December and indicated that it will furnish its arguments on the merits "within the procedurally stipulated period".
  41. By Note Verbale of 6 March 2006 and by letter of the same date, the Secretariat of the African Commission reminded the State as well as the Complainant to submit their arguments on the merits. Both parties were given until 31 March to do so.
  42. On 3 April 2006, the Secretariat received a Note Verbale from the Embassy of the Republic of Zimbabwe in Ethiopia forwarding another Note Verbale from the Ministry of Foreign Affairs of the Republic of Zimbabwe requesting the Secretariat to extend the date of submission of its arguments to 15 April 2006.
  43. By Note Verbale date 10 April 2006, the Secretariat of the African Commission acknowledged receipt of the Embassy's Note Verbale and obliged to the latter's request.
  44. At the 39<sup>th</sup> Ordinary Session of the Commission, the Respondent State submitted on the merits and the Commission decided to defer further consideration of the Communication to its 40<sup>th</sup> session.

45. By note verbale of 29 May and letter of the same date, the Secretariat of the Commission notified both parties of the Commission's decision.
46. At its 40<sup>th</sup> Ordinary Session the Communication was deferred due to lack of time and the parties were informed accordingly.
47. At its 41<sup>st</sup> Ordinary Session the Communication was deferred to give the Secretariat more time to prepare the draft decision. During the same session the Secretariat received a supplementary submission from the respondent State.
48. By note verbale of 10 July 2007, and letter of the same date, both parties were notified of the Commission's decision.
49. At its 42<sup>nd</sup> Ordinary Session the Communication was deferred to verify the State's claim that it hadn't submitted on the merits and to allow it submit its arguments.
50. By note verbale of 19 December 2007, and letter of the same date, both parties were notified of the Commission's decision. The Respondent State was informed that it had in fact submitted on the merits and a copy of the State's submission was sent to both parties for ease of reference.
51. At its 43<sup>rd</sup> Ordinary Session held in Ezulwini, the Kingdom of Swaziland the Communication was deferred to allow the Secretariat incorporate the State's supplementary submission into the draft decision.
52. At its 44<sup>th</sup> Ordinary Session held in Abuja, Federal Republic of Nigeria, the Communication was deferred due to lack of time.

## **The Law Admissibility**

### **Complainants' submission on admissibility**

53. The Complainants submit that the Republic of Zimbabwe adopted an Act of Parliament on 13 March 2002, which obliged all media houses, journalists and all those working in the media profession to be registered or face closure. The Associated Newspapers of Zimbabwe ("ANZ") (publishers of the Daily News and the Daily News on Sunday) challenged the provisions of the Act under Section 24(1) of the Constitution of Zimbabwe (hereinafter the "Constitution")
54. Section 24 (1) of the Constitution provides that in cases involving the Bill of Rights, one may approach the Supreme Court (hereinafter the "Court") as the court of first instance. The ANZ challenged the Act on the basis of its

- likelihood to infringe freedom of expression, free and uninhibited practice of journalism. According to the Complainants, the Court declined to pronounce on the constitutionality of the Act and instead made a preliminary ruling that the ANZ had to and was supposed to comply with the provisions of the Act before challenging them as the ANZ was approaching the court with “dirty hands”.
55. According to the Complainants, the interpretation of the Constitution by the Court was contrary to the rights and freedoms guaranteed under the Charter. They believe that the application of the judicial doctrine of clean hands by the Court had a detrimental effect on the rights of the petitioners in the domestic courts. They argue that the reliance by the Court on the common law equitable doctrine of unclean or dirty hands in a matter not of an ordinary nature but one that is dealing with fundamental human rights and freedoms grievously affects the fundamental human right to due protection of the law and further undermines the predictability in human rights related issues.
56. The Complainants submit that the Constitution provides that laws which are inconsistent with the Constitution are void *ab initio*, and not voidable, as seemingly was the interpretation of the Court, noting that the interpretation by the Court of this particular provision of the Constitution clearly subordinates basic constitutional and human rights issues to general rules deciphered from ordinary case law mainly in English jurisdiction where their Lordships were never confronted with a matter involving violation of fundamental human rights. The unclean hands doctrine, according to the Complainants, was established to deal with principles of equity and stems from the law of equity. They argue that it cannot be applied in matters relating to extent of conformity of Acts of Parliament to the Constitution in a system of constitutional supremacy, separation of powers and the power of judicial review without leading to violation and infringement of fundamental rights and freedoms.
57. The Complainants submit that their contention before the Supreme Court was that the Act was contrary to the Constitution and other international instruments which provide for fundamental rights and therefore sought the protection of the Court and its decision on the constitutionality or otherwise of the Act. Instead of dealing with the merits of the claim the Court applied a procedural discretionary rule of practice thereby undermining the notion of constitutional supremacy and intermittently denying the Petitioners of an effective remedy.
58. The Court ruled that the ANZ had approached the court with dirty hands therefore the court could not attend to the merits of the case until the ANZ had obeyed the law which they deemed not to be law. Further the Court ruled that the Act was not blatantly unconstitutional.

59. The Complainants argue that as provided by the Constitution, any law which is contrary to the supreme law shall be impugned. The impugning of the law or sections of it can only be achieved if the law is put under a 'constitutional compliance test', which again in terms of the Constitution, that power lies with the Supreme Court. They claim that by failing to decide on the constitutionality of AIPPA, the Court abrogated its responsibility and duties as provided by the Constitution and one can reasonably conclude that the Court was in contravention of the Constitution, the Charter and other international instruments signed and ratified by the government of Zimbabwe which provide for appeal to competent bodies and equal protection of the law.
60. According to the complainants, without approaching the Court, or as in this case, the Court deciding to "shut the door in the face of the applicants", there is no other mechanisms of establishing the nature and extent of repugnancy of an Act of Parliament to the Constitution. In constitutional supremacy, they argue, jurisdictions matters relating to the constitutional conformity of any law deemed to be contrary to the Constitution there is no need to have that said by the Court since from the onset there is no law to argue about as provided by Section 3 of the Constitution.
61. As a result of the reliance on the unclean hands doctrine, the Complainants believe that the Court refused to hear the arguments of the ANZ on the merits of the case thereby refusing the petitioner of equal protection before the law and appeal to competent bodies. They refer to Section 24 of the Constitution which provides for the 'Enforcement of Protective Provisions' and states that "if any person alleges that the declaration of rights has been, is being or is likely to be contravened in relation to him...then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may subject to the provisions of subsection (3) apply to the Supreme Court for redress"
62. The above section they claim gives the Court original jurisdiction to enforce the provisions of the Bill of Rights, adding that the ANZ approached the Court to enforce the very same tenets establishing the Court, i.e. to protect fundamental rights as enshrined in the Bill of Rights, but the Court abrogated its duty to decide on the constitutional soundness or validity of the petition.
63. The Complainants submit that the absence of an effective remedy to violations of rights recognised in the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense it should be emphasised that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally

recognised, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.

64. According to the Complainants, a remedy which proves illusory because of the conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective, in the opinion of the Inter-American Courts on Human Rights.<sup>1</sup>
65. The Complainants further argue that the determination of one's rights by a competent and impartial tribunal is a procedural guarantee provided for in the Charter, adding that to determine whether ones' rights have been violated, the national body has to make an evaluation of the facts of the case on the merits. According to them, the Supreme Court avoided dealing with the petitioner's rights and the soundness of the claim, thereby depriving the petitioners of an effective remedy.
66. The Complainants finally submit that with the decision of the Supreme Court to decline to entertain the applicants, particularly given that the decision was taken by the respondent's most senior Court in the land and that the decision had the unanimous approval of all the justices of the Court, local remedies have been exhausted.

#### Respondent State's submission on admissibility

67. The Respondent State submitted its argument on admissibility on 2 November 2004. The State notes that the Complainants' application is based on section 24 of the Constitution of Zimbabwe which allows anyone who feels that the Declaration of Rights contained in the Constitution is being violated in relation to him/her should apply to the Supreme Court for relief. The State notes further that in the Complainants' application, they sought the nullification of the Access to Information and Protection of Privacy Act (AIPPA) on the grounds that the latter is *ultra vires* section 20 of the Republican Constitution.
68. The Respondent State submits further that at the time the application was filed with the Supreme Court, the First Complainant, the Associated Newspaper of Zimbabwe (ANZ) had not complied with section 66 of the AIPPA which makes it an offence to provide mass media services without registration. That the ANZ did not want to register in terms of the provisions of the AIPPA because it viewed the legislation as unconstitutional, and argued "it [could not] on conscience obey such a law".
69. The State added that the Supreme Court refrained from deliberating on the merits of the case, directing the Complainants to "first put its house in

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<sup>1</sup> Advisory Opinion OC 9/87, also Annual Report 39/96 Case 11.673 Santiago Marzioni.

order”, either by registering or by refraining from carrying on mass media services, and thereafter approaching the courts. The State added that the Complainants did not comply with the Court order but instead went ahead to continue publishing. According to the Respondent State, this led to the closure of its two papers and seizure of its property by the Police. According to the Respondent State, the complainant subsequently made an application to register in terms of the AIPPA but this application was unsuccessful.

70. The Respondent State explains the background to the AIPPA and notes that the Act was enacted by the Parliament of Zimbabwe in 2002 to, among other things:

- a. provide members of the public with the right of access to information held by public bodies;
- b. make public bodies accountable by giving a right to request correction of misrepresented personal information;
- c. prevent the authorised collection, use or disclosure of personal information by public bodies;
- d. protect personal privacy, to provide for the regulation of the mass media and to establish a Media and Information Commission.

71. It notes further that the regulation of the mass media constitutes part and not the sole provision of the Act, adding that prior to the enactment of the Act, there was no regulation of the press in the country and that the regulation was necessitated by a number of “irresponsible and misleading publications in the media...” According to the State, to address the security interests of the nation as well as protect the rights of others, the rights which “*hitherto the press enjoyed without statutory limitation were thus subjected to control*”, adding that this was intended to instil discipline and ensure responsibility within the profession.

72. The State notes further that notwithstanding the prohibition under the Act, section 93 allows any person who was lawfully operating a mass media service at the time of the coming into force of the Act to continue practising for a period of three months from the date of commencement of the Act. However, at the end of the three months, the necessary regulations were not in place, the period was extended to the end of December 2002. The State submits that Complainant’s averment that “publication is specifically allowed by the Law while any application for registration is pending”, is misleading.

73. The State submits that the Communication does not meet the requirements under Article 56 (3), (5) and (6) of the African Charter and should thus be declared inadmissible.

74. With regards to Article 56 (3), the State submits that the language used in the Communication and its attachments is disparaging of the Supreme Court of Zimbabwe. To support this claim the State refers the African Commission to paragraphs (r) (page 6), 13, 15, 17, 18, 26, 27, 30 and 31 in the Complainants' Summary of facts submitted on 10 November 2003. The State submits further that on 12 September 2003, the Complainants published an issue of its newspaper in which it stated *inter alia* that "...the handing down of the judgment marked a *sad day for Zimbabwe's constitutional history*. I suppose we should be immensely thankful that we are not prisoners on death row because the practical effect of this judgment is that had we have been challenging the death penalty and not AIPPA , we would have had to hang first and challenge the penalty from hell". According to the State, this statement shows the contempt that the complainant has for the Supreme Court.
75. The State notes further that the implications of the statement and the paragraphs mentioned above includes the fact that:
- there is bias in the appointment of judges of the High Court and the Supreme Court because they are appointed by the President;
  - that the composition of the Supreme Court that heard the Complainants' matter was manipulated so that a junior judge, Judge Sandura, was omitted. The State claims that the use of the word "omitted" clearly connotes a motive by the Chief Justice to exclude Judge Sandura; and
  - that the Supreme Court was biased towards the government and therefore acted not as the judiciary but as a political agent of the Government.
76. The State notes that its submission should not be taken as an attempt to curtail freedom of expression and criticism of the judiciary but is intended to protect the dignity of the judiciary, adding that the language used by the Complainants go beyond mere criticism of the judiciary, that the language is discourteous, contemptuous and disparaging and is clearly intended to undermine the judiciary in the performance of its duties and hence the administration of justice. It notes further that fair criticism of the conduct of a judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in the public interest, and good faith and the public interest are ascertained from all the surrounding circumstances including the person responsible for the comments and the intended purpose sought to be achieved. The State concluded by stating that the Complainants operated in apparent defiance of the law and the decision of the Administrative Court and Supreme Court and now invites the African Commission to sanction its defiance of the law and did so in a language disparaging and insulting to the judiciary of Zimbabwe. It notes that the Judiciary in Zimbabwe cannot enter into public or political controversy as such involvement will bring the judiciary into disrepute and it is therefore improper for the Complainants to make such disparaging

statements knowing very well that the judiciary cannot respond to the statements.

77. Regarding Article 56 (5) on the exhaustion of local remedies, the State notes that the Complainants indeed filed an application in terms of section 24 of the Constitution to challenge the constitutionality of AIPPA and argues that the judgment on the matter is not yet out not because the process is unduly prolonged but because of the Complainants' defiance of the law. The State notes that the Complainants, after refusing to comply with the AIPPA chose to comply with it later and is still pursuing its challenge of its constitutionality and if the Complainants are successful, they will be able to resume operations without going through the registration process.
78. The State notes that as at when the Complainants were submitting the Communication to the Commission during the 34<sup>th</sup> Ordinary Session in November 2003, there was an application in the Supreme Court they were pursuing to challenge the constitutionality of the AIPPA. The State notes further that the Minister of State for Information and Publicity and Cabinet appealed a decision that the Complainants should publish by 30 November 2004.
79. The State notes further that the provisional order sought by the Complainants demonstrates that it has not exhausted local remedies. The State referred the African Commission to the Complainants' statement in page 6 paragraph (r) that "[a]s a provisional measure necessary to uphold and protect the rights contained in the Charter and avoid irremediable damage, complainants ask the Commission to request that ANZ's computers and equipment be returned and it be allowed to resume publication on the Daily News immediately, *until its question whether the impugned sections of the Zimbabwe statute are consistent with the provisions of the Constitution of Zimbabwe has been properly heard and determined by an impartial tribunal*"
80. The State also submitted that it is misleading for the Complainants to argue that the Supreme Court did not consider the question of admissibility as the Court made an obiter statement on the question of constitutionality. The Respondent States finally notes that appeal by the Government of the Republic against the decision of the Administrative Court was heard together with the Complainants' constitutional application and judgment is awaited and as such, the African Commission cannot entertain the Communication until all local remedies have been exhausted.

### **African Commission's decision on admissibility**

81. The current Communication is submitted pursuant to Article 55 of the African Charter which allows the African Commission to receive and consider Communications, other than from States Parties. Article 56 of the African Charter provides that the admissibility of a Communication submitted pursuant to Article 55 is subject to seven conditions.<sup>2</sup> The African Commission has stressed that the conditions laid down in Article 56 are conjunctive, meaning that, if any one of them is absent, the Communication will be declared inadmissible.<sup>3</sup>
82. The Complainants in the present Communication argue that it has satisfied the admissibility conditions set out in Article 56 of the Charter and as such, the Communication should be declared admissible. The Respondent State on its part submits that the Communication should be declared inadmissible because, according to the State, the Complainants have not complied with Article 56 (3), (5) and (6) of the African Charter.
83. Article 56 (3) of the Charter requires that Communications submitted to the African Commission are not written in *disparaging* or *insulting* language directed against the State concerned and its institutions or to the Organization of African Unity (or African Union).
84. In the present Communication, the Respondent State argues that the Communication is written in a language insulting to the judiciary of the State. The State avers that the Complainants published an issue of its Newspaper (The Daily News) on 12 September 2003 in which it stated *inter alia* that "...the handing down of the judgment marked a *sad day for Zimbabwe's constitutional history. I suppose we should be immensely thankful that we are not prisoners on death row because the practical effect of this judgment is that had we have been challenging the death penalty and not AIPPA , we would have had to hang first and challenge the penalty from hell*". According to the State, this statement shows the contempt that the Complainants have for the Supreme Court.
85. The State claims further that by stating in the Communication that a Judge of the Supreme Court - Judge Sandura, was *omitted* from the case Complainants were insinuating that the composition of the Supreme Court was manipulated. The State claims that the use of the word "omitted" in the Communication clearly connotes a motive by the Chief Justice, who selects judges to sit on a case, to have excluded Judge Sandura and that there is bias in the appointment of judges of the High Court and the Supreme Court because they are appointed by the President, and that that the Supreme

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<sup>2</sup> See Article 56 of the African Charter.

<sup>3</sup> See African Commission, Information Sheet No. 3.

Court was biased towards the government and therefore acted not as the judiciary but as a political agent of the Government.

86. In response to the State's allegation of disparaging language, the Complainants refuted the allegation and noted that the language was necessary in that it sought to describe the effect of the judgment on the Complainants. The Complainants also described a number of situations in which it claims the Respondent State itself had made "uncharitable remarks against the same judiciary..." which they consider as insulting and disparaging and far removed from the "criticism that is contained in the Complainants' brief" which according to them "are aimed at showing the absence of a local remedy in the light of the decision by the Supreme Court".
87. The fundamental question that has to be addressed in the present Communication is *how far one can go in criticizing a judge or the judiciary in the name of free expression*, and whether the statement made by the Complainants constitutes *insulting* or *disparaging* language within the meaning of Article 56 (3) of the African Charter. Indeed, the Communication invites the Commission to clarify the ostensible relationship between freedom of expression and the protection of the reputation of the judiciary and the judicial process.
88. The operative words in sub-paragraph 3 in Article 56 are *disparaging* and *insulting* and these words must be directed against the State Party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, *disparaging* means *to speak slightly of... or to belittle....* and *insulting* means *to abuse scornfully or to offend the self respect or modesty of...*
89. The judiciary is a very important institution in every country and cannot function properly without the support and trust of the public. Judges, by the very nature of the profession, speak in courts and courts only. They are not at liberty to debate or even defend their decisions in public. This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis, it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly, and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One such protective device is to deter insulting or disparaging remarks or language calculated to bring the judicial process into ridicule and disrepute.

90. The freedom to speak one's mind and debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual officers. A clear line cannot be drawn between acceptable criticism of the judiciary and statements that are downright harmful to the administration of justice. Statements concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. Because of the grave implications of a loss of public confidence in the integrity of the judges, public comment calculated to bring the judiciary into disrepute and shame has always been regarded with disfavour.
91. In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56 (3) must be interpreted bearing in mind Article 9 (2) of the African Charter which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.
92. The importance of the right to freedom of expression was aptly stated by the African Commission in Communications 140/94, 141/94, 145/94 against Nigeria<sup>4</sup> when it held that freedom of expression is  
a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in

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<sup>4</sup> Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria, 13<sup>th</sup> Annual Activity Report of the OAU, 1999–2000.

an honest and sincere commitment to  
democracy and good governance

93. Over the years, the line to be drawn between genuine criticism of the judiciary and insulting language has grown thinner. With the advancement of the politics of human rights, good governance, democracy and free and open societies, the public has to balance the question of free expression and protecting the reputation of the judiciary. Lord Atkin expressed the basic relationship between the two values in *Ambard v A-G of Trinidad and Tobago* (1936) 1 All ER 704 at 709 in the following words:

but whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public act done in the seat of justice. The path of criticism is a public way...Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even through outspoken comments of ordinary men

94. More recently Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate* (1994) 2 SA expressed the modern balance as follows:

Judges, because of their position in society and because of the work which they do, inevitably on occasion attract public criticism and that it is right and proper that they should be publicly accountable...Criticism of judgments, particularly by academic commentators, is at times acerbic, personally oriented and hurtful...To some extent what in former times may have been regarded as intolerable must today be tolerated.... This, too, will help maintain a balance between the need for public accountability and the need to protect the judiciary and to shield it from wanton attack

95. In an open and democratic society individuals must be allowed to express their views freely and especially with regards to public figures, such views must not be taken as insulting. The freedom to speak one's mind is now an inherent quality of a democratic and open society. It is the right of every member of civil society to be interested in and concerned about public affairs – including the activities of the courts.

96. In the present communication, the Respondent State has not established that by stating that one of the judges of the Supreme Court was "omitted" the Complainants has brought the judiciary into disrepute. The State hasn't shown the detrimental effect of this statement on the judiciary in particular

and the administration of justice as a whole. In its submission to the Commission, the Complainants indicated that "... [t]he judges who issued the judgment sat as the country's constitutional court, constituted as usual by a bench of five. The country only has six Supreme Court judges. The most senior judge, Justice Sandura, was *omitted* from the Court's line-up, but he cannot now constitute a new bench, either by sitting alone or by sitting with acting judges of appeal". In the opinion of the Commission, the Complainants were simply stating a fact - a fact to demonstrate that in their view, it had approached the highest judicial body in the country. The use of the word "omitted" can not in the Commission's view be seen as disparaging or insulting to the judiciary. There is no evidence to show that it was used in bad faith or calculated to poison the mind of the public against the judiciary.

97. With regards the Respondent State's claim that the Complainants published an article with disparaging language in their Newspaper edition of 12 September 2003, the African Commission cannot make a pronouncement on the same as the purported statement does not form part of the complaint submitted to the Commission. Article 56 (3) of the Charter requires that *Communications submitted* to the African Commission are not written in *disparaging* or *insulting* language.... Communications within the meaning of Articles 55 and 56 refer to the *complaints* submitted by petitioners. These complaints invariably include other documentations submitted by the petitioner to support their case, such as annexes. Documents supplied by third parties or the Respondent cannot and should not form part of the complaint. In the present Communication, neither the complaint itself nor the annexes thereto made reference to the statement purportedly published by the Complainant in its Newspaper edition of 12 September 2003. For the above reasons, the Commission decline to uphold the Respondent State's argument that the Communication is written in disparaging and insulting language.
98. With regards the exhaustion of local remedies, Complainants submit that domestic remedies are ineffective, that the Respondent State has been given the opportunity to remedy the grievance submitted before the Commission but the State, through its courts, has proved unable to do so. The Respondent State on its part argues that the matter is still before the Supreme Court, the highest court in the country, and has been pending before the Court simply because of the Complainants' "defiance of the law".
99. It is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the State should have been exhausted. The principle of the exhaustion of local remedies is contained in Article 56(5) of the African Charter and provides that Communications relating to human and peoples' rights

referred to in Article 55 received by the African Commission shall be considered if they “*are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged*”.

100. International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the State was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of human rights violations.
101. The international bodies do recognize however, that in many countries, remedies may be non-existent or illusory. They have therefore developed rules about the characteristics which remedies should have, the way in which the remedies have to be exhausted and special circumstances where it might not be necessary to exhaust them. The African Commission has held that for the domestic remedies referred to in Article 56 (5) of the Charter to be exhausted they must be *available, effective and sufficient*. If the domestic remedies do not meet these criteria, a victim may not have to exhaust them before complaining to an international body. However, the complainant needs to be able to show that the remedies do not fulfil these criteria *in practice*, not merely in the opinion of the victim or that of his or her legal representative.
102. If a Complainant wishes to argue that a particular remedy does not have to be exhausted because it is unavailable, ineffective or insufficient, the procedure is as follows: (a) the Complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or insufficient) - this does not yet have to be proven; (b) the Respondent State must then show that the remedy is available, effective and sufficient; and (c) if the Respondent State is able to establish this, then the Complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective *in the specific case*, even if it may be effective in general.
103. In the present Communication, the Complainants and the Respondent State seem to have reached what the Commission would call a “*legal impasse*”. The Complainants argue that the domestic remedy provided by the Respondent State is ineffective and cannot remedy their grievance, while the State contends that the remedy is available and effective but the Complainants’ defiance of the law has prevented them from using it.

Usually, when there is a legal disagreement between two parties, the appropriate national institution to resolve that disagreement is the domestic courts. In the present Communication, the Complainants have been to the highest court of the country and the latter refused to hear and determine Complainants' grievance on the merits claiming Complainants have approached it with dirty hands. Complainants argue that on matters of fundamental human rights, as is the case with the present Communication, the dirty hands doctrine invoked by the Supreme Court cannot be used as it would be undermining the supremacy of the Constitution. According to the Complainants therefore, the domestic remedy available is not effective because it is incapable of redressing the grievance and that is why the matter has been referred to the Commission.

104. A brief account of the circumstances of the case would be helpful to determine whether Complainants' argument that there is no effective remedy or the State's contention that the Complainants have not exhausted domestic remedies is correct.
105. On 15 March 2002, the Respondent State enacted a law, the Access to Information and Protection of Privacy Act which required media practitioners to register their businesses before operating in the country. In terms of Section 93 of the Act, any person who immediately the Act became law was publishing a Newspaper was deemed to be lawfully registered for a period of three months, that is, up to 15 June 2002. It was envisaged that those who were required to register would apply and be registered within the three months period. However, the Regulations to the Act prescribing the various forms that had to be used for registration were published only on the date the three months was due to expire, 15 June 2002. This means that no application for registration could be made before 15 June 2002. To cater for this delay, section 8(2) of the Regulations provides that once a person has submitted an application for registration, then that person is permitted to carry on mass media activities while the application is being considered.
106. Meantime, the Complainants sought to challenge the constitutionality of the Act claiming the Act was unconstitutional and thus null and void *ab initio*. The Complainants applied to the Supreme Court for an order declaring certain provisions of the Act a nullity. The application was heard on 3 June 2003. On 11 September 2003, the Supreme Court handed down a ruling that it was not prepared to hear and determine the merits of the case until the applicant (the Complainants) had registered, that is, comply with the Act. A day after the ruling, that is, 12 September 2003, Complainants published an edition of their Newspaper, the Daily News. That same day, police visited the premises of the Complainants and evicted all employees there from.

107. After discussions with the police on 13 September 2003, Complainants were given permission to enter the premises with a few staff to prepare documents to apply for registration. On 15 September 2003, Complainants submitted application for registration to the Media and Information Commission and the application was duly acknowledged on the same day. On 16 September 2003, Respondent's agents - the police, raided the premises of Complainants seizing equipment – computers, printers and other office accessories belonging to Complainants. On 17 September Complainants went to the High Court seeking an order that Respondent vacates the premises and restore possession and control thereof to them and return all goods and equipment removed from the premises. On 18 September, the High Court ruled in favour of the Complainants and ordered the Respondent to return the property. The Court also noted that in terms of section 8 (2) of the Regulations, the Respondent has no legal right to prevent the applicant and its employees from gaining access to the premises of the applicant and carrying on its business of publishing a Newspaper.
108. On 19 September 2003, the MIC informed the Complainants that its application for registration could not be granted because Complainants have been operating illegally even after the Supreme Court Order of 11 September 2003 and that the Complainants had failed to accredit its journalists. On 23<sup>rd</sup> September 2003, the Complainants lodged an appeal with the Administrative Court of Zimbabwe against the decision of the MIC claiming that MIC was improperly constituted, acted *ultra vires* and that the Chairperson of the MIC was biased. On 24 October 2003, the Administrative Court upheld the arguments of the Complainants and ordered the MIC to grant a certificate of registration to the Complainants by the 30<sup>th</sup> of November 2003. Before the certificate could be issued and before the 30<sup>th</sup> of November 2003, Complainants went ahead and published on 25 November 2003, another edition of its Newspaper – The Daily News. The Respondent State claims it has appealed the decision of the Administrative Court and it is this appeal which the State is claiming is still before the courts and thus domestic remedies have not been exhausted.
109. In view of the above scenario, it is apparent to the African Commission that there are two matters that the Complainants have taken to the Courts of the Responding State. The one is a matter to declare the AIPPA unconstitutional, which the Supreme Court on 11 September 2003 declined to entertain on condition that Complainants comply with AIPPA – the same Act they sought to challenge before the Court. The second matter brought before the Administrative Court is the one to appeal against the decision of the Media and Information Commission not to grant the complainant registration to operate media services. The Administrative Court ruled in

favour of the Complainants and the State claims to have appealed the decision.

110. Both matters originate from the Complainants' desire to challenge the AIPPA. The matter for which the African Commission is called upon to decide is clear. It is the decision of the Supreme Court not to rule on the Complainants' challenge of the constitutionality of AIPPA. After the Supreme Court decision of 11 September 2003, the Complainants argue that there was no other court available in the country to hear the matter. Since the Complainants disagreed with the reasoning of the Supreme Court for not making a determination on the merits of the matter and since the Court sat as the highest court in the land on the matter, there was no other avenue for appeal. As far as the Complainants are concerned, the only domestic remedy available, the Supreme Court, was not able to deal with the particular case and as such was ineffective. The Complainants therefore approached the African Commission to seek redress. The Communication to the African Commission was submitted on 12 November 2003, twelve days before the decision of the Administrative Court on another matter – that dealing with the MIC's refusal to grant the Complainants a registration certificate.
111. In the opinion of the African Commission, the two cases, though stemming from the same matter, cannot be considered as pending before the courts of the Respondent State. The appeal of the Respondent on the Administrative Court's decision has no bearing on the case before the African Commission, because the Respondent State has not established that the Complainants intend to use the outcome of that case to revert to the Supreme Court to hear its original application on the constitutionality of AIPPA. Also, the fact that the Complainants submitted the present Communication to the Commission while the appeal on the other case was still pending indicates that the outcome of the appeal had no bearing on the case submitted to the Commission. There is no information submitted to the African Commission to the effect that the matter before it is on appeal. What the Commission knows is that the Supreme Court refused to hear the matter on the merits and ordered Complainants to go and put its house in order. Complainants have not indicated that they intend to put their house in order and revert to the Court.
112. In view of the above, the African Commission is of the view that the matter for which the State has appealed is not before it and has not been brought to it by any of the parties. However, on the matter submitted to it by the Complainants, the latter has demonstrated that it has seized the highest Court in the country and could not get appropriate remedy.

113. It is immaterial at this stage to discuss why the Supreme Court refused to hear the Complainants' case. What the Complainants need to do is to satisfy the African Commission that it approached the Supreme Court with the current grievance and failed to get remedy. This, in the opinion of the Commission, has been aptly demonstrated.
114. Regarding the Supreme Court ruling of 14 March 2005, the African Commission recognises the fact that the parties to the case are the same, that the subject matter is similar to those brought by the Complainants before the same Supreme Court in June 2003 and which the latter ruled on 11 September 2003 against the Complainants.
115. The question before the African Commission at this stage is not to determine whether the Complainant have, subsequent to the submission of the Communication to the Commission, had their grievances resolved, but rather whether at the time of submitting the Communication, domestic remedies were available, effective and sufficient.
116. The African Commission has held that a remedy is considered available if the petitioner can pursue it without impediment. In *communication 147/95 and 149/96*, the Commission held that a remedy is considered available only if the applicant can make use of it in the circumstances of his case. It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.<sup>5</sup>
117. The facts as presented before the African Commission indicate that at the time the Communication was submitted the Complainants had approached the highest court in the Respondent State – the only domestic remedy available to address the grievance. The Court declined to make a determination on the merits of the case brought by the Complainants requiring the Complainants instead to undertake an action which was the very subject matter of the application.
118. By refusing to make a determination on the merits of the case and by “forcing” the Complainants to perform that which it was challenging before the Court, the Supreme Court effectively demonstrated its inability to address the question put to it by the Complainants and made domestic remedies unavailable and ineffective in the instance of the Complainants' case and left the latter with no other alternative than to resort to the international forum to seek protection.
119. The availability of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and

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<sup>5</sup>. Sir Dawda Jawara v The Gambia, communication 147/95 and 149/96.

effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because he is required by the same judiciary to first of all recognise that which he is challenging, local remedies would be deemed to be unavailable to him. In the present Communication, that seems to have been the case.

120. The Respondent State, without elaborating, also argues that the Complainants have not complied with Article 56 (6) of the African Charter. This sub-article provides that Communications referred to under Article 55 of the Charter shall be considered if they...*are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter...* The Communication was received at the Secretariat of the African Commission on 12 November 2003, two months after the Supreme Court refused to hear the matter on the merits. It is the opinion of the Commission that the Communication was submitted within a reasonable time.
121. For the above reasons, the African Commission declines to grant the Respondent State's request for the Communication to be declared inadmissible and upholds the Complainants' arguments that all the conditions under Article 56 have been met and thus declares the Communication admissible.

### **Submissions on the merits**

#### **Complainants' submissions on the merits**

122. The Complainants submit that, the Respondent State's court, by invoking the dirty hands doctrine and refusing to hear their case, violated their rights guaranteed in Articles 3, 7, 9, 14 and 15 of the African Charter. The Complainants are not asking the Commission to pronounce on the compatibility of the AIPPA to the African Charter.
123. Regarding the alleged violation of Article 3, they submit that the failure of the Supreme Court to decide whether the AIPPA was unconstitutional was a violation of their right to equal protection of the law, adding that this refusal 'collides not only with the letter and spirit of the Charter but more so with universal law as expressed in several other documents such as Article 2 (b) of the International Covenant on Civil and Political Rights, Article 8 of the Universal Declaration of Human Rights, as well as Articles 7 and 26 of the African Charter.
124. According to the Complainants, the relief sought by ANZ was a determination of the constitutionality or otherwise of an Act of Parliament, and the Court was supposed to decide on the facts of the alleged violations and 'not on the presumption of non-compliance with an Act of Parliament'.

That by deciding on a procedural aspect on a principle of equity which was not applicable to matters pertaining to human rights, the Court denied the ANZ the right to equal protection before the law as provided in the Charter.

125. The Complainants argue that the right to equal protection of the law is guaranteed in the constitution of the Respondent State thus: 'any one who has reason to believe that his fundamental rights are about to be violated or are likely to be violated can petition the Court for its immediate intervention'. The Complainants submit that 'to then rely on a doctrine of equity addressing an issue which is believed to stem from the rights protected by the constitution will not only be depriving the petitioner of an effective remedy but also denial of the right to protection of the law'.
126. Regarding allegation of violation of Article 7, Complainants argue that by refusing to hear the merits of their petition, the supreme court proved to be ineffective in acting both as the court of first instance in matters relating to human rights, and in their case, as final tribunal. They argue that for an appeal to a competent body to be considered to be effective, there must be an equally effective decision to remedy the violation of the right of the petitioner. The decision that results from the appeal need not be favourable to the petitioner but it must be considered effective in so far as it addresses the petition.
127. The Complainants argue further that the right to appeal to competent authorities on allegation of human rights violations should not be dealt with on procedural aspects only, but the competent body, in this case the Supreme Court, should make a decision based on the merits of the petition. According to the Complainants, in their case, the Court denied them the right to be heard and therefore denying them justice.
128. The Complainants indicate that the determination of one's rights by a competent tribunal is a procedural guarantee provided for in the Charter. To determine whether one's rights have been violated, the national body has to make a determination on the merits of the petition. In the present case, they argue, the Supreme Court refused to determine the merits of the case thereby depriving them of an effective remedy. The Complainants go further to state that the application of the clean hands doctrine in matters relating to constitutional challenges actually results in legal unpredictability and could ultimately lead to disorder, adding that non-judicial decision of a *bona fide* case deprives litigants as well as future actors of that knowledge of effective remedies, and the fact that an Act has been passed into law does not preclude one from challenging its constitutionality and the notion of complying with an illegality first does not tally with the notion of constitutional supremacy and laws which are not in conformity with the constitution are void *ab initio*.

129. The Complainants further submit that by declining to decide on the constitutionality of the AIPPA, the Court abdicated on its primary duty as the protector of fundamental human rights and denied the petitioners the right to be heard and the protection of the law.
130. In conclusion, the Complainants submit that the role of the African Commission in the matter is not to interpret the law being challenged or declare that the decision of the domestic court was unconstitutional, but it is rather to establish whether the decision of the court is in violation of the Charter. They implore the Commission to find that by applying the unclean hands doctrine in matters relating to constitutional rights, the Supreme Court of Zimbabwe violated the rights guaranteed in the Charter, in particular, *equal protection of the law, fair trial and the right to appeal to competent bodies*.

***Respondent State's submissions on the merits***

131. In its submissions, the Respondent State argues that all the Complainant's submissions are without merit. The State cited the Supreme Court decision in *Association of Independent Journalists and Others vs. Minister of State for Information and Publicity and others*, where it was held that any law that seeks to regulate the practice of journalism has to conform to the stringent requirements for a law abridging the right conferred by section 20 of the Constitution in order to be valid. The State emphasised that the Media Commission does not have any discretion and that anybody who complies with the requirements of section 79 is entitled to accreditation. According to the State, the implication is that, if the requirements are too onerous, then the regulations, including section 83 which prohibits practicing as a journalist without accreditation, could be held to be unconstitutional.
132. The Complainants indicate that, regulations require personal information which includes marital status, national identity number, residential address, criminal record and details of accreditation to a specific media house. They claim that for purposes of licensing, these requirements cannot be said to be onerous.
133. According to the Respondent State, statistics held by the Media and Information Commission portrayed that none of these requirements are onerous.
134. The Respondent State argues that the Complainants' claim that it is dangerous for journalists to disclose their residential address for fear of arrest after midnight cannot go unchallenged because there is no prove as to the fact that any journalist has been arrested at midnight after having filed the application for accreditation.

135. The Respondent quotes Article 9(2) of the African Charter, where the African Commission in interpreting the phrase 'within the law' has said that the authorities should not override constitutional provisions and fundamental rights guaranteed by the Constitution and International human rights standards.<sup>6</sup> The Respondent recognises that national law cannot set aside the right to express and disseminate information which is recognised under international law.
136. Furthermore, the State contends that the Charter recognises the right of the State to justify resorting to limitation of the right which has to be justifiable in terms of international practice, and measures taken must be in line with protected interest, adding that Section 20(1) of the Zimbabwean Constitution is in line with Article 9(2) of the Charter. The Constitution provides for derogation of a fundamental right where the derogation is according to law.
137. The Respondent State submits further that, the legislation applies to all media houses and practitioners who wish to practice in Zimbabwe without posing any threat to the right of the public to receive information.
138. In addition to the above, that mere registration of the media does not inhibit the practice of journalism and that the Complainants' submission does not portray how exercise of that right is curtailed by the requirement of registration. The State quotes the wordings of Article 13 of the European Convention which grants an absolute right as opposed to Article 9(2) of the African Charter, adding that the interpretation by the American Convention is different from that in article 10.1 of the European Convention which empowers legislation in respect for licensing of broadcasting, television and cinema, and Article 9 of the African Charter which allows for the exercise of the right. Therefore, the State asserts, within the African Charter provisions, there is nothing that stops both technical and journalistic regulation as long as it is in accordance with the Charter.
139. The Respondent State contends that, the objective of regulating journalists is not to control them and to prevent or limit critical journalism, rather it is within the ambit of allowable derogations within the Charter.
140. According to the Respondent, the provisions being challenged by the Complainant may cause inconveniences to journalists. However, that they are not arbitrary and oppressive and do not violate the right of freedom of expression.

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<sup>6</sup> Communication 101/1993.

141. The State further submit that, the accreditation of journalists and licensing of the media is constitutional and compliant to the Charter.
142. The Repondent therefore submit that both sections 79 and 80 of the AIPPA are not in contravention of Article 9 of the Charter. Furthermore, that the provisions of Article 27(2), in line with section 20(1) of the Constitution and section 80 of the AIPPA provide that the rights and freedoms of each individual shall be exercised with due regard to the rights, collective security, morality and common interest.
143. The Respondent State therefore prays that the Commission finds that the legislation in question does not violate Article 9 of the Charter as alleged by the Complainant.

### ***Respondent State's supplementary submissions on the merits***

144. During the 41<sup>st</sup> Ordinary Session, the Respondent State made a supplementary submission claiming that it never received the Complainant's submissions on the merits prior to submitting its original submission on the merits, adding that the supplementary submissions was meant to address the issues raised by the Complainants.
145. In its submissions, the Respondent State notes that Complainants argue that there are civil and criminal sanctions for *injuria* and defamation which already regulate the conduct of journalists and hence no need for further legislation, that registration requirements are unduly intrusive and burdensome, and that compliance with the requirements does not necessarily guarantee registration of a journalist as the MIC has the discretion to decide whether or not to register a journalist. The Respondent State claims that each of the Complainants' submissions referred to above and elsewhere are without merit.
146. The African Commission finds that supplementary submission of the Respondent State does not depart from its earlier submission summarised in paragraphs 131 – 143 of this decision.

### ***The African Commission's decision on the merits***

147. In the present Communication, the Commission is called upon to make a determination whether the decision of a domestic court, the highest court of the land in the Respondent State, not to hear a petition brought by the Complainants because the latter came before the Court with 'dirty hands', is a violation of the Charter. In other words, did the Supreme Court violate the rights of the Complainants by invoking the equitable doctrine of 'he who

comes to equity must come with clean hands'? The Commission is not called upon to determine the constitutionality of the AIPPA which was the subject at issue before the Supreme Court. The Commission is also not called upon to determine whether the AIPPA or provisions thereof, violate the African Charter. It is called upon to determine whether by invoking the dirty hands doctrine, the Respondent State, through its Court, violated the right to have the Complainants' cause heard, as guaranteed under Article 7 (1) (a) of the African Charter.

***What is the clean hands doctrine?***

148. According to the Black's Law Dictionary (2000), the clean hands doctrine is an equitable principle which requires that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle such as good faith. It bars relief to persons who are guilty of misconduct in the matter for which they seek relief. It is a positive defense that is available where the complaint by the claimant is equitable.
149. Normally, equitable relief is generally available when a legal remedy is insufficient or inadequate to deal with the issue. These rights and procedures were created to provide fairness, unhampered by the narrow confines of the old common law or technical requirements of the law. It was recognised that sometimes the common law did not provide adequate remedies to solve all problems hence the creation of the courts of equity by the monarch.
150. However, in modern days, separate courts of equity have largely been abolished and the same courts that may award a legal remedy have the power to prescribe an equitable one. With time, certain aspects of equity were imported into the law and one such import is the doctrine of Clean Hands.
151. It is notable also that it is quite a controversial doctrine particularly in the sphere of public law where the formulation is that the responsibility of the state is not engaged when the complainant has acted in breach of the law of the state. However, as an equitable rule extended to the domain of law, it is necessary to be cautious when applying it particularly in cases where fundamental legal/human rights are involved.
152. In the present Communication, the relief sought by the Complainants before the Supreme Court was a determination by the Court whether an Act of Parliament, enacted by the Respondent State, violated or was likely to violate their fundamental rights guaranteed under the Constitution, and other international human rights instruments, including the African Charter. According to the Supreme Court, the petition could not be entertained

because the Complainants approached the Court with *dirty hands*. They (the Complainants) had refused to comply with the very law they approached the Court to challenge. The Court thus invoked the equitable doctrine of ‘he who comes to equity must come with clean hands’, and refuse to entertain the Complainants’ request for the Court to determine the constitutionality of the Act they were challenging.

153. The question before the Commission is whether the Supreme Court, by invoking the clean hands doctrine, and refusing to entertain the merits of the petition of the Complainants, violated the rights of the Complainants and in effect, the African Charter.

### ***Alleged violation of Article 3***

154. The Complainants allege the violation of Article 3 of the African Charter. This Article provides that: ‘Every individual shall be equal before the law, and every individual shall be entitled to equal protection of the law “According to the Complainants, by applying the unclean hands doctrine and refusing to hear the merits of their case, the Supreme Court of Zimbabwe violated the right to equal protection of the law guaranteed under Article 3 of the African Charter. The State did not address itself to this allegation.
155. Article 3 guarantees fair and just treatment of individuals within the legal system of a given country. 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.
156. The most fundamental meaning of equality before the law provided for under Article 3(1) of the Charter *is the right by all to have the same procedures and principles applied under the same conditions.*
157. The right to equality before the law means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. With respect to Article 3(2) on the right of equal protection of the law, the African Commission in its decision in Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development /Republic Of Zimbabwe<sup>7</sup>, relied on the Supreme Court decision in *Brown v. Board of Education of Topeka*,<sup>8</sup> in which Chief Justice Earl Warren of the

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<sup>7</sup> Communication 293/2004.

<sup>8</sup> 347 U.S 483 (1954).

United State of America argued that ‘equal protection of the law refers to *the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.*<sup>9</sup>

158. In order for a party to establish a successful claim under Article 3 of the Charter, it should show that, the Respondent State has not given the Complainant the same treatment it accorded to the others in a similar situation. Or that, the Respondent State had accorded favourable treatment to others in the same position as the Complainant.
159. In the present Communication, the Commission notes that the Complainants have not demonstrated the extent to which the Courts treated them differently from the Respondent State or from any other party in a similar situation. This seems to be the first instance where the Supreme Court is approached to deal with the kind of matter raised by the Complainants and there is no evidence to indicate that the Complainants were treated differently. The African Commission can therefore not find the Respondent State to have violated the Complainants’ rights under Article 3 of the African Charter.

### ***Alleged violation of Article 7***

160. With respect to the alleged violation of Article 7 of the African Charter, the Complainants submit that the right to have their cause heard, in particular, the right to an appeal to competent national organs against acts violating their fundamental rights... guaranteed under Article 7 (1) (a) of the African Charter have been violated. The Respondent State on its part argues that their right to be heard has not been violated, noting that Complainants’ have disregarded the law.
161. The Respondent State operates a legal system where the Constitution reigns supreme. Article 3 of the Constitution of Zimbabwe provides that “this Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”. This means any law that violates the Constitution, or any conduct that conflicts with it, can be challenged and struck down by the courts.
162. The fundamental rights of Zimbabweans are enshrined in Chapter 3 of the Constitution of Zimbabwe entitled *the Declaration of Rights* (Bill of Rights). All legislation passed by Parliament must conform to the Bill of Rights

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[www.legal-explanations.com](http://www.legal-explanations.com).

- provisions of the Constitution. If a legislative provision is inconsistent with the Bill of Rights, the courts, in particular, the Supreme Court, have been given the power to declare it to be void and of no force and effect.
163. This function to determine constitutionality or compatibility or otherwise of laws with the Constitution rests with the Supreme Court of the Respondent State. Thus, when there are doubts about the constitutionality of a new legislation, persons affected are entitled to obtain a ruling from the Supreme Court as to whether or not the legislation is constitutional.
164. The Supreme Court has also been given extensive powers to provide appropriate remedies to persons whose fundamental rights have been violated. In terms of Section 24 (1) of the Constitution, if any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, *without prejudice to any other action with respect to the same matter which is lawfully available*, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.
165. In view of the importance attached to fundamental rights, Article 24 (4) provides that the Supreme Court shall have original jurisdiction –
- to hear and determine any application made by any person pursuant to subsection (1) *or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious*; and... may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:
166. In terms of the Constitution, there are at least two instances in which the Supreme Court can decline to entertain an application to determine the constitutionality of a law. The first is when in its view, the application is *vexatious or frivolous*; and the second is when the Supreme Court is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the Constitution or under any other law. In the present Communication, neither of the two grounds could apply. The Court did not find the application vexatious or frivolous and there was no other adequate means of redress of the issue as the Supreme Court in the Respondent State has original and final jurisdiction with respect to matters dealing with fundamental rights.
167. Article 24 of the Constitution does not provide any time bar or an indication on when one should approach the Supreme Court to seek redress for any

- alleged violation of their rights. The Constitution simply provides that anyone who believes his rights *have been, are being or are likely to be* violated can approach the Court. This means that a law can be challenged at any time, depending on the circumstances, and on how the alleged victim perceives the law as interfering with the enjoyment of their rights, that is, whether the law has already violated the person's rights, whether the law is violating the person's rights or whether the law is likely to violate the person's rights.
168. In the case under consideration, the Complainants argue that the law enacted by Parliament *is likely to* violate their rights guaranteed under the Constitution of the Respondent State and under international human rights instruments. For this reason, they approached the Supreme Court to declare those sections of the law they believed would *likely* violate their rights, unconstitutional. In the Supreme Court, the Respondent State raised the point *in limine* that the Applicant (Complainants before the Commission), ought not to be heard on the merits as it had not sought registration. The Supreme Court upheld the Respondent State's contention, and in its ruling advised the applicant to seek registration with the Respondent State before approaching it (the Supreme Court) for the relief on the merits of the constitutional challenge.
169. Can it be said that the Complainants were refused to be heard by the Supreme Court? In other words, by not hearing the Complainants' petition on the merits, could it be argued that their right to have their cause heard has been violated?
170. To answer this question, the Commission will have to determine the meaning of having 'one's cause heard' under Article 7(1)(a) of the Charter.
171. Article 7(1) of the African Charter provides that "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".
172. The right to have one's cause heard requires that the matter has been brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law.
173. In the present Communication, the Complainants argue that the Supreme Court failed to hear their 'cause' on the merits. The Supreme Court instead pronounced itself on a preliminary objection raised by the Respondent

State that the Complainants were before the Court with dirty hands. In its ruling, the Supreme Court directed the Complainants to go and do that which they were challenging (to register in accordance with the Respondent State's Law they were challenging before the Court), and it is only then that their 'cause' could be heard on the merits.

174. In the opinion of the Commission, a 'cause' before a tribunal must be construed in broader terms to include everything related to the matter, including preliminary issues raised on the matter. The Court need not pronounce itself on the merits of the substantive matter. It simply needs to hear the parties. Thus, by pronouncing on the preliminary issue raised by the Respondent State on the question brought by the Complainants, the Supreme Court in effect heard the 'cause' of the Complainants. Besides, the Supreme Court did not close its doors on the Complainants, it simply asked the latter to go and register and come back to it for the matter to be heard on the merits. It can therefore not be said that the Respondent State has violated the Complainants' rights under Article 7.

***Alleged violation of Article 9, 14 and 15***

175. It is alleged that the State moved into action to seize the premises and close the offices of the Complainants after the Court's decision.
176. Can it be said that the State was enforcing a Court decision or trying to prevent a breach of the law? The African Commission is of the view that even if the State was in the process of ensuring respect for the rule of law, it ought to have responded proportionally. In law, the principle of proportionality or proportional justice is used to describe the idea that the punishment of a certain crime should be in proportion to the severity of the crime itself. The principle of proportionality seeks to determine whether, by the action of the State, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole. In determining whether an action is *proportionate*, the Commission will have to answer the following questions:
- Was there sufficient reasons supporting the action?
  - Was there a less restrictive alternative?
  - Was the decision-making process procedurally fair?
  - Were there any safeguards against abuse?
  - Does the action destroy the very essence of the Charter rights in issue?
177. In its decision, on Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme*/Islamic Republic of Mauritania, the African Commission held in respect of the allegations made against the State that "the dissolution of *UFD/Ere nouvelle* political party by the Respondent

State was not proportionate to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of Article 10(1) of the African Charter”.

178. In the present Communication, when put against the above criteria, it is clear that the action of the State to stop the Complainants from publishing their newspapers, close their business premises and seize all their equipment cannot be supported by any genuine reasons. In a civilized and democratic society, respect for the rule of law is an obligation not only for the citizens but for the State and its agents as well. If the State considered the Complainants to be operating illegally, the logical and legal approach would have been to seek a court order to stop them. The State did not do that but decided to use force and in the process infringed on the rights of the Complainants.
179. The action of the Respondent State to stop the Complainants from publishing their newspapers, close their business premises and seize their equipment resulted in them and their employees not being able to express themselves through their regular medium; and to disseminate information. The confiscation of the Complainants' equipment and depriving them of a source of income and livelihood is also a violation of their right to property guaranteed under Article 14. By closing their business premises and preventing the Complainants' and their employees to work, the Respondent State also violated Article 15 of the Charter. Thus, whether motivated by the Supreme Court's decision or through its own initiative, the action of the Respondent State resulted to an infringement of the rights of the Complainants. The Commission thus finds the State in violation of Articles 9 (2), 14 and 15 of the African Charter.
180. The African Commission thus finds the Respondent State has not violated Articles 3 and 7 of the African Charter as alleged by the Complainants.
181. The African Commission however finds the Respondent State in violation of Articles 9 (2), 14 and 15 of the African Charter.
182. Since a violation of any provision of the Charter necessarily connotes the State Party's obligation under Article 1, the African Commission also finds the Respondent State in violation of Article 1 of the African Charter.

The African Commission thus recommends that the Respondent State provides adequate compensation to the Complainants for the loss they have incurred as a result of this violation.

**Adopted at the 6<sup>th</sup> Extra Ordinary Session of the African Commission on Human and Peoples' Rights, 30<sup>th</sup> March – 3<sup>rd</sup> April, 2009, Banjul, The Gambia.**

**Communication 294/2004: Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) /Republic Of Zimbabwe**

***Summary of Facts:***

1. The Communication is submitted by the Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (the Complainants) on behalf of Mr. Andrew Barclay Meldrum (the victim). It alleges that Mr. Meldrum's rights of freedom of expression and freedom to disseminate information were violated by the Republic of Zimbabwe (the Respondent).
2. It is stated by the Complainants that Mr. Andrew Barclay Meldrum's an America citizen was legally admitted into Zimbabwe in October 1980 and settled permanently until 2003 when he was deported. It is alleged that the Ministry of Home Affairs of Zimbabwe on 10 February 1980 issued Mr. Meldrum with a permanent residence permit which allowed him to work as a journalist and since then he has been a foreign correspondent for the Mail and Guardian, a paper published in the United Kingdom.
3. The Complainants state that on 7 May 2002, Mr. Meldrum published an article in the Daily News (an independent paper that has been closed by the Respondent State) on the internet version of the Mail and Guardian. As a result of the publication, the Complainants claim Mr. Meldrum was charged with "publishing falsehood" under section 80 (1) (b) of the Access to Information and Protection of Privacy Act, (AIPPA). Mr. Meldrum was found not guilty on 15 July 2002. The complainants state that on 7 May 2003, the Supreme Court of Zimbabwe declared section 80 (1) (b) of the AIPPA unconstitutional in the case of Lloyd Zvakavpano Mudiwa v The State.
4. It is further alleged that immediately after his acquittal, Mr. Meldrum was requested to report to the Immigrations Department Investigations Unit and was served with a deportation order issued in terms of section 14 (i)g of the Immigrations Act. Mr. Meldrum appealed the deportation order within 24 hours to the Ministry of Home Affairs as required by the Immigrations Act. Meanwhile, an application challenging the deportation order was filed by his lawyers in the High Court. On 17 July 2002, the High Court ordered that Mr. Meldrum should be allowed to stay in the country until the Supreme Court had dealt with all the constitutional matters raised in the matter.
5. The Complainants, allege further that on 16 May 2003, Mr. Meldrum was summoned to the Immigration Department where he was informed that he could no longer work as a journalist. He was informed that he had not been accredited in terms of the Access to Information and Protection of Privacy Act. Mr. Meldrum informed the immigration authorities that he had filed an

application to the Supreme Court and pending the outcome he should be allowed to practice journalism as provided by the Act. The Immigration authorities then informed him that they had a deportation order issued by the Ministry of Home Affairs which empowered them to deport him forthwith without disclosing the reason for the deportation. Mr. Meldrum was then forced into a car and taken to the airport.

6. They claim that an urgent appeal was filed in the High Court to interdict the deportation order and to compel the State to bring Mr. Meldrum before the High Court by 15:30hrs that same day. But at 15:30hrs, the State Counsel appeared in court without Mr. Meldrum. The High Court gave another order prohibiting the State from deporting Mr. Meldrum. At about 20:00hrs, the State Counsel informed the Court that Mr. Meldrum could not be located. The High Court issued another order for the release of Mr. Meldrum and this order was served on the immigration authorities by Mr. Meldrum's lawyer who had to drive to the airport for that purpose. In spite all these efforts and Court orders, the State defiantly deported Mr. Meldrum.

### **Complainant**

7. The Complainants allege that the Respondent State has violated articles 2, 3, 7 (1a) (b), 9, 12(4), and 26 of the African Charter on Human and People's Rights.

### **Procedure**

8. The complaint was received at the Secretariat of the African Commission on 6 October 2004.
9. On 12 October 2004, the Secretariat wrote to the Complainants acknowledging receipt of the complaint and informing them that it will be considered at the Commission's 36<sup>th</sup> Ordinary Session.
10. On 13 December 2004, the Secretariat wrote a letter to inform Parties that at its 36<sup>th</sup> Ordinary Session held from 23 November to 7 December 2004, in Dakar, Senegal, the African Commission considered the above mentioned Communication and decided to be seized thereof.
11. On 3 February 2005, the Complainants transmitted their arguments on admissibility.
12. On 22 February 2005, the Secretariat acknowledged receipt of the Complainants' arguments on admissibility and inform them that the Communication will be considered on admissibility at the 37<sup>th</sup> Ordinary Session of the African Commission scheduled to take place from 27 April to 11 May 2005 in Banjul, The Gambia.

13. The Secretariat of the African Commission wrote a Note Verbal to the Respondent State transmitting Complainants' submissions on admissibility and reminding the Respondent State that the Secretariat is yet to receive their submission on admissibility.
14. A fax message was received by the Secretariat on 14 March 2005, from the Respondent State requesting a postponement of consideration of the Communication on admissibility to the 38<sup>th</sup> Ordinary Session.
15. The Secretariat acknowledged receipt of the above mentioned fax and forwarded the decision of the 36<sup>th</sup> Ordinary Session of the African Commission to the Ministry of Foreign Affairs by Note Verbales dated 13 December 2004 and urged the Respondent State to submit on admissibility so that a decision could be taken at the next session of the African Commission.
16. In this respect, the Secretariat requested the Respondent State if they could make their submissions on admissibility with respect of all pending Communications by 18 April 2005. The Secretariat also asked the Respondent State to inform it whether the government of Zimbabwe would like to make oral submissions, so that it can advise the Complainants and the Members of the Commission accordingly.
17. During its 37<sup>th</sup> Ordinary Session, held from 27 April to 11 May 2005, in Banjul, The Gambia, the African Commission considered the said communication and deferred consideration thereof to its 38<sup>th</sup> Ordinary Session pending the Respondent State's submissions of its arguments on admissibility.
18. On 24 May 2005, the Secretariat informed both parties about the Commission's decision. The Secretariat also reminded the Respondent State that it had not submitted its submissions on admissibility requested it to do so before 15 October 2005 so that the Commission could decide on the admissibility at its forthcoming session.
19. On 13 October 2005, the Secretariat reminded to the Respondent State to submit its argument on admissibility, for consideration during the 38<sup>th</sup> Ordinary Session to be held from 21 November to 05 December 2005 in Banjul, The Gambia.
20. On 31 October 2005, the Respondent State informed the Secretariat that the transmission of its submissions would be slightly delayed.
21. During the 38<sup>th</sup> Ordinary Session, the Respondent State finally submitted its arguments on admissibility.

22. On 14 December 2005, the Secretariat wrote to both parties informing them that at its 38<sup>th</sup> Ordinary Session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission considered the Communication and declared it **admissible**.
23. The Secretariat also informed both parties that the African Commission would consider the Communication on the merits at its forthcoming session, and requested them to forward their arguments on the same.
24. On 04 April 2006, the Secretariat sent a reminder to both parties to submit their arguments on the merits.
25. On 26 July 2006, the Secretariat wrote to both parties informing them that, at its 39<sup>th</sup> Ordinary Session held from 11 – 25 May 2006, in Banjul, The Gambia, the African Commission considered the Communication and decided to defer its decision on the merits at its 40<sup>th</sup> Ordinary Session to be held from 15 – 29 November 2006 in Banjul – The Gambia.
26. On 3 November 2006, the Secretariat wrote a reminder to the Respondent State to request its submissions on the merits of the case, as soon as possible.
27. On 26 November 2006, the Secretariat received the Complainant's submissions on the merits and the Secretariat was informed that the Respondent State has been duly served a copy of the submission.
28. On 08 December 2006, the Secretariat informed both parties that at its 40<sup>th</sup> Ordinary Session held from 15-29 November 2006 in Banjul-The Gambia, the African Commission considered the Communication and decided to defer its decision on the merits to its 41<sup>st</sup> Ordinary Session scheduled from 16-30 May 2007 in Ghana, in order to allow the Respondent State to submit its arguments on the merits.
29. The Secretariat of the African Commission wrote a reminder to the Respondent State to submit its arguments on the merits before 10 of May so that the Commission could take a decision at its 41<sup>st</sup> Ordinary session.
30. At its 41<sup>st</sup> Ordinary session held in Accra-Ghana from 16 to 30 May 2007, the African Commission considered the Communication and decided to defer its decision on the merits to its 42<sup>nd</sup> Ordinary Session, in order to receive the Respondent State's arguments.
31. The Secretariat wrote reminders on 25 June 2007, and, on 25 September 2007 to the Respondent State to submit the requested arguments on

merits latest by 15 October 2007 for consideration during the 42<sup>nd</sup> Ordinary Session held from 14 to 28 November 2007

32. On 19 December 2007, the Secretariat wrote to inform both parties that at its 42<sup>nd</sup> Ordinary Session held from 15 to 28 November 2007 in Brazzaville, Congo, the African Commission considered the Communication and decided to defer its decision on the merits to its 43<sup>rd</sup> Ordinary Session, in order to receive the Respondent State's arguments.
33. On 19 March 2008, the Secretariat informed both parties about the decision and reminded the Respondent State to submit its arguments on the merits in order to allow the Commission to take a decision on the matter.
34. At its 43<sup>rd</sup> Ordinary Session, the Commission considered the Communication and decided to defer its decision on the merits to its 44<sup>th</sup> Ordinary Session.
35. At its 44<sup>th</sup> Ordinary Session held from 10 – 24 November 2008, in Abuja, Nigeria, the African Commission deferred consideration of the Communication due to lack of time.

### **Decision on admissibility**

#### **The Complainant's arguments**

36. The Complainant had argued the complaint had complied with Article 56 (3), because the information was based on court records and affidavits.
37. Regarding Article 56 (5), the Complainants submit that the victim was not given the opportunity to exhaust the local remedies that were available to him, and that the High Court had ordered on many instances that he be allowed to stay in the country until a decision was made on the constitutional issues, which he had been raised in an application pending before the Supreme Court. Complainants submit that in terms of Section 24 of the Zimbabwe Constitution, any issues that pertain to the Zimbabwean Bill of Rights are referred to the Supreme Court, as the court of first instance on alleged case of human rights infringements. They argue that the deportation of the victim by the Immigration Department was in contempt of court orders, which had stayed his deportation.
38. That the victim could not have pursued any other remedies other than approach the courts for a vindication of his rights. They argue that the fact that he was given an opportunity on one occasion to appeal to the Minister of Home Affairs, who is responsible for immigration, does not at all prove the availability and effectiveness of local remedies, since the decision of

- the Minister 'is and was more of a review by a quasi judicial individual government official or functionary, who is not obliged to make considerations in accordance with legal rules which in all fairness takes away the very principles of natural justice and due process of the law (sic) which are covered under Article 7 of the Charter'.
39. The Complainants further argue that the Commission has ruled that only remedies of a judicial nature are considered to be effective remedies for acts of human rights violations. This, they rely on the Commission's decision in the **Constitutional Rights Project vs. Nigeria** where the commission ruled that:
- "the Civil Disturbances Act empowers the Armed Forces Ruling Council to confirm the penalties of the Tribunal. This power is a discretionary, extraordinary remedy of a non-judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complaint seeking remedies from a source, which does not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective"*
40. The Complainants added that in the **Constitutional Rights Projects Case** (*supra*) the Commission stated further that the types of remedies that existed were of a nature that did not require exhaustion according to Article 56(5).
41. It is also alleged that the victim was ordered to make representations to the Minister of Home Affairs on why he should not be deported after being served with his deportation order. The exhaustion of local remedies in this case would fall away as the Minister of Home Affairs being the person responsible for the Immigration Department, the state arm which was responsible for infringing on his rights, could not in any way proffer an effective remedy, the Complainants assert.
42. The Complainants submit that when the victim sought judicial protection of his rights, the Immigration Department deported him regardless of the court orders, which stayed his deportation, adding that the practice by the Respondent State to disobey courts orders has made it a senseless for an aggrieved party to seek or obtain any form of remedy.
43. The Complainants therefore argue that, 'one can safely conclude that the failure by the government of Zimbabwe to respect court orders thereby denying local remedies to victims of human rights violations amounts to constructive exhaustion of local remedies'.<sup>1</sup>

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<sup>1</sup> As was established in the cases of *Godinez Cruz vs. Honduras* (Inter-America Court on Human Rights Series C No. 5 at 69, *Jon D Ouko vs. Kenya* (ACHPR Decision 232/1999)

44. The Complainants urged the Commission to draw inspiration from the Inter- American Court decision on the same principle, which states as follows; “...when remedies are denied for trivial reasons or without examination on merits, or if there is proof of the existence of a practice or policy tolerated by the government, the effect of which is to impede persons from invoking internal remedies that would normally be available to others, resort to such remedies becomes a senseless formality.”

### **Respondent State’s arguments**

45. The Respondent State relies on two grounds:

**1. Disparaging language (Article 56(3))**

46. The Respondent State submits that the language used in the Communication is disparaging to the Republic of Zimbabwe, in particular, the Department of Immigration in Zimbabwe and, as such, the Communication should be considered inadmissible. The Respondent State claims that the language used to describe the deportation and events preceding the deportation of the Complainant expose the State and the Department of Immigration of Zimbabwe to unnecessary ridicule. It argues that international attention garnered by the *Land Reform Programme*, is exacerbated by such disparaging statements are, among other things, that there is no rule of law in Zimbabwe, court orders are not enforced and crimes against humanity are committed by high ranking State Officials.

**2. Exhaustion of local remedies (Article 56(5))**

47. Concerning Article 56(5), the Respondent State submits that the Complainants have not attempted to exhaust local remedies and, as such, the Communication should be considered inadmissible. According to the Respondent State, the victim, while still resident in the Republic of Zimbabwe, approached the local courts on a number of occasions seeking redress. The State argues that the victim does not, however, need to be physically in Zimbabwe in order to avail himself of available domestic remedies. That he can instruct his lawyers from wherever he is and the relevant action can be done through his lawyers. The State argues further that his lawyers could, for instance, make issue of the alleged contempt of court by Immigration Officials, and also push for the revocation of the deportation order and subsequent reinstatement of the victim’s residence permit.

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and Rencontre Africaine pour la Defense des Droits de l’Homme vs. Zambia (ACHPR Decision 71/92.

48. Consequently, the Respondent State argues that the Communication does not meet the requirements of Article 56(3) and 56(5) and should be declared inadmissible.
49. During its oral submission, the Respondent State submitted that following discussions with the Complainants, it decided to abandon its argument of disparaging language, but maintains the issue of non exhaustion of local remedies.

### **Decision**

50. When the parties made oral submissions before the Commission, the Respondent State submitted that, it had decided to abandon the argument on disparaging language but maintained the grounds on issue of non exhaustion of local remedies. The Commission takes note of that submission, and would not make a ruling on article 56 (3) since the parties are not at issue on the question of disparaging language.
51. Both parties made submissions on Article 56(5) regarding the question of non-exhaustion of local remedies. The Commission has stated in previous decisions, (see paragraph 39 above) that the principle of exhaustion of domestic remedies, presupposes existence of effective judicial remedies. Administrative or quasi judicial remedies which do not operate impartially are considered as inadequate and ineffective. The Respondent State argues that the victim did not exhaust domestic remedies. It argues that, the mere fact that the victim was outside the country could not stop the victim instructing lawyers to approach the courts on his behalf. i.e.; the victim did not require or need to be inside the country to access the domestic remedy. The Respondent state submitted further that the victim could have initiated contempt proceedings.
52. The Complainants submitted at length on the non applicability of Article 56(5) and argued in favour of invoking the principle of constructive exhaustion of local remedies. In summary, they submit that the disregard by the Respondent State of various court orders prior to, and coupled with, the deportation of the victim, denied him the opportunity to exhaust local remedies. Secondly they submit that there were no domestic remedies to exhaust, since the judicial remedies had proved ineffective. The appeal to the Minister was a non judicial remedy, for purposes of addressing human rights violation. Such a remedy does not fall within the scope of Article 56(5), it failed to comply with rules of natural justice. In any case it was the Minister who had ordered the deportation, thus he could not be expected to proffer any remedy to the victim.

53. The Commission agrees with the Complainants' arguments. The Commission is of the firm view that immigration officials of the Respondent State had no basis in law to disregard court orders. The complainants referred the Commission to the **Cordinez Cruz** decision, on constructive exhaustion of local remedies. The Commission has looked at the decision in terms of Article 60 of the Charter and finds it very persuasive. The Commission has previously applied this principle too, where the Complainant or victim is impeded from exhaustion of domestic remedies through the conduct of the Respondent State.
54. The deportation of the victim in the case under consideration had been effected in the face of several High Court orders, the Commission finds that to require the victim to pursue further judicial remedies, when all efforts at seeking judicial remedies had been frustrated and ignored by the Respondent State, would have amounted to a "senseless formality" in the true meaning of the words. The remedy which would have granted protection to Mr Meldrum, namely the application pending in the Supreme Court, was considered by the Respondents State's immigration officials, as "trivial" and of no legal consequence. The Respondent State had notice of the pending application in the Supreme Court, and yet effected the deportation. It actively participated in impeding the victim from accessing the remedy.
55. The Commission therefore holds that the conduct of the Respondent State brings this Communication within the scope of constructive exhaustion of remedies principle. By accepting the applicability of the principle of constructive exhaustion of domestic remedies in this case, the Commission distinguishes this case from its decision in **Communication 219/98 Legal Defence Centre/Gambia**<sup>2</sup> in which it declared the communication inadmissible for failure by a deportee to exhaust local remedies, since the circumstances were not similar.
56. The decision in the **Legal Defence Centre** is distinguishable because in that case, no effort was made to exhaust domestic remedies. In the case under consideration, the Respondent State was actively engaged in frustrating the restraint orders obtained from the domestic court. The Commission is aware that its decisions on admissibility must be based on the criteria

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<sup>2</sup> Communication No 219/98, The Legal Defence Centre/The Gambia,, the victim, one Mr Sule Musa was deported by the Gambian authorities to Nigeria. The Commission sought clarification during its 25<sup>th</sup> Ordinary Session, whether the Complainant could have recourse to domestic remedies, to which no response was received. The Commission declared the Communication inadmissible, observing that; "...the victim does not have to be physically present in a country to avail himself of available domestic remedies, such could be done by his counsel.....Rather than approach the Commission first, the complainant ought to have exhausted available local remedies in the Gambia....".(emphasis added) It must be stated here that the distinguishing factor relied by the Commission in the Zimbabwe case is the role played by the State in impeding access to the local remedies available.

under Article 56, it must however reiterate that States Parties are obliged to respect their obligation to guarantee the independence of the judiciary under Article 26 of the Charter. It is the view of the Commission that Article 56(5) must be read in the context of the Article 26 of the Charter. A State which ignores its duty to guarantee an independent judiciary fails to provide effective remedies to human rights violations, and thereby undermines the protection of human rights under the Charter.

57. On these grounds, the African Commission declares the Communication admissible.

### **Decision on the merits**

#### **Complainant's submissions**

58. The Complainants allege the violations of Articles 2, 3 (1) and (2), 7 (a), 9, 12 (4) and 26 of the African Charter.

59. Concerning alleged violations of Articles 2 and 3 of the Charter, the Complainants submitted that the deportation of Mr. Meldrum was based on vague and unsubstantiated reasons of a danger to public order, national security and breach of his work permit.

60. The Complainants state that the allegations against Mr. Meldrum were never proven in the domestic courts, but the Respondent State proceeded to deport him despite numerous High Court orders that he should not be deported, until the constitutional application for stay of deportation had been heard.

61. The Complainants allege that the act of deportation constituted an unfettered exercise of discretion by the Chief immigration Officer, which was tantamount to indiscriminate action by state authorities and violated the right equality before the law, therefore it is a violation of Article 2 of the Charter.

62. The Complainants conclude that the deportation of Mr. Meldrum was not in anyway motivated by the desire to promote peace and security, neither was it to accomplish a given pressing social need, it was to physically censor him from disseminating information within Zimbabwe.

63. The Complainants recall the jurisprudence of the Commission dealing with cases of expulsion of non-nationals from State Parties to the Charter, in which concluded that deporting non-nationals without providing them the opportunity to challenge their deportation before the courts, constitute discrimination and inequality before the law. Article 2 of the Charter obligates

State parties to ensure that persons living in their territory, be they nationals or non nationals, enjoy the rights guaranteed in the Charter<sup>3</sup>.

64. The Complainants argued that Mr. Andrew Meldrum was arrested and charged under the Access to information and Protection of Privacy Act (AIPPA), but the charges against him were subsequently dismissed in court, and the State never appealed. Further, the sections of the Act which were deemed to have breached were subsequently struck off and declared unconstitutional.
65. The Complainants submit that, in essence, the deportation of Mr. Andrew Meldrum is unfounded at law.
66. Concerning Article 7 (1) (a) and (b), the Complainants note that the failure to by the Respondent State to obey court judgments or orders constitute a violation of the Charter and breach the duty and right to have independent and competent tribunals and courts mandated with the protection of rights as provided in the Charter.
67. The Complainants submit further that the deportation order was a violation of the presumption of innocence which is a doctrine well founded under the principles of natural justice as it gives an accused person the opportunity to have his cause heard by an organ competent to determine such guilt or innocence.
68. They argue that, when an individual, who has a vested interest in the matter, acts contrary to principles of natural justice, and becomes the first and last institution of appeal, then decision of such an individual would be a violation of the Charter, in particular Article 7 (1) (a) and (b).
69. The Complainants emphasize that the Access to Information and Protection of Privacy Act allows journalists to practice for six months whilst their accreditation applications were pending, and Mr. Meldrum was still within the transitional reprieve period and was, in terms of the Act, allowed to work as a journalist while his application was pending.
70. The Complainants note further that the free practice of the profession of journalism and freedom of expression ought to be interpreted to include freedom to impart and receive information, and this was abrogated by the Respondent State.
71. It is alleged by the Complainants that Mr. Meldrum had been charged for publication of falsehoods, charges he was acquitted of in the Magistrates

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<sup>3</sup> Union Interafricaine des Droits de l'Homme and Others vs. Angola (2000) AHRLR 18 (ACHPR 1997) at paragraph 18.

Court, against which the State never appealed. They state further that the same provision of AIPPA under which Mr Meldrum charged, was declared unconstitutional by the Supreme Court.<sup>4</sup> The Complainants submit that the only way for the Respondent State to deter Mr. Meldrum from the free practice of his profession was to physically censor him through an arbitrary act of deportation.

72. The Complainants consider that the response of the State to perceived, real or illicit threats to national security, public order was disproportionate to the threat, if any, posed by the writings of Mr. Meldrum.
73. Referring to Article 12 (4), the Complainants affirm that non-nationals admitted in any State Party to the Charter should enjoy the same rights entitled to nationals. Thus, according to the Complainants, the expulsion of Mr. Meldrum did not satisfy the provisions of the Charter as it was arbitrary in so far as it was improper, disproportionate and contrary to the law and the principles of natural justice.
74. Recalling the restriction on fundamental rights guaranteed by the Charter, the Complainants affirm that the limitations are founded where the drafters of the Charter include clawback provisions such as “in accordance with the law”, “abides by the law”, “within the law” and more clearly stated under Article 27 (2).
75. Relying on the principles of necessity and proportionality and referring to international jurisprudence, the Complainants submit that the act of restriction of a right must not be arbitrary, unfair or based on irrational considerations, but must be rationally connected to the objective, and should not impair the right or freedom in question more than is necessary to accomplish a given objective or a pressing social need.
76. Further, the Complainants argue that several international human rights instruments to which Zimbabwe is a party recognize the importance of non-discrimination in the pursuit and enjoyment of human rights by nationals and non-nationals. The Complainants also submit that the deportation of Mr. Meldrum was in violation of Article 26, read together with Article 7 of the Charter. According to the Complainants, Article 7 as has been ruled by the Commission gives meaning to the individual right, whilst Article 26 emphasizes on the importance of institutions which give effect to the right in Article 7.
77. The Complainants argue that Mr. Meldrum was deported while his case was yet to be heard by the Supreme Court sitting as a constitutional court, thus rendering the right to appeal in this instance illusory. The Complainants

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<sup>4</sup> See paragraph 3 (supra)

submit that the Respondent State, through various organs had defied court orders and allowed such actions to become “acceptable standard of deviation” from enforcing rights guaranteed in the Charter.

78. The Complainants submit that Article 26 of the Charter was violated by pointing to the wanton disregard of court orders by the Respondent State and non-state entities as clear evidence of the non-existence of the rule of law, principles of natural justice, and presumption of innocence. For the Complainants, these latest principles are elementary indicators of the existence of a proper functioning judiciary, an executive which operates within the law, and a legislature which appreciates the essence of separation of powers.
79. The Complainants argued that the actions of the Respondent State were a violation of Article 9 (1) and (2) of the Charter, which provides for freedom of expression, and the right to receive and impart information. They claim that the deportation of Mr. Meldrum deprived him of his rights, as well as denying the general citizenry their rights to receive information.
80. The Complainants recall that the restrictions on freedom of expression under international law have been examined under various tests of necessity, proportionality and achievement of a legitimate objective, and request the Commission to apply the same tests to the present Communication.

### **Respondent State’s submission**

81. The Respondent State did not formally submit its arguments on the merits in spite of several reminders. However, it should be noted that in its submission on admissibility dated 16 November 2005, the Respondent State also made arguments relating to the merits of the Communication. The African Commission here below summarizes those arguments and consider them as the State’s submissions on the merits of the present Communication.
82. In relation to the alleged violation of Article 2, the Respondent State denies that the victim’s right to equality before the law was violated. The State submits that the Complainant faced deportation because of alleged violations of the terms of his Residence Permit which entitled him to stay in Zimbabwe. According to the State, it is wrong to suggest that Mr Meldrum’s right to equality before the law was violated because of his opinion and/or origin.
83. Concerning Article 3, the Respondent State submits that the victim was afforded protection of the law, adding that it is on record that the victim approached local courts in Zimbabwe at least four times prior to his deportation and that the matters were given due consideration.

84. With regards to the alleged violation of Article 7, the Respondent State submits that the victim was not denied his right to appeal. The State argues that he made an application to the High Court which, in turn, was referred to the Supreme Court, noting that the issues were still pending before the Supreme Court at the time the victim left for the United Kingdom. The Respondent State argues that the complainant was at liberty to approach the courts, whenever he deemed it necessary to do so.
85. Concerning Article 9, the Respondent State submits that while the right to freedom of expression is enshrined in the *Constitution of Zimbabwe* and contained in Article 9 of the African Charter, it would be inappropriate for the victim to seek to enforce that right by way of publishing falsehoods. Moreover, the State avers, publications of falsehoods are in direct contravention of the *Access to Information and Protection of Privacy Act (AIPPA)*.
86. On the alleged violation of Article 12(4), the Respondent State submits that Immigration Officials responsible for Mr. Meldrum's deportation were guided by Section 14(1)(g) of the *Immigration Act*. Under this law, the State argues, Mr. Meldrum was declared a prohibited immigrant and the Chief Immigration Officer revoked his Residence Permit in terms of Section 20(2) of *Statutory Instrument 195 of 1998*. The decision to deport Mr. Meldrum, according to the Respondent State, cannot therefore be considered as outside of the provisions of the law as it was made by the Chief Immigration Officer who was acting within the purview of the law governing the deportation of non-nationals, namely the *Immigration Act*.
87. Concerning Article 26, the Respondent offers no argument in response to allegations made by the Complainant.

### **Decision of the Commission on the merits**

#### **Alleged violation of Articles 2 and 3**

88. The Commission has considered the submissions of both parties regarding the alleged violations of the African Charter.
89. With respect to the alleged violation of Article 2 of the African Charter, the Complainants argue that the deportation of Mr. Meldrum was based on vague and unsubstantiated reasons of a danger to public order, national security and breach of his work permit, adding that the deportation process gives unfettered discretion to the Chief Immigration Officer, and this is tantamount to indiscriminate practices by state authorities and erodes the right to equality before the law, therefore it is a violation of Article 2 of the Charter. The

Complainants also argue that Article 2 guarantees against discrimination based on national origin.

90. 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 “[e]very individual shall be entitled to equal protection of the law”.

91. Discrimination can be defined as any act which aims at 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.<sup>5</sup> Article 2 of the African Charter stipulates the principle of non discrimination, which is essential to the spirit of the African Charter.<sup>6</sup>

92. The Respondent State argued that Mr. Meldrum was deported because he violated the terms of his residence permit and therefore submit that Article 2 was not violated. The facts as presented by the Complainants indicate that the victim, Mr. Meldrum, was legally resident in the Respondent State, his residential permit had not expired, and he had not been refused accreditation by the MIC. His application contesting the denial of accreditation under AIPPA was still pending before the Supreme Court. The High Court had ordered that he remain in the country until his application in the Supreme Court is disposed of. It had issued a restraining order against his deportation. In short, he was in all-fours legally resident in the Respondent State.

93. The Respondent State did not give any details concerning the terms of the residence permit which Mr Meldrum violated. The Commission is not satisfied by the reasons or explanations given by the Respondent State. It is not very clear why he was deported. Given the circumstances, it can only be concluded that he was deported because he was a non-national who had published what the Respondent State considered to be falsehoods, which are not protected by the Constitution. In its decision in the case between

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<sup>5</sup> See The Human Rights Committee General Comment No. 18.

<sup>6</sup> See Communication 241/2001 - Purohit and Moore / The Gambia, para 49.

**Institute for Human Rights and Development in Africa v Republic of Angola**<sup>7</sup>, the African Commission held that *'although governments have the right to regulate entry, exit and stay of foreign nationals in their territories, and ... although the African Charter does not bar deportations per se, the African Commission reaffirms its position that a State's right to expel individuals is not absolute and it is subject to certain restraints, one of those restraints being a bar against discrimination based on national origin'*.

94. It would be interesting to know what the government would have done if Mr. Meldrum was a Zimbabwean. Surely, the Respondent State would not have deported its own national to another country. The only logical reason the State deported him under then prevailing circumstances was because he was a non-national. In the opinion of the Commission therefore, it appears that the victim was targeted because he is not a national of the Respondent State, and this according to the Commission constitutes a violation of Article 2 of the Charter.
95. With respect to Article 3 of the Charter, Complainants submit that the deportation of Mr Meldrum in defiance of the court orders amounted to a violation of Article 3 of the African Charter. Article 3 guarantees fair and just treatment of individuals within the legal system of a given country, whereby every individual is equal before the law and guaranteed equal protection of the law. Given the treatment Mr Meldrum was exposed to, would it be argued as the Respondent State does, that he was able to access the courts and therefore was given equal protection of the law?
96. The most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment under the similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws.
97. Factual patterns that are objectively equal must be treated equally. Thus, it is expected that if the law requires that all those who publish offensive articles against the government be brought before a judge for questioning, and if found guilty, sentenced or pay a fine, this law should apply to all those subjected to it, including nationals and non nationals alike.

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Communication 292/2004.

98. In the present Communication, that does not seem to be the case, because the victim is a non-national, the Respondent State chose not to treat him as it would have treated nationals. It is very unlikely and impractical that if a Zimbabwean had published the same article the victim published, he/she would have been treated the same way. In the opinion of the Commission therefore, the Respondent State violated Article 3(1) of the Charter.
99. Equal protection of the law under Article 3(2) on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness.<sup>8</sup> It simply means that similarly situated persons must receive similar treatment under the law.<sup>9</sup>
100. In its decision in **Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development /Republic of Zimbabwe**<sup>10</sup>, this Commission relied on the Supreme Court decision in **Brown v. Board of Education of Topeka**,<sup>11</sup> in which Chief Justice Earl Warren of the United State of America argued that *'equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.'*<sup>12</sup>
101. In order for a party therefore to establish a successful claim under Article 3 (2) of the Charter, it should show that, the Respondent State had not given the Complainant the same treatment it accorded to the others. Or that, the Respondent State had accorded favourable treatment to others in the same position as the Complainant.
102. In the present Communication, the Commission notes that the Respondent State treated the victim in a manner which denied him the opportunity to seek protection of the Courts. Due process which was key to ensuring remedy to the deportation, and therefore the protection of the rights of the victim were denied through the arbitrary actions of the Respondent State. The African

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<sup>8</sup> See People v Jacobs, 27 California Appeal, 3d 246, 103 California Rep 536, 543, 14<sup>th</sup> Amendment, US Constitution.

<sup>9</sup> See Dorsey v Solomon, DCMd.,435 F. Supp. 725.

<sup>10</sup> Communication 293/2004.

<sup>11</sup> 347 U.S 483 (1954).

<sup>12</sup> [www.legal-explanations.com](http://www.legal-explanations.com).

Commission therefore finds that the Respondent State violated Article 3 (2) of the African Charter.

**Alleged violation of Article 7 (1) (a) and (b)**

103. The Complainants argue that the deportation of Mr. Meldrum violated Article 7 (1) (a) and (b). Article 7 (1) of the Charter provides that *'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 recognised and guaranteed by conventions, laws, regulations and customs in force;*
  - b) The right to be presumed innocent until proved guilty by a competent court or tribunal.*
104. Article 7 (1) deals with the right to have one's cause heard, which comprises, *inter alia* (a) the right to appeal to competent national organs against acts violating their rights, and (b) the right to be presumed innocent until proven guilty by a competent court or tribunal.
105. In the present Communication, the victim went to the Courts of the Respondent State. The Courts ruled in his favour against the deportation order. The victim petitioned the Supreme Court for enforcement of his right to practice his profession after his accreditation was rejected, but before the latter could hear the application, the Respondent State deported him. Could it be said that the victim's right to have his cause heard was violated by the Respondent State?
106. The right to have one's cause heard requires that the victims have unfettered access to competent jurisdiction to hear their case. A tribunal which is competent in law to hear a case must have been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law. Where the competent authorities put obstacles on the way which prevents victims from accessing the competent tribunals, they would be held liable. These are the issues which must be borne out by the evidence to warrant the Commission's findings of a violation.
107. In the present Communication, it is clear that the Respondent State did not want the victim to be heard in the Supreme Court. To ensure that this happened, the Respondent State deported him out of the country before the date scheduled for the hearing, thus effectively preventing him from being heard. Admittedly, the victim could still have proceeded against the Respondent State from wherever he was deported to, but by suddenly deporting him the Respondent State frustrated the judicial process that had been initiated.

108. To this extent, the Respondent State is found to have violated Article 7 (1) (a) of the African Charter.
109. Regarding the allegations concerning the violation of Article 7(1) (b), the Commission finds that the deportation was effected in disregard of several the High Court orders. The Immigration officers refused, or failed to produce Mr Meldrum as was ordered by the Court. By doing so they denied him the right to be heard by a competent and impartial tribunal. Instead they acted under the Immigration Act without affording him an opportunity to defend himself. The actions of the Respondent State amounted to a conclusion that Mr Meldrum was guilty of the allegations against him, contrary to the presumption of innocence. The Commission finds that the conduct of the Respondent State amounted to a violation of Article 7 (1)(b) as alleged by the Complainants.

#### **Alleged violation of Article 9**

110. With respect to allegations of violation of Article 9 of the African Charter, guaranteeing freedoms of expression, the Complainants submit that the deportation of Mr. Meldrum deprived him of his rights to receive information, and disseminate his opinions, as well as the right of the general citizenry to receive information.
111. Article 9 (1) of the African Charter provides that every individual shall have the right to receive information. Article 9 (2) state that “every individual shall have the right to express and disseminate his opinions within the law”. Does the deportation of the victim violate his right to freedom of expression?
112. It should be recalled that the victim’s deportation arose from the publication of an article that the Respondent State did not appreciate. The Respondent State resorted to deportation in order to silence him, in spite a court order that he can stays in the country. Admittedly, he is not prevented from expressing himself where ever he was deported to, but vis-à-vis his status in the Respondent State, which is a State Party to the African Charter, his ability to express himself as guaranteed under Article 9 was violated.

#### **Alleged violation of Article 12 (4)**

113. In the same vein, the deportation of the victim by the Respondent State amounts to a violation of Article 12 (4) of the African Charter, which provides that *“a non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law’*.

114. The African Commission notes that the import of this provision under the African Charter is to ensure that due process is followed before legally admitted non-nationals are expelled from a Member State. In the *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola* case<sup>13</sup>, the African Commission stated that although African States may expel non-nationals from their territories, the measures that they take in such circumstances should not be taken at the detriment of the enjoyment of human rights, and that while the Charter does not bar a State's right to deport non-nationals *per se*, it does require deportations to take place in a manner consistent with the due process of law.<sup>14</sup>
115. The African Charter's requirement of due process as outlined above is also shared by similar systems elsewhere. The Human Rights Committee under the International Covenant on Civil and Political Rights, for instance, had expressed a similar concern over the treatment of aliens being deported from Switzerland when it held the latter liable for degrading treatment and use of excessive force resulting on some occasions in the death of the deportee during deportation of aliens.<sup>15</sup> The Committee recommended that Switzerland should "*ensure that all cases of forcible deportation are carried out in a manner which is compatible with articles 6 and 7 of the Covenant*" and that "*restraint methods do not affect the life and physical integrity of the persons concerned*".<sup>16</sup>
116. Very clearly, the situation as presented by the Respondent State did not afford the victim due process of law for protection of his rights. The Respondent State ignored the Court orders that he be allowed to stay in the country. The African Commission thus holds the Respondent State in violation of the provisions of Article 12(4) of the African Charter.

### **Alleged violation of Article 26**

117. With respect to the alleged violation of Article 26, the Complainants argue that by refusing to comply with court decisions, the Respondent State not only violated Article 7, but also violated Article 26. Article 26 of the Charter provides that State Parties shall have the duty '*.....to guarantee the independence of the courts...*' The Complainants argue further that the deportation is in violation of Article 7 (a) and (b) as read together with Article

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<sup>13</sup> Communications 159/1996.

<sup>14</sup> Id. Para 23.

<sup>15</sup> The UN Human Rights Committee, ICCPR, A/57/40 vol. I (2002) at para. 76 (13).

<sup>16</sup> *Ibid.*

26 of the Charter, noting that Article 7 gives meaning to the individual right, whilst Article 26 emphasizes on the importance of ensuring the independence and integrity of the institutions which give effect to the right in Article 7.

118. It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.<sup>17</sup>
119. It is a vital requirement in a state governed by law that court decisions be respected by the state, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.
120. Thus, by refusing to comply with the High Court orders, staying the deportation of Mr. Meldrum and requiring the Respondent State to produce him before the Court, the Respondent State undermined the independence of the Courts. This was a violation of Article 26 of the African Charter.
121. In view of the above reasoning, the African Commission:  
holds that the Respondent State, the Republic of Zimbabwe, has violated Articles 1, 2, 3, 7(1) (a) and (b), 9, 12(4) and 26 of the African Charter.

The African Commission recommends that the Respondent State should:

- a. Take urgent steps to ensure court decisions are respected and implemented;
- b. Rescind the deportation orders against Mr Andrew Meldrum, so that he can return to Zimbabwe, if he so wishes, being a person who had permanent residence status prior to his deportation. The status quo ante to be restored;
- c. Ensure that the Supreme Court finalizes the determination of the application by Mr Meldrum, on the denial of accreditation;
- d. In the alternative, taking into account that the AIPPA has undergone considerable amendments, grant accreditation to Mr Andrew Meldrum, so that he can resume his right to practice journalism; and

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<sup>17</sup> See the views expressed by K Ryan, in "Judges, Courts and Tribunals", paper presented at the Australian Judicial Conference Symposium on Judicial Independence and the Rule of Law at the Turn of the Century, Australian National University, Canberra, 2 November 1996.

- e. Report to the African Commission within six months on the implementation of these recommendations.

**Adopted during the 6<sup>th</sup> Extra – Ordinary Session of the ACHPR, Banjul, The Gambia. April, 2009.**

## Communication 297/2005: Scanlen & Holderness / Zimbabwe

### Summary of the facts:

1. The Complainants are the Independent Journalists Association of Zimbabwe, the Zimbabwe Lawyers for Human Rights and the Media Institute of Southern Africa. The Respondent State is the Republic of Zimbabwe, a State Party to the African Charter on Human and Peoples' Rights (the African Charter).
2. The Complainants submit that on 18 March 2002, the Respondent State enacted a legislation known as the Access to Information and Protection of Privacy Act (AIPPA), Chapter 10:27. Section 79 subsection 1 of the Act provides that: "No journalist shall exercise the rights provided in Section 78<sup>1</sup> in Zimbabwe without being accredited by the Commission." The Commission being referred to here is the Media and Information Commission (MIC) established under AIPPA, the Zimbabwe legislation, subject of this Communication.
3. According to the Complainants, the Media and Information Commission (MIC) is managed by a Board appointed by the Minister of Information and Publicity, or other Ministers the President assign the administration of the AIPPA. Complainants allege that the Minister acts in consultation and in accordance with directions from the President of the Republic of Zimbabwe.
4. It is also alleged that no journalist may practice journalism unless he/she is accredited by the MIC and that Section 80 of the AIPPA provides that a

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<sup>1</sup> Section 78 provides that "*Subject to this Act and any other Law, a Journalist shall have the following rights (hereinafter in this Act collectively referred to as "journalistic privilege"),*

- i. to enquire gather, receive and disseminate information;*
- ii. to visit public bodies with the express purpose of carrying out duties as a journalist;*
- iii. to get access to documents and materials as prescribed in this Act;*
- iv. to make recordings with the use of audio-video equipment, photography and cine-photography;*
- v. to refuse to prepare under his signature reports and materials inconsistent with his convictions;*
- vi. to prohibit the publication of, remove his or her signature from or attach conditions to the manner of using a report or material whose content was distorted, in his or her opinion, in the process of editorial preparation."*

journalist found guilty of abusing his or her journalistic privilege is liable to a fine or imprisonment for a period not exceeding two years.

5. It is further submitted by the Complainants that Sections 79 (1) and 80 (1) (b) of the AIPPA contravene Article 9 of the African Charter on Human and Peoples' Rights which provides that:

*"[e]very individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law."*

6. According to the Complainants, compulsory accreditation of journalist, irrespective of the quality of the accrediting agency, interferes with freedom of expression. They state that accreditation fees provided for under the Law are an additional restriction on freedom of expression. They allege that compulsory accreditation of journalists by a Commission which lacks independence interferes with professional independence and the autonomy of the journalism profession. The Complainants submit further that, the MIC is not democratically constituted. Its constitution and control is not consistent with democratic values.
7. The Complainants submit further that self-regulation is a central feature of an independent profession and that the AIPPA is inherently inimical to freedom of expression and has no justification in a democratic society.
8. The Complainants claim further that they have a real and substantive interest in the matter as they were established to protect human rights and the freedom of expression.
9. They submit finally that they have exhausted local remedies and that they have litigated the issues in the highest court in Zimbabwe, whereby the Supreme Court of Zimbabwe declined to declare unconstitutional, the intentional publication of falsehoods and compulsory accreditation of journalists.

### **Complaint**

10. The Complainants allege that Section 79 (1) and Section 80 of the Access to Information and Protection of Privacy Act of Zimbabwe contravene Article 9 of the African Charter on Human and Peoples' Rights.

### **Procedure**

11. The Secretariat of the African Commission on Human and Peoples' Rights acknowledged receipt of the Communication on 10 February 2005 and informed the Complainants that the Communication was registered as Communication 297/2005 – Scanlen & Holderness (on behalf of

Independent Journalists Association of Zimbabwe Lawyers for Human Rights and Media Institute of Southern Africa)/Zimbabwe.

12. The Secretariat also informed the Complainants that the Communication would be considered for seizure at the 37<sup>th</sup> Ordinary Session of the Commission scheduled to take place from 27 April to 11 May 2005, in Banjul, The Gambia.
13. On 2 June 2005, the Secretariat informed both parties that during its 37<sup>th</sup> Ordinary Session the African Commission considered the Communication and decided to be seized thereof. The Secretariat also informed them that the Commission intended to consider the Communication on admissibility at its 38<sup>th</sup> Ordinary Session to be held from 21 November to 5 December 2005. It requested the parties to forward their arguments on admissibility within three (3) months from the date of the notification.
14. On 18 August 2005, the Secretariat sent reminders to both parties requesting them to submit their arguments on admissibility.
15. On 12 September 2005, the Secretariat received the Complainants' arguments on admissibility.
16. On 14 December 2005, the Secretariat wrote to both parties informing them that during its 38<sup>th</sup> Ordinary Session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission considered the Communication and declared it **admissible**.
17. The Secretariat also informed both parties that the African Commission intended to consider the Communication on the merits at its forthcoming session, and invited the parties to forward their arguments on the same.
18. On 6 March 2006, the Secretariat received and acknowledged receipt of the Complainants' submissions on the merits.
19. On 4 April 2006, the Secretariat wrote a reminder to the Respondent State to submit their arguments on the merits.
20. During the 39<sup>th</sup> Ordinary Session held from 11 – 25 May 2006, in Banjul, The Gambia, the Respondent State submitted its arguments on the merits.
21. On 26 July 2006, the Secretariat wrote to both parties informing them that, at its 39<sup>th</sup> Ordinary Session held from 11 – 25 May 2006, in Banjul, The Gambia, the African Commission considered the above Communication and decided to defer its decision on the merits to its 40<sup>th</sup> Ordinary Session to be held from 15 – 29 November 2006 in Banjul – The Gambia.

22. On 8 December 2006, the Secretariat informed both parties that at its 40<sup>th</sup> Ordinary Session, the African Commission considered the Communication and decided to defer its decision on the merits to its 41<sup>st</sup> Ordinary Session scheduled from 16-30 May 2007 in Ghana.
23. On 25 June 2007, the Secretariat wrote to both parties informing them that at its 41<sup>st</sup> Ordinary session the Commission considered the Communication and deferred its decision on the merits to its 42<sup>nd</sup> Ordinary Session, in order to finalise the draft decision.
24. On 19 December 2007, the Secretariat wrote to both parties informing them that at its 42<sup>nd</sup> Ordinary Session held from 15 to 28 November 2007 in Brazzaville, Congo, the African Commission considered the Communication and deferred its decisions on the merits to its 43<sup>rd</sup> Ordinary Session.
25. At its 43<sup>rd</sup> Ordinary Session held in Ezulwini, Kingdom of Swaziland from 7 – 22 May 2008, the African Commission deferred consideration of the Communication to its 44<sup>th</sup> Ordinary Session.
26. By Note Verbale of 2 July 2008 and letter of the same date, the Secretariat informed both parties of the Commission's decision.
27. At its 44<sup>th</sup> Ordinary Session held in Abuja, Federal Republic of Nigeria from 10 – 24 November 2008, the African Commission deferred consideration of the Communication.
28. By Note Verbale of 5 December 2008 and letter of the same date, the Secretariat informed both parties of the Commission's decision.

## **Law**

### **Admissibility**

#### **The State's Submission**

29. The Respondent State submits that the Communication does not meet the requirements of admissibility under the *African Charter on Human and Peoples' Rights* because:
  - (i) the Complainants fail to disclose a violation of Article 9 of the *Charter* and;
  - (ii) the Complainants have not exhausted local remedies as required under Article 56 (5).

### **Non exhaustion of local remedies**

30. The Respondent State claims that the Complainants have not approached the Supreme Court of Zimbabwe to seek redress in terms of Section 24(1) of the *Constitution of Zimbabwe* and, as such, the Communication should be considered inadmissible.
31. Section 24(1) affords every person the opportunity to obtain expeditious redress if any of the rights under the *Declaration of Rights* in the Constitution of Zimbabwe are infringed. The Supreme Court has a wide discretion to grant any form of redress in order to enforce the *Declaration of Rights*.
32. The Respondent State made reference to a decision of the Supreme Court in the *Association of Independent Journalists* case, whereby the Supreme Court struck down Sections 80 (1) (a), (b) and (c) as unconstitutional and the sections were subsequently repealed and substituted through *Section 18 of Act 5 of 2003*.
33. The Respondent State submits further that the Complainants have not challenged the constitutionality of the substituted provision before the courts in Zimbabwe, arguing that Complainants are therefore requesting the African Commission to become a tribunal of first instance, a function which it cannot fulfill, either as a legal or practical matter.

### **Complainants submissions on admissibility**

34. In response to the State Party arguments, the Complainants submits that, the Communication meets the requirements of Article 56(5) of the Charter as all national remedies have been exhausted. The Complainants concede that in terms of the hierarchy of the courts of Zimbabwe, the Supreme Court is the final arbiter on constitutional and human rights matters. They argue that Section 24 of the Constitution of Zimbabwe stipulates that an individual who feels that her or his rights as enshrined in the Chapter on the Declaration of Rights in the Constitution, have been or are likely to be infringed shall approach the Supreme Court as a court of first instance. The Complainants state that the Supreme Court was approached, and it ruled that accreditation and registration of Journalists was constitutional and mandatory, for any individual who intends to pursue the profession of journalism in Zimbabwe. Pursuant to that decision<sup>2</sup>, the Complainants claim they had no other means of remedying the situation but to approach

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<sup>2</sup> Judgment No S.C. 136\02; Const. Application NO. 252\02; Supreme Court of Zimbabwe,, Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malab JA; Harare November 21, 2002 & February 5, 2004.

the African Commission. They argue therefore that the requirement of Article 56(5) of the Charter have been met.

35. The Complainants state further that, the Supreme Court decision which upheld the requirement for compulsory registration by the MIC is tantamount to an intrusion in the actual right to freedom of expression. The Complainants submit that the African Commission has held in **Media Rights Agenda and Other vs. Nigeria**<sup>3</sup>, that onerous conditions of accreditation and total discretion by the registration board, effectively giving government the power to prohibit publication of newspapers or magazines are akin to censorship and seriously endanger the right of the public to impart and receive information in contravention of Article 9 (1) of the Charter.
36. The Complainants argue further that the Supreme Court found that the proscription of false news can never be said to be unconstitutional, noting that the reasoning of the Supreme Court was that falsehood is the antithesis of the truth of information.<sup>4</sup> They claim that the Supreme Court found that there was no constitutional protection for false news.
37. They claim it is on that basis that they have brought their Communication to the African Commission, arguing that there is no domestic remedy available in Zimbabwe to afford protection to a distributor of false news or fiction or false cartoons.

### **Decision of the African Commission on admissibility**

38. The African Commission, having considered the criteria on admissibility under Article 56 of the Charter, is satisfied that the Communication indicates the authors, that it falls within the *ratione materiae* and *ratione temporis* of the Charter and the Constitutive Act, and is therefore compatible with the Charter. It does not use disparaging language, it has provided information and facts on the decision of the Supreme Court of Zimbabwe, including Affidavits on which the Complaint is based. It was submitted within reasonable time, and is not a subject of adjudication in any other tribunal and nor previously settled by another international tribunal.
39. The only criterion which the African Commission has to look at is whether the Communication satisfies Article 56(5). Having analysed the

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<sup>3</sup> Communications 105/1993, 128/1994 and 130/1994.

<sup>4</sup> In that decision, the Supreme Court stated that “The Constitution confers no right on an individual to falsify or fabricate information or publish falsehoods. Section 20 of the Constitution protects the right to impart and receive information, not falsehoods. Falsehoods are not information.”

submissions by both parties on the question of exhaustion of domestic remedies, the African Commission is satisfied that in the light of the Supreme Court decision, **Constitutional Application No 252/02**,<sup>5</sup> spelling out the position of the law in Zimbabwe concerning the provisions applicable to the accreditation and registration of journalists, which is a binding authority in Zimbabwe, it would have been futile for the Complainants to go to the Supreme Court in order to exhaust domestic remedies.

40. Taking into account all the foregoing submissions, the Commission decides to declare the Communication admissible.

### **Consideration of the merits**

#### **Complainants' submissions**

41. The Complainants argue that the emphasis on the right to freedom of expression in ensuring democracy is such that regulation, other than self-regulation, is undesirable in a democratic society. They argue further that practical considerations for media regulation arise from the need for resource management, need to ensure equal access, competition laws and minority rights, public service considerations, consumer protection and revenue considerations. All the aforesaid factors are applicable to electronic media house regulation and not applicable to regulation of journalists.
42. The Complainants submit further that there is no necessity for additional measures to control journalists in Africa because in virtually all jurisdictions in Africa, there are civil and criminal sanctions for *injuria* and defamation which already regulate the conduct of journalist in the discharge of their work.
43. The Complainants submit further that the registration requirements and procedures are unduly intrusive and burdensome, particularly inquiries into individuals' private details such as one's marital status, passports numbers, expiring dates of passports, place of issue of passports, driver's license numbers, demands for residential addresses, and details related to any criminal record. Others include demand for details concerning specific assignments to be covered by the journalists, all of which impose prior self-censorship as a precondition to acquire accreditation. They argue that the accreditation form have to be examined and approved by both the Permanent Secretary and the Minister, thereby establishing control of journalists by central government.

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<sup>5</sup> Please see Footnote 3 above.

44. According to the Complainants, the fact that one has to be accredited to a media house and obtain the support of a media house to successfully apply for accreditation amounts to restriction on the practice of journalism and the free flow of information.
45. They submit that a foreign journalist is required to pay as much as US\$1,050 for accreditation and registration to carry out a temporary assignment.
46. The Complainants submit further that even more restrictive and unreasonable is the fact that there is no provision for a permanent accreditation of foreign correspondents. That the US\$12,000,00 requirement per annum accreditation and registration fees for a foreign news agency representative is unduly burdensome, unaffordable for most people in Zimbabwe and an unreasonable restriction on freedom of expression.
47. They claim that the temporary nature of the accreditation is itself particularly ominous and different from the accreditation required to cover specific events. The Complainants argue that accreditation is not aimed at giving the journalist access, but that it is apparent from the legislation that the accreditation is aimed at controlling and even obstructing the work of a journalist.
48. The Complainants argue further that, compliance with formal but onerous and intrusive pre-registration requirements stipulated in the statutory instrument does not guarantee registration of a journalist because the MIC has discretion to decide whether or not to register the journalist.
49. The Complainants urge the African Commission to draw inspiration from legal precedent developed in other regional human rights systems. They specifically draw the attention of the African Commission to Article 13 of the American Convention on Human Rights, which provides, *inter alia*, that:
  - (1) *“Everyone has the right to freedom of thought and expression. This includes freedom to seek, receive and impart information and ideas of all kinds regardless of frontier, either orally or in writing, in print, in the form of art or through any other medium of one’s choice.”*
  - (2) Article 13 paragraph 3, provides that:
  - (3) *“ the right of expression may not be restricted by indirect methods or means such as the abuse of government or private controls over newsprint, radio broadcasting frequencies or equipment used in dissemination of*

*information or by any other means tending to impede the communication and circulation of ideas and opinions.”*

50. The Complainants also cite an Advisory Opinion of the Inter American Court of Human Rights on compulsory registration which dealt with the question of registration of journalists in Costa Rica. The Court stated in this Advisory Opinion that;

*“it is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of freedom and independence of journalists. The compulsory licensing of journalists does not comply with the right to freedom of expression because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting the practice only to a limited group of the community...”<sup>6</sup>*

51. According to the Complainants, Article 13 of the American Convention on Human Rights defines freedom of expression in a way similar to that of Article 9 in the Charter; as “freedom to seek, receive, and impart information and ideas of all kinds.”

52. The Complainants note that the right protected by Article 13 of the American Convention (similar to the right protected under Article 9 of the Charter) has a special scope and character, evidenced by the dual aspect of freedom of expression. That, on the one hand, the prohibition of any restrictions or impediments by governments or privately against the free expression, dissemination of information, communication or circulation of thoughts and ideas, and in that sense, it is a right that belongs to each individual. Its second aspect implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.

53. The Complainants also submit that ‘if you control journalists you control expression, controls are an obstacle to the means of expression and therefore against freedom of expression itself’. According to them, the Respondent State’s attempts to distinguish between freedom of the press and freedom of expression are not sustainable. They add that, although freedom of expression encompasses a wider range of activities than freedoms of the press, in that sense the two are different. Freedom of the press is an element of freedom of expression.

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<sup>6</sup> OC-5/85, November 13, 1985, Ser.A, N0.5.

54. The Complainants argue further that, freedom of expression goes further than the theoretical recognition of the right to speak or to write. They submit that it also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.
55. The Complainants argue that the both the Inter-American Convention on Human Rights and the Universal Declaration of Human Rights proclaim that freedom of thought and expression includes the right to impart information and ideas through “any... medium”, and this means that the expression and dissemination of ideas and information are indivisible concepts. They submit that, the restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. They argue further that the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derive from this concept. They state that in its social dimension, freedom of expression is a means of the interchange of ideas and information among human beings and for mass communication and includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others.
56. The Complainants refer the African Commission to the Zambian case of **Francis Kasoma v The Attorney General**<sup>7</sup>, where compulsory registration of journalists ordered by the Zambian government was declared unconstitutional by the Zambian High Court in 1997. According to the Complainants, in that case, journalists were obliged to become members of a Media Association of Zambia and to register with a statutory Media Council. They submit that the High Court of Zambia quashed the decision and among the reasons given by the High Court Judge is that:

*“I do not in my view consider the decision to constitute the Media Council of Zambia to be in furtherance of the general objectives and purpose of the Constitutional powers, among them, to promote democracy and related democratic ideals such as freedom of expression, and press freedom in particular. ... The decision to create the Media Council of Zambia is no doubt going to have an impact ... on freedom of expression in that failure of one to affiliate himself to the Media Council of Zambia, or in the event of breach of any moral code determined by the council would entail losing his status as a journalist, and with the denial of the opportunity to express and communicate his ideas through the media”.*

57. The High Court in Zambia went on to state that

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<sup>7</sup> (Zambia High Court civ. Case N0. 95/HP/2959)

*‘in light of the above it cannot be seriously argued that the creation of the Media Association or any other regulatory body by the Government would be in furtherance of the ideal embodied in the Constitution, vis-à-vis freedom of expression and association. Consequently, I find that the decision to create the Media Association is not in furtherance of the objectives or purposes embodied in the Constitution in particular those protected in Articles 20 and 21 [which guarantee freedom of expression and association]’.*

58. The Complainants further submitted that the provision under section 84 of the AIPPA, which makes it compulsory to renew accreditation after a maximum period of twelve months, i.e. at the end of each calendar year, places journalists in a position of permanent insecurity. This, according to them, will have an extremely chilling effect on their ability to freely practice their trade and will inevitably lead to various degrees of self-censorship.
59. The Complainants argue that in those very rare instances where expression really does pose a risk to society, as in the example from Rwanda cited by the Respondent, this should be addressed through the criminal law, not by generalized restrictions on all journalists.
60. The Complainants submit that the real purpose of the licensing system established by AIPPA is to provide the Government with a measure of control over journalism and to prevent, or at least limit critical reporting. As a result, they claim, the licensing system for journalists imposed by the contested provisions of AIPPA does not serve a legitimate aim as required under international law.
61. In conclusion, the Complainants submit that modern jurisprudence accepts that it is contrary to freedom of expression to criminalize falsehoods, and to support this argument, they cite **Chavunduka and Another v Minister of Home Affairs and Another**<sup>8</sup>, where the Supreme Court of Zimbabwe observed that:

*“Plainly, embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered HOLMES J so wisely observed in **United States v Schwimmer 279 US 644 (1929) at 654**, the fact that the particular content of a person’s speech might “excite popular prejudice” is no reason to deny it protection for “if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought-not free thought of that we hate.” Mere content, no matter how offensive, cannot be determinative of whether a statement*

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<sup>8</sup> 2000 Vol. 1 Z.L.R page 552 at 558

*qualifies for the constitutional protection afforded to freedom of expression.”*

### **Respondent State’s arguments on the merits**

62. The Respondent State on its part submits that the Complainants have failed to establish a violation of Article 9 of the Charter, adding that it is misleading to suggest that the MIC is susceptible to political manipulation and control. According to the Respondent State, the operations of the MIC are controlled and managed by a Board which consists of no fewer than five members and more than seven members of whom at least three shall be nominated by an association of journalists and an association of media houses. The Respondent State submits that the Complainants’ suggestion that the registration process is prejudicial to them is baseless as there are other independent journalists who have been registered even though their work is critical of the government.
63. It is incorrect, the Respondent State argues, to suggest that Section 80 of the AIPPA unreasonably restricts the right to freedom of expression and dissemination of information. According to the Respondent State, Section 80 restricts not all falsehoods, but only those that are willfully published and that are likely to injure the public interest. In the opinion of the Respondent State, such restrictions are reasonably necessary and cannot be held to be excessively invasive of the enjoyment of the guaranteed right.
64. On the allegation that the AIPPA seeks to regulate the media, the Respondent State submits that the Constitutional Court has already held that accreditation of journalists and the licensing of electronic media is constitutional as long as the requirements for such accreditation and licensing are not onerous.<sup>9</sup> The Respondent State also made reference to the Provisions of Article 19 of the ICCPR and Article 9 of the African Charter to the effect that the right is subject to regulation by law.
65. In response to the Complainants’ submission that journalists should not be regulated by statute but should be self-regulating, the Respondent State submits that this amounts to no regulation, and goes beyond what is permissible, adding that regulation of the media including licensing of journalist is permissible.

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<sup>9</sup> The State in this regard makes references to the *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity and 2 others SC-111-04*, *Association of Independent Journalists and Others v The Minister of State for Information and Publicity and 2 Others SC-136-02*, and *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe and Others SC-128-02*.

66. The Respondent State argues further that in terms of Article 9 of the African Charter together with Article 19(3) of the ICCPR, freedom of expression is not absolute. Those restrictions are permissible if provided by law and are necessary. The Respondent State cites the case of **Athukorale and others, supra** where it was held that:

*“Absolute and unrestricted individual rights do not and cannot exist in a modern State. The welfare of the individual, as a member of collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs.”*

67. The Respondent State submits that the Constitution of Zimbabwe contains a justiciable Bill of Rights and Section 20(1) provides that everyone has a right to freedom of expression. It states further that, in terms of Section 20 (2) of the Constitution, the right can be restricted.

68. The Respondent State argues further that in terms of the Zimbabwe Constitution the freedom of expression is guaranteed with permissible limitations. This is in accordance with Article 9 of the African Charter which guarantees the enjoyment of the right “within the law”, and according to the Respondent State, the “law” referred to in Article 9 of the Charter, relates to “domestic law”.

69. The Respondent State submits that what is explicit in the African Charter is the recognition that the exercise of the right is subject to national law, adding that the Complainants conveniently avoided to mention or place emphasis on the wording of the Article in question.

70. AIPPA, according to the Respondent State, is a law made in terms of the Constitution of Zimbabwe and Section 79 thereof has been held by the Zimbabwean Constitutional Court as constitutional. The State cites **Associate Newspapers of Zimbabwe (Pvt) v The Minister of State for Information and Publicity and 2 Others** SC 111/04 and **Association of Independent Journalists and 2 Others v The Minister of State and 2 Others** SC. 136/02 to support this submission.

71. The State submits further that the practice of journalism does not place it beyond statutory regulation and any such law has however to conform to the stringent requirements of limitations provided for by the Constitution, and according to the State, Section 79 of AIPPA passes the test.

72. The Respondent State states further that the registration exercise is of a technical nature, it is not onerous, and urges the Commission to find Section 79 of AIPPA does not contravene the right to freedom of expression under Article 9 of the African Charter.

73. With respect to Section 80 of AIPPA, the Respondent State submits that the provision makes it an offence to intentionally publish falsehoods which threatens the interests of defence, public safety, public order, the economic interests of the State, public morality or public health or are injurious to reputation, rights and freedoms of other persons.

74. The Respondent State concludes its submission by arguing that, the provisions of AIPPA being challenged by the Complainants have been declared Constitutional and hence comply with the qualification under the African Charter's exercise of the freedom of expression "**within the law.**"

75. The Respondent State calls on the Commission to dismiss the Communication.

### **Decision of the African Commission on the merits**

76. In the present Communication, the Complainants allege that Section 79 (1) and Section 80 of the AIPPA contravene Article 9 of the African Charter. Section 79 (1) of AIPPA provides that "*No journalist shall exercise the rights provided in Section 78 in Zimbabwe without being accredited by the Commission.*" Section 78 meanwhile provides that:

- (1) "*Subject to this Act and any other Law, a Journalist shall have the following rights (hereinafter in this Act collectively referred to as "journalistic privilege"),*
- (2) *to enquire, gather, receive and disseminate information;*
- (3) *to visit public bodies with the express purpose of carrying out duties as a journalist;*
- (4) *to get access to documents and materials as prescribed in this Act;*
- (5) *to make recordings with the use of audio-video equipment, photography and cine-photography;*
- (6) *to refuse to prepare under his signature reports and materials inconsistent with his convictions;*
- (7) *to prohibit the publication of, remove his or her signature from or attach conditions to the manner of using a report or material whose content was distorted, in his or her opinion, in the process of editorial preparation."*

77. Section 80 provides for instances which constitute abuse of journalistic privileges, as well as the punishment that goes with such abuse. Section 80 (1) provides that;

*"[a] journalist shall be deemed to have abused his journalistic privilege and committed an offence if he does the following:  
falsifies or fabricates information;  
publishes falsehoods*

*except where he is a freelance journalist, collects and disseminates information on behalf of a person other than the mass media service that employs him without the permission of his employer; contravenes any of the provisions of this Act;"*

78. Section 80(2) states that;

*"[a] person who contravenes subparagraphs (a) to (d) of Subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding two years."*

79. In the present Communication, the Commission is called upon to make a determination whether Section 79 (1) which requires compulsory accreditation of journalists, and Section 80 which prohibits and punishes the publication of falsehood violate the right to freedom of expression guaranteed under Article 9 of the African Charter.

80. Article 9 of the African Charter provides that:

*"(1). every individual shall have the right to receive information.  
(2). every individual shall have the right to express and disseminate his opinions within the law."*

81. Article 9 of the Charter guarantees the right to freedom of expression, which includes the right to receive information and the right to express and disseminate opinions within the law.

82. The Complainants submit that the law imposed by the Respondent State is unreasonable and restrictive to freedom of expression, thus violates Article 9 of the Charter.

83. The Respondent State on the other hand contends that the restrictions imposed by the AIPPA are reasonable, *within the law* and necessary for maintenance of public order. The Respondent State argues further that the right to freedom of expression is guaranteed within permissible limitations, and that it is not an absolute and unrestricted individual right.

84. To determine whether the requirements of Section 79(1) and Section 80 of AIPPA are in contravention of the African Charter, the African Commission will examine what these two provisions mean, and also examine the meaning of Article 9 of the Charter, with a view to determine whether or not there is a violation of Article 9 of the African Charter.

85. Section 79 of AIPPA reads as follows:

*No journalist shall exercise the rights provided in section seventy-eight in Zimbabwe without being accredited by the Commission...*

*Any person who wishes to be accredited as a journalist shall make an application to the Commission in the form and manner and accompanied by the fee, if any, prescribed: Provided that a mass media service or news agency may file an application for accreditation on behalf of journalists employed by such mass media service or news agency....*

*(5) The Commission may accredit an applicant as a journalist and issue a press card to the applicant if it is satisfied that the applicant- (a) has complied with the prescribed formalities; and (b) possesses the prescribed qualifications; and (c) is not disqualified by virtue of subsection (2), or applies for accreditation in terms of subsection (4).*

*Every news agency that operates in Zimbabwe, whether domiciled inside or outside Zimbabwe, shall in respect of its local operations not employ or use the services of any journalist other than an accredited journalist who is a citizen of Zimbabwe, or is regarded as permanently resident in Zimbabwe by virtue of the Immigration Act [Chapter 4:02]:*

*Provided that the news agency may employ or use the services of a journalist referred to in subsection (4) for the duration of that journalist's accreditation.*

86. The Complainants are asking the African Commission to determine whether the conditions stipulated under Section 79 amount to restrictions, which constitute a violation of Article 9 of the African Charter. It is evident from the above provision that the compulsory accreditation of journalists can result in the imposition of liability, including penal sanction for those who cannot, or may not be able to fulfil the requirements of accreditation, and to that end are deemed to intrude on the professional practice of journalism.
87. Does compulsory accreditation in itself affect the enjoyment of freedom of expression?
88. Section 79(1) requires that before a journalist practices his/her profession within the Respondent State's territory, he/she must *apply for* and *obtain* a certificate of accreditation from the MIC. Section 83 of the AIPPA makes it clear that;

*'(1) No person other than an accredited journalist shall practice as a journalist nor be employed as such or in any manner hold himself out as a journalist'.*

89. Official accreditation of a journalist is a mandatory precondition for operating within the Respondent State. Criminal sanctions are imposed for operating without accreditation. There are mandatory requirements for accreditation and the possession of the requisite qualifications does not guarantee provision of a certificate of accreditation.
90. The African Commission considers that registration procedures are not in themselves a violation of the right to freedom of expression, provided they are purely technical and administrative in nature and do not involve prohibitive fees, or do not impose onerous conditions. The requirements set out in AIPPA, in the opinion of the Commission, undoubtedly have a negative effect on the exercise of freedom of expression. There are no good grounds for official involvement in the registration of journalists. It creates considerable scope for politically motivated action by the authorities. The regulation of the media should be a matter for self-regulation by journalists themselves through their professional organizations, or associations.
91. A regulatory body such as the MIC whose regulations are drawn up by government cannot claim to be self-regulatory. Any act of establishing a regulatory body by law brings the body under the control of the State. This is exactly the case with the AIPPA.
92. The compulsory accreditation of journalists has been held at both national and international levels to be a hindrance to the effective enjoyment of the right to freedom of expression.
93. In its *Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*,<sup>10</sup> the Inter-American Court of Human Rights emphasized the important role of the press in the development of a free and democratic society. The Costa Rican government approached the Court for advisory opinion whether ‘...*the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism is permitted or included among the restrictions or limitations authorized by Articles 13 and 29 of the American Convention on Human Rights*’. In responding to the Costa Rican government’s question the Court stated that a law providing for compulsory association and, thus, barring non-members from the practice of journalism was incompatible with the American Convention, as it would deny access

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Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985).

to the full use of the news media as a means of expressing opinions or imparting information.

94. The Inter-American Court noted further that compulsory licensing of journalists or the requirement of a professional identification card does not mean that the right to freedom of thought and expression is being denied, nor restricted, nor limited, but only that its practice is regulated. Compulsory licensing, the Court held, *'seeks the control, inspection and oversight of the profession of journalists in order to guarantee ethics, competence and the social betterment of journalists...'* The accreditation of journalists may thus be beneficial to the profession, provided though it is done in a manner that does not infringe on the effective enjoyment of the rights of journalists to freely express themselves or receive and disseminate information.
95. Distinguishing the compulsory registration of persons of other profession from the registration of journalists, the Court held that;

*'.....within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional...The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom " to seek, receive, and impart information and ideas of all kinds... either orally, in writing, in print....". The profession of journalism - the thing journalists do - involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the [Charter] guarantees'.<sup>11</sup>*

96. The Court went on to state that;

*'.....this is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine - that is to say, the things that lawyers or physicians do - is not an activity specifically guaranteed by the Convention [Charter].*

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Id. Paras 71-73.

*It is true that the imposition of certain restrictions on the practice of law would be incompatible with the enjoyment of various rights that the Convention guarantees....But no one right guaranteed in the Convention exhaustively embraces or defines the practice of law as does Article 13 when it refers to the exercise of a freedom that encompasses the activity of journalism. The same is true of medicine'.<sup>12</sup>*

97. The African Commission has considered the opinion expressed by the Inter American Court on Human Rights in the Costa Rican case, and finds a great deal of persuasion in the reasoning and the approach adopted by the Inter American Court on the question of compulsory licensing of journalists. The Commission is convinced that the question of compulsory accreditation is the same as compulsory licensing which was addressed by the Inter American Court. The Commission is inclined to accept the argument that compulsory licensing or accreditation amounts to a restriction of the freedom to practice the journalist profession where it aims to control rather than regulate the profession of journalism. Regulation is acceptable where it aims at the identification of journalists, the maintenance of ethical standards, competence, and the betterment of the welfare of journalists. In other words the aim of registration should be for purposes of betterment of the profession rather than its control, since control by its nature infringes the right to express oneself. Article 60 and 61 of the African Charter enjoin the Commission to seek inspiration from other international human rights instruments, precedent and doctrine.

98. The Inter American Court found that compulsory licensing aimed at controlling journalists was a violation of Article 13 of the American Convention. By applying the same logic, and analogy to the conditions stipulated for compulsory accreditation under AIPPA, without which, one could not practice journalism, the African Commission finds that section 79 of AIPPA constitutes a violation of Article 9 under the African Charter..

99. Section 80 of AIPPA makes it clear that;

*'(1) No person other than an accredited journalist shall practice as a journalist nor be employed as such or in any manner hold himself out as a journalist.*

*No person who has ceased to be an accredited journalist as a result of the deletion of his name from the roll, or who has been suspended from practising as a journalist, shall, while his name is so deleted, or is so suspended, continue to practice directly or indirectly as a journalist, whether by himself or in partnership or association with any other person, nor shall he, except with*

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<sup>12</sup>

Id. Papa 74.

*the written consent of the Commission, be employed in any capacity whatsoever connected with the journalistic profession.*

100. The Respondent State argued that the restrictions could be imposed in the interest of public order. It also stated that the limitations are permissible and that the exercise of the right is not absolute. The African Commission having looked at Section 79 of AIPPA, holds that the provision does not mention if the said conditions were made in the interest of public order. In fact the reading of Article 9(2) suggests that the phrase “within the law” applies to the actual dissemination and expression of opinion and ideas, rather than pre accreditation conditions. In our view, any conditions prescribed for the accreditation of journalists should be aimed at facilitating, rather than impeding the exercise of the right. In the **John D. Ouko/Kenya**,<sup>13</sup> the African Commission commenting on Article 9 stated the following;

”[t]he above provision guarantees to every individual the right to free expression, within the confines of the law. Implicit in this is that if such opinion is contrary to laid down laws, the affected individual or government has the right to seek redress in a court of law. Herein lies the essence of the law of defamation.....”

101. The Complainants argue that, the accreditation conditions are onerous, and aimed at controlling journalists through the exercise of prior self censorship, and obstruction of the work of journalists. They submitted that there are civil and criminal sanctions within Zimbabwe, which provide remedies in the event journalists violate legal provisions during the exercise of their profession. They argue against the conditions for compulsory accreditation.

102. The African Commission agrees with these submissions and states that the presence of laws which provide for civil and other legal sanctions in the event of any injury caused, or infraction of the law by journalists during the practice of their profession, coupled with self regulation, would provide an adequate mechanism for the regulation and control of the journalism profession in a democratic society, without the necessity of the rigorous regime under AIPPA.

103. The right to freedom of expression is protected by national, regional as well as international human rights instruments. One common thread that runs through the freedom of expression guarantees at all levels is the fact that the right to freedom of expression is not absolute.

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<sup>13</sup> Communication 232/99, 14<sup>th</sup> Activity Report, also reported in the IHRDA Compilation of Decisions of Communications of the ACHPR, extracted from the Commission’s Activity Reports 1994-2001, at page 149.

104. The European Convention on Human Rights regulates freedom of expression in Article 10(2) and spells out the legitimate aims that can justify the restriction of freedom of expression, states that:

*"[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

105. Article 13 of the American Convention on Human Rights guarantees the enjoyment of the right of freedom of expression. Article 13(2) provides that the exercise of freedom of expression;

*"shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be established by law to the extent necessary to ensure respect for the rights and reputation of others as well as to protect national security, public order, public health, or morals."*

106. Article 10 of the European Convention, 13 of the American Convention and 9 of the African Charter all emphasize that the exercise and enjoyment of freedom of expression can be restricted under lawful conditions.

107. The African Commission has adopted a Declaration of Principles on Freedom of Expression in Africa which upholds certain basic principles aimed at enhancing the enjoyment of freedom of expression. Principle II of the Declaration states that;

*"(1) No one shall be subject to arbitrary interference with his or her freedom of expression; and  
(2). Any restrictions on freedom of expression shall be provided by law, **serve a legitimate interest and be necessary in a democratic society**"(emphasis is added).*

The African Commission reads from the foregoing that the right to freedom of expression may be restricted by legislation which aims to protect the public or individuals, against practice of journalism which deviates from certain basic norms and legitimate interests in a democratic society. The restrictions imposed by AIPPA do not fall within those norms or interests.

108. The individual's right to freedom of expression thus carries with it the right to impart information to others. The right to freedom of expression within the context of the African Charter must also be read together with the duties of the individual under Article 27. Hence when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. When the Charter proclaims that every individual has the right to receive information and disseminate opinions, it also implicitly emphasizes the fact that the expression, reception and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The Commission is thus of the opinion that the two dimensions of the right to freedom of expression must be guaranteed simultaneously.
109. In the present Communication, the Respondent State cites the protection of public order, security and public safety as reasons to ensure the regulation of the profession of journalism. It argues further that the practice of journalism does not place it beyond statutory regulation and any such law has however to conform to the stringent requirements of limitations provided for by the Constitution. The Commission finds that the notion of public order in a State implies conditions that ensure the normal and harmonious functioning of institutions on the basis of an agreed system of values and principles. The Commission notes however that maintenance of public order in the exercise of the freedom of expression is perfectly conceivable without the necessity of restricting the practice of journalists.
110. Further, the same concept of public order in a democratic society demands the greatest possible amount of information. It is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole that ensures this public order.
111. In the instant Communication, the restrictions imposed on the practice of individual journalists can thus not be justified on the grounds of public order.
112. With regards to the Respondent's assertion that the restrictions imposed by the AIPPA are within the domestic law of Zimbabwe, in conformity with Section 20 (2) of the Constitution of the Respondent State, the Commission notes that, the meaning of the phrase "within the law" in Article 9 (2) must be interpreted in the context of Principle II as elaborated under the Declaration of Principles on Freedom of Expression stated hereinabove. In other words, the meaning of the phrase "within the law," must be considered in terms of whether the restrictions meet the legitimate

interests, and are necessary in a democratic society. In addition, the concept of “within the law” employed in the Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

113. In **Dawda Jawara v. The Gambia**<sup>14</sup>, the African Commission elaborated the meaning of such phrases such as; ‘in accordance with the law’, or ‘previously laid down by law’ or ‘within the law’. In that Communications, the Republic of The Gambia defended arbitrary arrests and detention and stated that it was acting within the confines of legislation ‘previously laid down by law’, as required by the wordings of Article 6 of the Charter.

114. The Commission rejected the arguments by The Gambia and restated its decision in **Alhassane Aboubacar v Ghana**<sup>15</sup>, that

*“competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or international human rights standards. This principle applies not only to freedom of association but also to all other rights and freedoms. For a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter...”*

115. The Commission adopts a broader interpretation of phrases such as “within the law” of “in accordance with the law” in order to give effect to the protection of human and peoples’ rights. To be “within the law” the domestic legislation must be in conformity with the African Charter or other international human rights instruments and practices. The Respondent State can not argue that the limitation placed by AIPPA was permissible “within the law” i.e. within its domestic law. This would be tantamount to admitting that the exercise of freedom of expression is left solely at the discretion of each State Party. This, in the opinion of the Commission, will cause jurisprudential/interpretation chaos, as each State Party will have its own level of protection based on their respective domestic laws.

116. The African Commission succinctly made this point in **Constitutional Rights Project; et al /Nigeria**<sup>16</sup> where it stated the following;

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<sup>14</sup> Communications 147/95 and 149/96.

<sup>15</sup> Communication 103/1993.

<sup>16</sup> Consolidated Communication 140/94, 141/94, 145/95 13<sup>th</sup> Annual Activity Report. 1999-2000)

*“[a]ccording to Article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one’s opinion guaranteed at the international level: this would make the protection of the right to express one’s opinion ineffective. To permit national law to take precedence over international law would defeat the purposes of codifying certain rights in international law and indeed, the whole essence of treaty making”*

117. The Commission therefore finds that the Respondent State’s arguments that the accreditation of journalists and prohibition of falsehood are on grounds of public order, safety and for the protection of the rights and reputation of others, to be unsustainable and an unnecessary restriction of the individual’s practice of journalists.

118. Similarly, by preventing journalists from freely exercising their right to freedom of expression, the Respondent State inevitably violates the freedom of expression of the Zimbabwean society by depriving the society the right to receive information due to the restrictions imposed on the journalists’ right to disseminate information.

119. The African Commission therefore finds that Section 80 of the Access to Information and Protection of Privacy Act (Chapter 10:27) of 2002, was not necessary, it did not address any legitimate interest such as to require compulsory accreditation of journalists. It reiterated the restrictions imposed by section 79, without giving any justification for such restrictions. The African Commission therefore finds that Section 80 is incompatible with Article 9 of the African Charter on Human and Peoples’ Rights.

120. The African Commission finds further that while accurate reporting is the goal to which all journalists should aspire, there will be circumstances under which journalist will publish or disseminate information, opinion or ideas, which will contravene other persons’ reputations or interests, national security, public order, health or morals. Such circumstances cannot be foreseen during accreditation. In such circumstances, it is sufficient if journalists have made a reasonable effort to be accurate and have not acted in bad faith.

121. The African Commission acknowledges the argument by the Respondent State that the rights of individuals, including the right under Article 9 are not absolute, hence the inclusion of Article 27 of the Charter on the duties of individual towards others. In the case of journalists, when they fail in their duty to respect the rights of others, when exercising their rights to free expression, then their right ceases to be absolute. It is then that the civil and other legal remedies will take their natural course. The

African Commission holds that the Zimbabwe domestic legal system can grant remedies to such false publication, and which therefore obviate the necessity for the restrictions complained against.

122. To adopt legislation such as AIPPA aimed at or under the pretext of protecting public order, health or morals, is tantamount to imposing conditions for prior censorship.

123. The African Commission is satisfied that Sections 79 and 80 of AIPPA impose restrictive accreditation conditions and excessive burden on journalists and restrict their effective enjoyment of the right to freedom of expression.

124. The Commission thus concludes that the arguments advanced by the Respondent State in justification of the restriction of the journalists' right to freedom of expression are incompatible with obligations assumed by the Respondent State to respect Article 9 of the Charter. Accordingly, the Commission considers that the Communication discloses a violation of Article 9 of the Charter.

125. In view of the above reasoning, the African Commission recommends that the Respondent State:

- (i) **Repeal Sections 79 and 80 of the AIPPA;**
- (ii) **Decriminalize offenses relating to accreditation and the practice of journalism;**
- (iii) **Adopt legislation providing a framework for self regulation by journalists;**
- (iv) **Bring AIPPA in line with Article 9 of the African Charter and other principles and international human rights instruments; and**
- (v) **Report on the implementation of these recommendations within six months of notification thereof.**

**Adopted during the 6<sup>th</sup> Extra – Ordinary Session of the ACHPR, Banjul, The Gambia. April, 2009.**

**Annex 4 – Communication decided the 45<sup>th</sup> Ordinary  
Session**

**266/2003 KEVIN MGWANGA GUNME ET AL/CAMEROON**

**Summary of facts :**

1. The Complainants are 14 individuals who brought the communication on their behalf and on behalf of the people of Southern Cameroon<sup>1</sup> against the Republic of Cameroon, a State Party to the African Charter on Human and Peoples' Rights.
2. The Complaints allege violations which can be traced to the period shortly after "*La Republique du Cameroun*" became independent on 1<sup>st</sup> January 1960. The Complainants state that Southern Cameroon was a United Nations Trust Territory administered by the British, separately from the Francophone part of the Republic of Cameroon, itself a French administered United Nations Trust Territory. Both became UN Trust Territories at the end of the 2<sup>nd</sup> World War, on 13 December 1946 under the UN Trusteeship system.
3. The Complainants allege that during the 1961 UN plebiscite, Southern Cameroonians were offered "two alternatives", namely: a choice to join Nigeria or Cameroon. They voted for the later. Subsequently, Southern Cameroon and *La Republique du Cameroun*, negotiated and adopted the September 1961 federal constitution, at Foumban, leading to the formation of the Federal Republic of Cameroon on 1<sup>st</sup> October 1961. The Complainants allege further that the UN plebiscite ignored a third alternative, namely the right to independence and statehood for Southern Cameroon.
4. The Complainants allege that the overwhelming majority of Southern Cameroonians preferred independence to the two alternatives offered during the UN plebiscite. They favoured a prolonged period of trusteeship to allow for further evaluation of a third alternative. They allege further that the September 1961 federal constitution did not receive the endorsement of the Southern Cameroon House of Assembly.
5. The Complainants allege that the violations suffered by the people of Southern Cameroon emanate from the UN plebiscite of 11 February 1961

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<sup>1</sup> The use of the term "Southern Cameroon" in this Communication is not intended to confer any legal status or recognition. The words "Southern Cameroon" describe the territory of the Respondent State where violations are alleged to have occurred. Unless otherwise expressly stated, the terms, "Southern Cameroonians," "Anglophones," or "Francophones" describe the people said to occupy the two parts of the Republic of Cameroon, which were prior to 1<sup>st</sup> January 1961 either English or French administered UN Trust territories respectively,

- organised to determine the political future of Southern Cameroon, and the failure by the Respondent State to abide by the 1961 federal constitutional.
6. They allege that on 1<sup>st</sup> October 1961 *La Republique du Cameroun*, with the tacit approval of the British government, drafted gendarmes, police and soldiers from the Francophone side into Southern Cameroon, which amounted to “forceful annexation” of Southern Cameroon. They allege that, “[a]t no time was sovereignty over Southern Cameroon transferred to a new Federal United Cameroons or any other entity.” They argue that the failure to exercise the third alternative, impacted negatively on the right of the people of Southern Cameroon to self determination.
  7. The Complainants allege further that “notwithstanding the forceful annexation,” the people of Southern Cameroon remained a separate and distinct people. Their official working language is English, whereas the people in *La Republique du Cameroun* are Francophones. The legal, educational and cultural traditions of the two parts remained different, as was the character of local administration. In spite of the foregoing, they allege further that the Respondent State manipulate demographic data to deny the people of Southern Cameroon equal rights to representation in government. They allege that the people of Southern Cameroon have been denied powerful positions within the national/federal government. They claim that the September 1961 federal constitution was designed to respect those differences.
  8. The Complainants allege further that from the outset of unification in 1961, and the declaration of a unitary state in 1972, Southern Cameroonians remain marginalised. They allege that Southern Cameroon was allocated 20% instead of 22% of the seats in the Federal/National Assembly, as per the population ratio, thus denying them equal representation. They allege that in 1961 West Cameroon was allocated 20 representatives in the Federal Assembly instead of 26. Later when representation to the Assembly was expanded to 180 representatives, West Cameroon was allocated 35 representatives, instead of 40 representatives. The Complainants allege further that the Francophones occupy local administrative positions in Southern Cameroon, and abuse their positions to amass land, and access economic resources, while the Southern Cameroonians play the minutest role at the local or national level.
  9. It is further alleged that several towns in Southern Cameroon were denied basic infrastructure, hence denying them the right to development. It is alleged that the Respondent State, relocated or located various economic enterprises and projects, such as the Chad - Cameroon Oil Pipeline, the deep seaport, and the oil refinery to towns and cities in Francophone

Cameroon, notwithstanding their lack of economic viability, thereby denying employment opportunities and secondary economic benefits to the people of Southern Cameroon.

10. The Complainants allege further that the Francophones have monopolistic control of the Ministry of National Education. That the Respondent State has under funded primary education in Southern Cameroon, it failed to build new schools, understaffed primary schools, and it is closing all teacher training colleges. They allege further that the Respondent State "Cameroonised" the GCE from the University of London, leading to mass protests which forced government to create an independent GCE Board. That, upon unification, diplomas awarded by the City & Guild, a technical education institution based in England, were replaced by the *Certificat d'Aptitude Professionale (CAP)* and the *BAC Technique*. These measure have resulted in persistent high levels of illiteracy in many areas in Southern Cameroon.
11. The Complainants allege that political unification and the application of the civil law system resulted in the discrimination against Anglophones in the legal and judicial system. Southern Cameroonian companies and businesses were forced to operate under the civil law system. The Companies Ordinance of the Federation of Nigeria, which was until then applicable in Southern Cameroon was abolished. Many Southern Cameroonian businesses went bankrupt, following the refusal by Francophone banks to lend them finances, in some cases, unless their articles of association were drafted in French.
12. They allege that Anglophones facing criminal charges were transferred to the Francophone zone for trial, under the Napoleonic Code, thereby adversely affecting their civil rights. The Complainants state that the common law presumption of innocence upon arrest is not recognised under the civil law tradition, since guilt is presumed upon arrest and detention. The courts conduct trial in the French language without interpreters. Furthermore, they allege that Southern Cameroon court decisions are ignored by the Respondent State.
13. The Complainants allege that the entry by the Respondent State as a State Party to the *Organisation pour l'Harmonisation des Droits d'Affaires en Afrique (OHADA)*, a treaty for the harmonisation of business legislation amongst Francophone countries in Africa, constituted discrimination against the people of Southern Cameroon on the basis of language. OHADA stipulates that the language of interpretation of the treaty shall be French. The Complainants argue that the Constitution recognises English and French as the official languages of Cameroon. They argue therefore that by signing the OHADA treaty, Cameroon violated the language rights of the English speaking people of Cameroon. They allege that any

company not registered under the OHADA law cannot open a bank account in Cameroon.

14. The Complainants allege further that, on 3<sup>rd</sup> April 1993, representatives of the people of Anglophone Cameroon adopted the Buea Declaration, which declared the preparedness of the Anglophones *“... to participate in the forthcoming Constitutional talks with their Francophone brothers....”* The Declaration stated that;

- (i) *“...the imposition of the Unitary State on Anglophone Cameroon in 1972 was unconstitutional, illegal and a breach of faith,”*
- (ii) *“That the only redress adequate to right the wrongs done to Anglophone Cameroon and its people since the imposition of the Unitary state is a return to the original form of government of the Reunified Cameroon,*
- (iii) *That to this end, all Cameroonians of Anglophone heritage are committed to working for the restoration of a federal Constitution and a federal form of government, which takes cognizance of the bicultural nature of Cameroon and under which citizens shall be protected against such violations as have been enumerated.*
- (iv) *That the survival of Cameroon in peace and harmony depends upon the attainment of this objective towards which all patriotic Cameroonians, Francophones as well as Anglophones, should relentlessly work.”*

15. Subsequent to the 1993 Buea Declaration, it is alleged that between 29<sup>th</sup> April and 1<sup>st</sup> May 1994, the Second Anglophone Conference convened in Bamenda adopted the Bamenda Proclamation, which stated, *inter alia*, that:

*“....one year since the Anglophone constitutional proposals were officially submitted, the government had not reacted to them;*

*that all efforts to generate the interest and understanding of the Francophone officials and Francophone public generally in the Anglophone constitutional proposals had been greeted with responses ranging from indifference through apathy to hostility.....”*

*IN THE LIGHT OF THE FOREGOING the Anglophone people of Cameroon.....;reiterated the Resolution taken at its first session in April 1993..... It stated further in paragraph 6 of the Proclamation that;*

*“6. Should the Government either persist in its refusal to engage in meaningful constitutional talks or fail to engage in such talks within a reasonable time, the Anglophone Council shall inform the Anglophone people by all suitable means. It shall, thereupon, proclaim the revival of the independence and sovereignty of the Anglophone territory of Southern Cameroon and take all measures necessary to secure, defend and preserve the independence, sovereignty and integrity of the said territory.” (emphasis added)*

16. The Complainants allege that the failure by the Respondent State to address the concerns of the Southern Cameroon people for a new constitution, coupled with the adoption of the 1995 December Constitution by the National Assembly of *La Republique du Cameroun* without public debate, meant that the door was being finally closed on any future constitutional links between the Southern Cameroon and *La Republique du Cameroun*. Henceforth, the Complainants decided to conduct a signature referendum, in view of *“the hostile atmosphere created by the occupying power.....which would not want to allow any form of consultation which might reveal the true suppressed aspirations of the people of Southern Cameroons.”*
17. The Complainants aver that between 1st and 30th September 1995, the Southern Cameroons National Council (SCNC) conducted a signature referendum which revealed that 99% of Southern Cameroonians favour full independence by peaceful separation from the Respondent State.
18. Besides their claim for statehood, the Complainants allege further that human rights of various individuals have been systematically violated by the Respondent State. The Complainants compiled eye witness accounts and field investigations relating to arbitrary arrests, detentions, torture, punishment, maiming and killings of persons who have advocated for the self determination of Southern Cameroon.

### **Complaint**

19. The Complainants allege that;

- (i) *Articles 2, 3, 4, 5, 6, 7(1), 9, 10, 11, 12, 13, 17(1), 19, 20, 21, 22, 23(1), 24 of the African Charter have been violated.*
- (ii) *the Republic of Cameroon has violated its general duty under in Article 26 of the African Charter to guarantee the independence of the judiciary.*

### **Procedure**

20. The complaint was received at the Secretariat of the African Commission on 9<sup>th</sup> January 2003.
21. On 10 January 2003, the Secretariat acknowledged receipt of the complaint.
22. On 19 January 2003, the Secretariat wrote another letter to the Complainants requesting for further information relating to the communication.
23. On 21 April 2003, the Secretariat sent a reminder to the Complainants requesting them to forward their clarifications. By a letter dated 8 May 2003, Counsel for the Complainants sent the clarifications sought by the Secretariat.
24. At its 33<sup>rd</sup> Ordinary Session held from 15 - 29 May 2003 in Niamey, Niger, the African Commission considered the communication and decided to be seized of the matter.
25. On 9 June 2003, the Secretariat informed the parties that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within 3 months.
26. On 9 September 2003, the Complainants informed the Secretariat that they would be forwarding their submissions on admissibility and requested to make oral submissions at the 34<sup>th</sup> session of the African Commission.
27. On 22 September 2003, the Secretariat received the Complainant's submissions on admissibility along with supplemental evidence. The Secretariat acknowledged receipt thereof on the same day.
28. On 3 October 2003, the Respondent State informed the Secretariat that it had not received a copy of the communication forwarded to it by DHL on 9<sup>th</sup> June 2003.
29. On 6 October 2003, the Secretariat wrote to the Complainant requesting for another copy of the supplemental evidence to be forwarded to the Respondent State.
30. On 27 October 2003, the Secretariat transmitted a copy of the Complainant's submissions on admissibility to the Respondent State and informed the latter that the Secretariat would give the accompanying documents to the delegation of Cameroon attending the 34<sup>th</sup> Ordinary Session. The Secretariat also informed the Respondent State that the DHL office in Cameroon had confirmed delivery of the communication.

31. On 27 October 2003, the Secretariat received another copy of the supplemental evidence from the Complainant for onward transmission to the Respondent State. The Secretariat acknowledged receipt of the same.
32. At its 34<sup>th</sup> Ordinary Session held from 6<sup>th</sup> to 20<sup>th</sup> November 2003 in Banjul, The Gambia, the African Commission examined the matter and decided to defer consideration on admissibility of the matter to the 35<sup>th</sup> Ordinary Session because the Respondent State claimed that they were unaware of the communication.
33. On 14 November 2003, the Secretariat furnished the delegates representing the Respondent State at the 34<sup>th</sup> Ordinary Session with the following documents -:
  - A copy of communication 266/2003
  - A copy of the Complainants' submissions on admissibility and the accompanying documents
34. On 4 December 2003, both parties to the communication were informed of the decision of the African Commission to defer consideration of the matter on admissibility to the 35<sup>th</sup> Ordinary Session. The Respondent State was reminded to forward its submissions on admissibility to the Secretariat of the African Commission within 3 months.
35. On 5 March 2004, the Secretariat of the African Commission received the Respondent State's submissions on admissibility and acknowledged receipt of the same on 9 March 2004.
36. At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 21 May - 4 June 2004, the African Commission heard the oral submissions of the parties, and declared the communication admissible.
37. On 15 June 2004, the Secretariat informed the parties about the African Commission's decision and requested them to submit their written submissions on the merits within 3 months.
38. On 13 August 2004, the Secretariat of the African Commission received a correspondence from the Respondent State, which was forwarded to the complainant on 26 August 2004.
39. On 20 September 2004, the Secretariat received the written submissions of the Respondent State on merits, which was transmitted to the Complainants on 12 November 2004.

40. On 23 and 28 September 2004, the Secretariat received the written submissions of the Complainants on the merits, which was transmitted to the Respondent State on 12 November 2004.
41. At its 36<sup>th</sup> Ordinary Session held in Dakar, Senegal from 24 November - 7 December 2004, the African Commission decided to defer its consideration on the merits to the next session. It also rejected an application to stay the proceedings by third parties purporting to represent the applicants claiming to have entered into negotiation with the Respondent State.
42. On 23 December 2004, the Secretariat wrote to the said third parties informing them of this decision.
43. The Commission also decided to forward the decision on admissibility of the communication to the Respondent State, upon its request.
44. On 30 March 2005, the Secretariat received further submissions from the Complainants, who also requested to make oral presentation to the next session.
45. On 31 March 2005, the Secretariat handed over copies of the decision on admissibility and the various submissions from the Complainants to the delegation of the Respondent State that visited the Secretariat on the same date.
46. At the 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 27 April - 11 May 2005, the African Commission considered this communication and decided to defer its decision to the 38<sup>th</sup> Ordinary Session.
47. On 7 May 2005, the Secretariat informed the Respondent State of this decision.
48. The Complainants were notified of the decision on 13 May 2005.
49. On 7 June 2005, the Secretariat received submissions from the complainant, which were sent to the Respondent State.
50. On 12 July 2005, the Secretariat received submissions from the Respondent State, which were later sent to the complainant.
51. At the 38<sup>th</sup> Ordinary Session held from 21 November - 5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on the merits to the 39<sup>th</sup> Ordinary Session.

52. On 30 January 2006, the Secretariat informed the Respondent State of this decision.
53. The Complainants were notified of this decision on 5<sup>th</sup> February 2006.
54. At the 39<sup>th</sup> Ordinary session held in Banjul, The Gambia, from 11 - 25 May 2006, the African Commission considered the communication and decided to defer it for further consideration at the 40<sup>th</sup> Ordinary Session.
55. At the 40<sup>th</sup> Ordinary session held in Banjul, The Gambia from 14 - 28 November 2006, the African Commission considered the communication and decided to defer its decision on the merits to the 41<sup>st</sup> Session.
56. At the 41<sup>st</sup> Ordinary Session held in Accra, Ghana, from 16 - 30 May 2007 the Commission considered the communication and deferred its decision to allow more time for the Secretariat to conduct further research and finalise the draft decision.
57. At the 42<sup>nd</sup> Ordinary session held in Brazzaville, Congo, from 14 - 28 November 2007, the African Commission considered the communication and decided to defer it for further consideration at the 43<sup>rd</sup> Ordinary Session.
58. At the 43<sup>rd</sup> Ordinary Session held in Ezulwini, Swaziland, from 7 - 22 May 2008, the African Commission considered the communication and decided to defer its decision on the merits to the 44<sup>th</sup> Ordinary Session.
59. At the 44<sup>th</sup> Ordinary Session held in Abuja, Nigeria, from 10 - 24 November 2008, the African Commission considered the communication and decided to defer it to the 45<sup>th</sup> Ordinary Session in order to finalise the draft decision on the merits.
60. During the 6<sup>th</sup> Extra Ordinary session held from 28 March - 3 April 2009 in Banjul, The Gambia, the Commission considered the communication and resolved to finalise it during the 45<sup>th</sup> Ordinary Session.
61. At the 45<sup>th</sup> Ordinary Session held in Banjul, The Gambia, between 13 and 27 May 2009, the Commission adopted the decision on the merits of the communication.

## **LAW**

### **Admissibility**

62. 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 must be fulfilled by a Complainant for a communication to be declared admissible.

63. Of the seven conditions, the Respondent State claims that the Complainants have not fulfilled four, namely: Article 56(1), (2), (3) and (4). From the submissions of the Respondent State, there is an inference that Article 56(7) has not been fulfilled by the Complainant.

64. The Respondent State submits that contrary to Article 56(1) of the African Charter, the victims of the alleged violations, indicated in the communication have not been identified.

65. Article 56(1) of the African Charter provides that:

*Communications ... received by the Commission shall be considered if they-:*

*(1) Indicate their authors even if the latter request anonymity*

66. In this particular matter, the African Commission notes that the authors of the communication have been identified at page 1 of the communication and they are 14 in number. Their ages and professions have also been given as well as their addresses of service. Furthermore, the communication reveals that the authors of the communication are members of the Southern Cameroons National Council (SCNC) and the Southern Cameroons Peoples' Organization (SCAPO), organisations that were established principally to protect and advance the human and peoples' rights of Southern Cameroonians, including their right to self-determination.

67. Article 56 (1) of the African Charter requires a communication to indicate its authors and not the victims of the violations. Thus the present communication cannot be declared inadmissible on the basis of Article 56(1). In coming to this decision, the African Commission would like to refer to its decision in *consolidated communication – Malawi African Association et al/ Mauritania*<sup>2</sup> where it held that “Article 56(1) demands simply that communications should indicate the names of those submitting and not those of all the victims of the alleged violations”.

68. The Respondent State argues that this communication does not meet the requirements of Article 56(2), because the Complainants are advocating

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<sup>2</sup> Consolidated 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.*

for secession under the pretext of allegations of violation of the provisions of the African Charter and other universal human rights instruments. While conceding that the right to self determination is an inalienable right, the Respondent State argues that the UN has established that this right should not “be interpreted as authorising or encouraging any measure that would partly or wholly compromise the entire territory or the political unity of sovereign and independent States”. The Respondent State submits further that it is established that the only entities likely as peoples to call for the external right to self determination from pre-existing States are the “peoples under foreign subjugation, domination and exploitation”.

69. The Complainants argue that the communication meets the requirements in Article 56(2) because it alleges violations of the African Charter and other international human rights instruments.

70. Article 56(2) provides that “Communications ... received by the African Commission shall be considered if they:

*(2) are compatible with the Charter of the Organisation of African Unity or with the present Charter.”*

71. The condition relating to compatibility with the African Charter basically requires that :

- The communication should be brought against a State party to the African Charter<sup>3</sup>;
- The communication must allege *prima facie* violations of rights protected by the African Charter<sup>4</sup>;
- The communication should be brought in respect of violations that occurred after State’s ratification of the African Charter, or where violations began before the State Party ratified the African Charter, have continued even after such ratification<sup>5</sup>

72. It is apparent to the African Commission that the present communication meets all the above requirements. The communication has been brought against Cameroon, which is State party to the African Charter. It reveals *prima facie* violations of the African Charter, all of which are alleged to have continued to occur following Cameroon’s ratification of the African Charter.

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<sup>3</sup> Communication 2/88 – Iheanyichukwu A. Ihebereme/United States of America.

<sup>4</sup> Communication 1/88 – Frederick Korvah/Liberia.

<sup>5</sup> Communication 97/93 (2) – John K. Modise/Botswana.

73. The Respondent State also submits that the communication has been written in disparaging or insulting language. The Respondent State argues that the Complainants' use of the phrases such as "forceful annexation" and "State sponsored terrorism" to characterise violations by the government of Cameroon against the people of Southern Cameroons, allegedly committed between 1961 and 2002 and a report titled "Let My People Go Part II", are disparaging and insulting language, contrary to Article 56 (3), of the African Charter.

74. Article 56(3) of the African Charter provides that:

*Communications ... received by the Commission shall be considered if they :*

*(3) Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity.*

75. The African Commission acknowledges that the above-mentioned provision is quite subjective because statements that could be disparaging or insulting to one person may not be seen in the same light by another person. Matters relating to human rights violations normally elicit strong language from the victims of the said violations. Nonetheless Complainants should endeavour to be respectful in the phrases they choose to use when presenting their communications.

76. The Respondent State submits further that the Complainants are not the sole authors of some of the documents and that the facts have been distorted.

77. The Complainants submit that they did not author the offensive publication, but rely on it to buttress their allegations. They argue further that the communication is not based exclusively on news disseminated through the media. They state that the evidence in support of their allegations is based on eye-witness accounts and documents prepared by those who have personal knowledge of the events and from official Records.

78. 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*

79. The African Commission has perused the appendices to the communication and has observed that they contain the following documents :
- Appendix II is a publication by SCNC/SCAPO – Let my People Go!
  - Appendix IV contains court documents, namely a motion on notice, 2 affidavits, originating summons, a ruling of the Federal High Court of Nigeria in Abuja, terms agreed by the parties to be embodied in the order of the court and an enrolment of order.
  - Exhibit SC contains among others numerous documents, declarations, agreements between Germany and Great Britain, UN General Assembly Resolutions, the Statute of the International Court of Justice and the UN Charter, a Petition made by the Federal Republic of Southern Cameroons to the United Nations etc.
80. Article 56(4) relates to communications brought before the African Commission based exclusively on news disseminated through the mass media. Looking at the nature of documents described herein above, it is quite clear that the Complainants do not base their case on mass media news, but on official records and documents, as well as international statutes. This clearly falls outside the ambit of Article 56(4).
81. With respect to Article 56(5), which relates to exhaustion of local remedies, the Complainants submits that there are no local remedies to exhaust in respect of the claim for self-determination because this is a matter for an international forum and not a domestic one. They argue that the issue for determination in this communication is whether or not the "union" of *La République du Cameroun* and Southern Cameroons was effected in accordance with UN Resolutions, International Treaty obligations and indeed International law. They assert that the right to self determination is a matter that cannot be determined by a domestic court.
82. The Respondent State concedes that no local remedies exist with respect to the claim for self determination. The Respondent State, however argues that, the right to self determination for the people of Southern Cameroon was solved when the British Trusteeship over British Cameroon ended following the plebiscite of 11<sup>th</sup> and 12<sup>th</sup> February 1961. Furthermore, it argues that the 1963 International Court of Justice (ICJ) decision in the Northern Cameroon case found in favour of the Republic of Cameroon and put the matter of Southern Cameroon to rest. The Respondent State believes that the Complainants are seeking a similar declaratory decision which should not be entertained by the African Commission.

83. The African Commission believes that this argument is an inference by the Respondent State that the Complainants have not met the conditions laid down in Article 56(7) of the African Charter. Article 56(7) provides :

*Communications ... received by the African Commission shall be considered if they:*

*(7) do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.*

84. Article 56(7) of the African Charter bars the African Commission from entertaining cases that have been settled by another international settlement procedure.<sup>6</sup> The issue that the African Commission needs to examine is whether the abovementioned complaint has been settled by some other international settlement procedure.
85. The African Commission has read the judgment of the ICJ in the Northern Cameroons case<sup>7</sup>. In that case the Government of the Republic of Cameroon asked the Court to declare whether, “in the application of the Trusteeship Agreement for the Territory of the Cameroons under the British Administration, the United Kingdom failed, with regard to the Northern Cameroons, to respect certain obligations flowing from that Agreement.”<sup>8</sup>
86. It is the view of the African Commission that the matter before the ICJ was unrelated to the issues before the African Commission. The African Commission states that for a matter to fall within the scope of Article 56(7) of the African Charter it should have involved the same parties, the same issues, raised by the complaint before the African Commission, and must have been settled by an international or regional mechanism. The case before the ICJ was between the Republic of Cameroon and the United Kingdom, and involved the interpretation and application of the Trusteeship treaty. These facts clearly differ from the complaint before the Commission. As such the case falls outside the scope of Article 56(7) of the African Charter.
87. For the reasons outlined herein above, the African Commission declares this communication admissible.

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<sup>6</sup> Communication 15/88 – Mpaka-Nsusu Andre Alphonse/Zaire.

<sup>7</sup> Cameroon v United Kingdom – judgement of 2<sup>nd</sup> December 1963

<sup>8</sup> Ibid

*Preliminary issue raised by the Respondent State regarding the jurisdiction of the African Commission;*

88. Before dwelling on the substance of the allegations, the Commission wishes to dispose of some preliminary legal issues raised by the Respondent State. The Respondent State questions the Commission's jurisdiction *rationae temporis*, and states the following:

*"...the complaint by the complainants contains an impressive number of cases of so called massive violations of human rights which alleged to have been carried out between 1961 and 2002. In this regard, the State of Cameroon refuses to acknowledge in limine litis the jurisdiction rationae temporis of the Commission with regard to acts before 18 December 1989, the date of entry into force of the Charter."*

89. The Respondent State also challenged the notion, or the existence of a territory known as "Southern Cameroon." It states as follows:

*"...it should be pointed out that in spite of the fact that the complainants refused to reveal their identities, they by no means ascertained to have been victims<sup>9</sup> of violations imputed to the State of Cameroon. And even when they act on behalf of a so called territory called Southern Cameroon, the State of Cameroon will point out that no territory exists called as such in the Republic of Cameroon...'*

90. The Respondent State, similarly, questions the existence of a "people" known as "Southern Cameroonians" and as such states that,

*"...[s]upposing that there are a people of Southern Cameroons, nevertheless, it would have to be proven that it is entitled to claim its self determination, under the specific form of "separate statehood"*

91. The Commission proposes to deal, firstly, with the question of its jurisdiction then the question whether the people of "Southern Cameroon" exist as a "people," and whether the territory otherwise referred to as "Southern Cameroon" does exist, and if it does, can its "people" exercise their alleged "right to self-determination?"

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<sup>9</sup> The issue whether or not a complainant needs to be a victim in order to submit a communication before the Commission is addressed, in para 62 hereinabove, when discussing Article 56 (1) of the African Charter.

*Decision on the preliminary issue of the Commission's jurisdiction rationae temporis*

92. The Respondent State raises objection to the Commission's exercise of jurisdiction *rationae temporis*. The Complainants responded that although those violations were carried out before the African Charter came into force for Cameroon, they did not stop even after 18 December 1989.
93. The Commission acknowledges the Respondent State's argument that its jurisdiction *rationae temporis* is limited *in limine*, and as such it cannot address violations retrospective the entry into force of the Charter. The Commission is aware that the Africa Charter entered into force in respect of the Respondent State on 18 December 1989. The Commission has been informed by the Complainants that some of the alleged violations occurred before that date.
94. The Commission stated its position on this principle in Communication 97/93, *John K. Modise v. Botswana*. In that communication the complainant was arrested by the Botswana authorities in 1978 and deported to apartheid South Africa, in violation of his citizenship rights. The communication was filed in 1993. The Commission held that:

*"The Republic of Botswana ratified the African Charter on 17 July 1986. Although some of the events described in the communication took place before ratification, their effects continue to the present day. The current circumstances of the complainant are a result of a present policy decision taken by the Botswana government against him."*

95. The Commission expanded the principle further in its decision on the Consolidated Communications Nos 54/91 *Malawi African Association, et al v. Mauritania*, where it, *inter alia*, considered an allegation of violations of the right to a fair trial. The Commission held that:

*"Mauritania ratified the Charter on 14 June 1986, and it came into force on 21 October 1986. The September trials, thus took place prior to the entry into force of the Charter. These trials led to the imprisonment of various persons. The Commission can only consider a violation that took place prior to the entry into force of the Charter if such a violation continues or has effects which themselves constitute violations after the entry into force of the Charter..."<sup>10</sup>*

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<sup>10</sup> § See Paragraph 91 of the decision.

96. The Commission has through its jurisprudence established the principle that violations that occurred prior to the entry into force of the Charter, in respect of a State party, shall be deemed to be within the jurisdiction *rationae temporis* of the Commission, if they continue, after the entry into force of the Charter. The effects of such violations may themselves constitute violations under the Charter. In other words, this principle presupposes the failure by the State party to adopt measures, as required by Article 1 of the Africa Charter to redress the violations and their effects, hence failing to respect, and guarantee the rights
97. The Commission therefore decides that it has the competence to consider this complaint against the Respondent State, in relation to violations which emanated prior to 18 December 1989, the date the African Charter entered into force for the Republic of Cameroon, if such violations or their residual effects continued after that date.

### ***Consideration of the Merits***

98. The communication alleges that the Respondent State violated Articles 2, 3, 4, 5, 6, 7(1), 9, 10, 11, 12, 13, and 17(1) in respect of individual Southern Cameroonians; and Articles 19, 20, 21, 22, 23(1), and 24 in respect of the Peoples of Southern Cameroons; and the general obligation under article 26 of the African Charter.

### **Decision on the Merits**

#### ***Alleged violation of Article 2.***

99. The Complainants allege that there have been various cases of discrimination against the people of Southern Cameroon contrary to Article 2 of the African Charter. Article 2 states 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”.*

100. The Complainants submit that Southern Cameroonians are discriminated against by the Respondent State, in various forms. These include under-representation of Southern Cameroonians in national institutions, economic marginalisation through the denial of basic infrastructure; such as roads, persistence high levels of unemployment and illiteracy in Southern Cameroon. It is submitted that Southern Cameroonians are discriminated against in the legal and judicial system.

101. The Complainants submitted further that the company law applied in Southern Cameroon was abolished in favour of the Napoleonic Code upon unification in 1972. They argued that Southern Cameroonians could not register companies whose articles of association were in the English language.
102. The issue for determination is whether the refusal to register the said companies was directly related to the unification of the legal system in 1972, and if it constituted discrimination? Could the 1972 unification prejudice registration of companies after ratification on 18 December 1989? This would be the case only if the unification impacted negatively on the registration of companies after December 1989. The Complainants argue that the refusal to register companies had such an effect. In order for the Southern Cameroonian companies to do business they had to register under the Francophone civil law system. The Respondent State did not dispute this allegation. English is one of the official languages in Cameroon. Southern Cameroonians had a legitimate expectation that the English language could be used to conduct official business, including the registration of companies. The Commission makes a finding that the refusal to register companies established by Southern Cameroonians on account of language amounted to a violation of Article 2 of the African Charter.
103. The Complainants submit further that the ratification of the Treaty for the Harmonisation of Business Law in Africa, otherwise known as "*Organisation pour l'Harmonisation des Droits d'Affaires en Afrique*" (OHADA), has discriminated against the people of Southern Cameroon on the basis of language. OHADA is an instrument harmonising business law amongst French-speaking countries in Africa. It states that the language of interpretation and settlement of disputes arising under OHADA shall be French.
104. The Complainants alleged that the ratification of OHADA was discriminatory to individual businesses and business people from Southern Cameroon. At this point we adopt the legal principle that businesses or corporate bodies are legal persons. The Complainants submit that objections against OHADA were ignored, and that companies not registered under OHADA could not open bank accounts in Cameroon.
105. The Respondent State argued that OHADA is not aimed at promoting the superiority of one legal system over the other, but rather to harmonise business law in the contracting states by elaborating simple, modern, common rules aimed at encouraging regional development and growth,

setting up appropriate judicial procedures and encouraging arbitration for the settlement of contractual disputes.

106. It states further that other non French speaking countries including Ghana and Nigeria, were undergoing the process of acceding to the OHADA treaty. The Respondent State submitted that it had taken several measures, such as the translation of the OHADA laws into English, with the support of the OHADA Permanent Secretariat and the African Development Bank, and the training of Anglophone and Francophone magistrates at the *Ecole regionale Superieure de magistrature* in Porto Novo, Republic of Benin. It stated further that the apprehension by the Anglophones was merely a transitory situation.
107. The Commission takes note of the fact that the Respondent State had taken measures to address the discriminatory effects of the ratification of OHADA. Had such measures not been taken upon the ratification of OHADA in 1996, the Commission would not have hesitated to find a violation. The Commission is cognisant of the bilingual nature of the Respondent State and the Western African region, in which the Respondent State finds itself. The Respondent State is from time to time being expected to interact with its neighbours in ECOWAS, or any other sub regional group, where both the French and the English language continue to be *lingua franca*.
108. The mere accession or ratification of OHADA, should not be deemed a violation of Article 2, unless the Respondent State had manifestly failed to take any steps to ameliorate the effects of the linguistic differences. The Respondent State has shown that it took measures, such as the training of magistrates, and translation of texts to address the discriminatory concerns. The OHADA ratification, however, resulted in the discrimination of Anglophone based companies and businesses, which could not open bank accounts unless they registered under OHADA. There was no response from the Respondent State on this issue. Nor were any measures taken to address this complaint. Notwithstanding the translation of OHADA into English, it was wrong for institutions, such as banks to force Southern Cameroon based companies to change their basic documents into French. The banks and other institutions could have dealt with the companies without imposing the language conditionality. Banking documents should have been translated into English. The Commission finds that the Respondent State failed to address the concerns of Southern Cameroonian businesses, which were forced to re-register under OHADA, and as such violated Article 2 of the African Charter.

### ***Allegation of violation of Article 3.***

109. The Complainants alleged violation of Article 3, which protects the individual's right to equality before the law and equal protection of the law. African Commission notes that although the communication alleges violation of Article 3 of the African Charter, the Complainants did not specifically argue or bring evidence of any instance against the Respondent State. In the absence of such evidence, the African Commission cannot find violation of Article 3 of the Charter.

#### ***Alleged violation of Article 4***

110. The Complainants allege violations of Article 4, the right to life, inviolability of the human being, and the integrity of the person. They submit that the Respondent State committed violations against individuals in Southern Cameroon. The communication gives account of people who were killed by the police during violent suppressions of peaceful demonstrations, or died in detention as a result of the bad conditions and the ill-treatment in prison.
111. The Respondent State contends that the allegations are not substantiated by documentary evidence. No certificates to ascertain the cause of death, no forensic medical certificates, no investigation reports by human rights organisation were produced. It states further that “the catalogue published by the press organs of the SCNC and SCAPO cannot be considered as a reliable source”.<sup>11</sup> The Respondent State however, admitted to the death of six people on the 26<sup>th</sup> March 1990, which occurred after a confrontation between security forces and demonstrators, whom it argued, were involved in an illegal political rally in Bamenda.
112. The African Commission observes that the parties do not have equal access to official evidences such as police reports, death certificates and forensic medical certificates. The Complainants endeavoured to inquire into the alleged violations, and gave names of the alleged victims. The Respondent State restricted itself to questioning the reliability of the evidence presented by the Complainants. It did not deny the alleged violations. The Respondent State had the opportunity to inquire into the alleged violations. The Respondent State did not conduct such investigation and redress the victims, it thus failed to protect the rights of the alleged victims. The Commission finds that it violated Article 4 of the African Charter.

#### ***Alleged violation of Article 5***

113. The communication gives details of victims who were subjected to torture, amputations, and denial of medical treatment by the Respondent State's law enforcement officers, in violation of Article 5 of the African Charter. The

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<sup>11</sup> The SCNC (Southern Cameroons National Council) and the SCAPO (Southern Cameroons People's Organisation) are two political organisations defending the rights of the people of Southern Cameroons, including their right to self-determination.

Respondent State responded by stating that some SCNC and SCAPO members had perpetrated terrorist acts in the country, killing law enforcement officers, vandalising State properties, stealing weapons and ammunitions.

114. The Commission holds the view that even if the State was fighting alleged terrorist activities, it was not justified to subject victims to torture, cruel, inhuman and degrading punishment and treatment. It therefore finds that the Respondent State violated Article 5 of the African Charter.

### ***Alleged violation of Article 6***

115. The communication further gives details of victims who were arrested, detained for days, sometimes for months without trial before being released in violation of Article 6 of the Charter.
116. The Respondent State did not deny the allegations, instead it tried to justify them. For instance, it states that:

*“...concerning citizens who had been arrested for committing various ordinary law offences since the return to multi party democratic processes, most of them are SCNC and SCAPO activists who, in their logic of contestation, defied republican institutions especially the forces of law and order, either during demonstration of the anniversary of “Southern Cameroon” every 1 October of the year, or at the approach, during and after important elections.”*

117. It goes on to state that,

*“whatever the circumstances, the more it is true that every individual shall have the right to liberty and the security of his person, the more it is accepted that an individual may be deprived of his freedom for reason and conditions previously laid down by the law. (Article 6 of the Charter) The cases of arrest registered since the return to multiparty politics in this part of the territory has always obeyed the principle of legality.....”*

118. The Commission states that a State Party cannot justify violations of the African Charter by relying on the limitation under Article 6 of the Charter. The Respondent State is required to convince the Commission that the measures or conditions it had put in place were in compliance with Article 6 of the Charter. The Commission has previously expressed itself on the effect of claw back clauses. Communication 211/98; Legal Resources Foundation/Zambia,<sup>12</sup> states the following;

*“The Commission has argued forcefully that no State Party to the Charter should avoid its responsibility by recourse to the limitations and “claw back” clauses in*

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<sup>12</sup> 14<sup>th</sup> Annual Activity Report, 2000-2001.

*the Charter. It was stated following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections of it. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert from the popular will, as such cannot be used to limit the responsibilities of State Parties in terms of the Charter.”*

119. Further to the foregoing, Communication 147/95 and 149/96, *Sir Dawda Jawara/The Gambia*, the Commission stated that,

*“ [t]he Commission in its decision on communication 101/93 laid down a general principle with respect to freedom of association, that ‘competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by constitution or international human rights standards.’ This therefore applies not only to right to freedom of expression of association, but also to all other rights and freedoms ... for a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter.”<sup>13</sup>*

120. In view of the foregoing, the Commission finds that the Respondent State has violated Article 6 as alleged by the Complainants.

***Alleged violation of Article 7(1).***

121. The Complainants alleged that the Respondent State violated Article 7(1), on the right to fair trial. They allege that individuals were transferred from Southern Cameroon to Francophone Cameroon for trial by military tribunals and that other victims were tried in civil law courts, without interpreters.

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<sup>13</sup> The principle was stated in **Communication 101/93; Civil Liberties Organization (In respect of the Nigerian Bar Association)/Nigeria**, where the Commission discussed the effect of the claw back clause in Article 10 on the right to freedom of association and stated the following; “[f]reedom of association is enunciated as an individual right and is first and foremost a duty of the State to abstain from interfering with the free formation of association. There must always be a general capacity for citizens to join, without State interference, in association in order to attain various ends. In regulating the use of this right, **the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine rights guaranteed by the constitution and international human rights standards.** (emphasis is added)

122. The Respondent State admits that between 1997 and 2001, some individuals were transferred from the North West Cameroon, and were tried for various criminal offences by the Yaoundé Military Tribunal, These offences include unlawful incitement, disturbances of public peace, destruction of public property, assassination of gendarmes and civilian individuals, illegal possession of weapons and ammunition, and the illegal declaration of the independence of Anglophone Cameroon on 30 December 1999.
123. The Respondent States asserts the following;
- “ [a]ware that in the past the actions of SCNC militants have always ended up in assassinations, kidnapping of persons, destruction and setting ablaze of public buildings, public authorities could not remain indifferent in front of this manifest determination to cause disorder and disturbances. About three days before 1 October 2001, gendarmes were dispatched nearly everywhere in the areas and localities targeted by the SCNC.”*
124. The Respondent State submitted that some of the victims were released, albeit after prolonged periods of detention, for lack of evidence. Others were released on bail, and fled the country. It argues that the prolonged detention was due to administrative bottlenecks, which are a constant concern of the government. The Respondent State did not indicate the measures it had taken to address the chronic administrative problems causing prolonged detentions.
125. The Respondent State denied that it ignored or failed to implement Court decisions in Anglophone Cameroon. It cited a number court decision it had complied with, including those which overturned executive decisions. The Complainant did not give any specific case or decision which was not complied with by the Respondent State.
126. The Commission wishes to state that the rights outlined in Article 7 constitute fundamental tenets of any democratic state. It is through respect for these rights that other rights guaranteed by the Charter may also be realised. The Commission has adopted the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, to assist State Parties to better guarantee the rights enshrined in Article 7.
127. The Respondent state did not explain why it transferred individuals from North West Cameroon for trial by the Yaoundé and Bafoussam Military Tribunals, nor the reason why the victims were tried by tribunals outside the jurisdictions where the offence were allegedly committed. The Commission has stated previously that trial by military courts does not *per se* constitute a violation of

the right to be tried by a competent organ. What poses problem is the fact that, very often, the military tribunals are an extension of the executive, rather than the judiciary. Military tribunals are not intended to try civilians. They are established to try military personnel under laws and regulations which govern the military. In communication 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* the Commission stated the following:

*“The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial”<sup>14</sup>*

128. The accused persons were not military personnel. The offences alleged to have been committed were quite capable of being tried by normal courts, within the jurisdictional areas the offences were allegedly committed. The Commission finds that trying civilians by the Yaoundé and the Bafoussam Military Tribunals was a violation of Article 7(1) (b) of the Charter.

129. The Complaints submit that the accused were tried in a language they did not understand, without the help of interpreters. The Respondent State did not contradict that allegation. The Commission states that it is a prerequisite of the right to a fair trial, for a person to be tried in a language he understands, otherwise the right to defence is clearly hampered. A person put in such a situation cannot adequately prepare his defence, since he would not understand what he is being accused of, nor would he apprehend the legal arguments mounted against him.<sup>15</sup> The aforementioned Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, states that one of the essential elements of a fair hearing is:

*“...an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body.”<sup>16</sup>*

130. The Commission recognizes that the Respondent State is a bilingual country. Its institutions including the judiciary can use either French or English. However since not all the citizens are fluent in both languages, it is the State’s duty to make sure that, when a trial is conducted in a language that the

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<sup>14</sup> § See para 27.

<sup>15</sup> See the decision of the Commission on communications 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 *Malawi African Association, Amnesty International, Ms. Sarr Diop, UIDH and RADDHO, Collectif des veuves et ayants-droits, and Association mauritanienne des droits de l’homme v. Mauritania*, 13<sup>th</sup> Annual Activity Report, § 97.

<sup>16</sup> § 2(g).

accused does not speak, he/she is provided with the assistance of an interpreter. Failing to do that amounts to a violation of the right to a fair trial.

131. The Commission therefore concludes that the Respondent State violated Article 7(1)(b) (c) and (d) of the Charter.

***Alleged violation of Article 9.***

132. The communication alleges violation of article 9 of the Charter. The Complainants did not make any submissions concerning Article 9. The Commission has therefore not made any finding regarding Article 9.

***Alleged violation of Article 10***

133. The Complainants allege that the Respondent State violated Articles 10 of the African Charter. The parties did not make any submission on Article 10 of the Charter. The Commission finds no violation of Article 10.

***Alleged violation of Article 11.***

134. The Commission examined whether Articles 11 was violated. The Commission deems that there is enough information on the record, based on the both parties to enable the Commission to make its determination.
135. Article 11 states that:

*“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 of others, health, ethics and rights and freedoms of others.”*

136. The facts before the Commission depict cases of suppression of demonstrations, including the use of force against, the arrest and detention of people taking part in such demonstrations. The Commission has held previously that;
- “.....the Charter must be interpreted holistically and all clauses must reinforce each other.”<sup>17</sup>*
137. The Complainant states that several victims were arrested and held in detention for long periods, for exercising their right to freedom of assembly. Some of the detained persons were acquitted. There were others who died at the hands of security forces or in detention, after being accused of participation in “unlawful political rallies.” The victims who died, or had been detained suffered while exercising their exercise of the right to freedom of assembly.

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<sup>17</sup> Communication 211/98 *Legal Resources Foundation/Zambia*, at para 70.

138. The Commission does not condone unlawful acts by individuals or organisations to advance political objectives, because such actions or their consequences are likely to violate the African Charter. It encourages individuals and organisations, when exercising their right to freedom of assembly, to operate within the national legal framework. This requirement does not absolve States Parties from their duty to guarantee the rights to freedom of assembly, while maintaining law and order. The Respondent State admits that it detained demonstrators, applied excessive force to enforce law and order, and in some cases lives were lost. The Commission concludes therefore that Article 11 of the African Charter was violated.

***Alleged violation of Article 12.***

139. The Complainants alleged that Article 12 was violated by the Respondent State. They did not substantiate any infringement by the Respondent State of the right to freedom of movement. The Commission finds no violation of Article 12.

***Alleged violation of Article 13.***

140. The Complainants alleged violation of Article 13. They stated that the people of Southern Cameroon were not adequately represented in the institutions of the Republic of Cameroon except for “token” appointments. They allege further that the Respondent State manipulated demographic data to deny Southern Cameroonians equal representation in government.
141. The Respondent State submitted that, upon the introduction of multi-partyism in 1992, many Southern Cameroonian opposition parties, such as the Social Democratic Front (SDF), have participated in municipal, legislative and presidential elections. Opposition parties control several councils and are represented in the National Assembly. It argues that access to high office is open to all citizens without distinction. The Respondent State accused the Complainants of bad faith, and stated that some of the highest positions in the Republic had been held by Southern Cameroonians. It accuses SCNC and SCAPO of persecuting fellow Anglophones who refuse to adhere to the secession agenda.
142. The Complainants claim that Southern Cameroonians have since 1961 been accorded only 20 % representation in the Federal/National Assembly instead of the 22% they think they deserve. The Complainants’ main complaint is the ratio of representation, rather than the non representation. The Respondent State states that 20% representation cannot be said to be “tokenism.”
143. The Commission is inclined to agree with the Respondent State. It finds that in spite of the alleged disproportionate percentage, Southern Cameroonians were representation, and hence participated in public affairs of the Respondent State as required under Article 13 of the African Charter.
144. The Commission states that it is not sufficient for the Complainants to assert in general terms that a certain category of citizens were denied the right to

access public positions or that they were under-represented in government or public administration. The Complainants did not furnish the Commission with information or cases that individuals in Southern Cameroon were denied representation or denied access to public services. The Commission finds that allegations concerning “tokenism” have not been substantiated and concludes that there is no violation of Article 13.

### ***Alleged violation of Article 17***

145. The Complainants allege that the Respondent State violated Article 17 of the Charter, because it is destroying education in the Southern Cameroons by under funding and understaffing primary education. That it imposed inappropriate reform of secondary and technical education. It discriminates Southern Cameroonians in the admission into the *Polytechnique* in Yaoundé, and refused to grant authorisation for registration of the Bamenda University of Science and Technology, thereby violating article 17 on the right to education.
146. The Respondent State denied that it is destroying the education system in the Southern Cameroon. It provided detailed data and statistics on the measures it had taken to cater for the education sector in the Southern Cameroons. It stated that in certain cases it had provided more resources to Southern Cameroon than it had done for other regions. The Complainants contested the reliability of the data and statistics, but did not convince the Commission that the data should not be relied upon.
147. Regarding the alleged discrimination concerning admission of Southern Cameroonians into the *Polytechnique* in Yaounde, the Respondent State argued that admission to the National Advanced School of Engineering is based on merit, as is the case with all higher institutions of learning. It stated that the School has trained a number of civil engineers from both the Anglophone and Francophone parts.
148. Concerning the alleged refusal to grant authorisation for the registration of the Bamenda University of Science and Technology, the Respondent State stated that the said university did not fulfill conditions for establishment of private universities. The Complainant did not show whether the criteria were met by the Bamenda University of Science and Technology or not. The Commission reiterates that for it to make finding on any allegations, the Parties have to provide it with the necessary information. Rule 119 of the 1995 Rules of Procedure of the Commission, (which govern this communication) require parties to furnish explanation or statements, including additional information.
149. The Complainants should have done so under Rule 119 (3) of the Rules of Procedure. The Commission allowed Parties to make oral submission in this particular case. The Complainants did not substantiate the allegations. For the above reasons, the African Commissions finds that there is no violation of Article 17(1) of the Charter.
150. The Commission then examined the alleged violation of Articles 19, 20, 21, 22, 23(1), and 20 of the African Charter.

***Alleged violation of Article 19.***

151. The Complainants premised the complaint alleging violation of their collective rights on the events which happened prior to 18 December 1989. The Commission has already expressed itself on the question of its jurisdiction *rationae temporis*. The Complainants alleged that the Respondent State, “forcefully and unlawfully annexed” Southern Cameroon. They argue that the Respondent State:

*“.....established its colonial rule there, complete with its structures, and its administrative, military and police personnel, applying a system and operating in a language alien to the Southern Cameroon, ... and continues to exercise a colonial sovereignty over Southern Cameroon to this day.”*

152. They argue further that:

*“... the occupation and assumption of a colonial sovereignty over Southern Cameroon by the Respondent State amounts to violation of Articles 19 and 20 of the African Charter...., both of which outlaw domination , and colonialism in all its forms and manifestations. Article 19 places an absolute ban on the domination of one people by another. Article 20 emphatically asserts the right of every people to existence, to self determination, and of resistance to colonialism or oppression by resorting to any internationally recognised means of resistance”*

153. These are very serious allegations which go to the root of the statehood and sovereignty of the Republic of Cameroon. The Respondent State responded by arguing that the Commission is:

*“...incompetent to handle the issue of the process of decolonisation that took place in this State and under the auspices of the United Nations.”*

154. Respondent State submits further that the Commission cannot examine or adjudicate on the 1961 UN plebiscite, on events which took place between the October 1961 and 1972, when the Federal and Union Constitutions were adopted, because they predated the entry into force of the Charter.

155. The Commission concedes that it is not competent to adjudicate on the legality of those events, due to limitation imposed on its jurisdiction *rationae temporis*, for reasons stated hereinabove. The Commission cannot make a finding on allegations made by the Complainants concerning “illegal and forced

annexation, or colonial occupation of Southern Cameroon by the Respondent State,” since they fall outside its jurisdiction *rationae temporis*.

156. The Commission states, however that, if the Complainants can establish that any violation committed before 18 December 1989, continued thereafter, then the Commission shall have competence to examine it.
157. The Complainants alleged cases of economic marginalisation, and denial of basic infrastructure by the Respondent State, as constituting violations of Article 19. They allege that these violations were a consequence of the events of 1961 and 1972, and continued after 18 December 1989.
158. The Respondent State contested the allegation of economic marginalisation. It submitted documents and statistics in support of its provision of basic infrastructure in Southern Cameroon. The statistical information and data show that, for the period 1998 up to 2003/4, the North West and South West provinces, (Southern Cameroon,) were allocated substantially higher budgetary resources, than the Francophone provinces, for the construction, and maintenance of roads, and running of education training institutions. The documents show that the situation in the Anglophone regions is not that different from other parts of the country. It argued that the problem concerning inadequate infrastructural development is not peculiar to Southern Cameroon.
159. The Complainants rejected as adulterated the data and statistics provided by the Respondent. The complainant did not furnish any document to support their allegation. The Commission finds no reason why it should not rely on the data and statistics provided by the respondent State in its decision. The Commission holds that the Respondent State allocated public resources to the Anglophone provinces without discrimination.
160. The Respondent State did not however respond specifically to the allegations concerning the relocation of major economic projects and enterprises from Southern Cameroon. It explained the reason for relocating the seaport to Douala from Limbe, otherwise known as Victoria. It argues that, Douala being the gateway into Cameroon, the government needed to monitor the movement of persons and good for evident security reasons and efficient customs control.
161. Every State has an obligation under international law to preserve the integrity of its entire territory. The maintenance of security and movements of persons and goods on the territory is part of that obligation. The argument by the Respondent State that it could not guarantee the security of persons and goods at Limbe, unless it moved the port, is tantamount to acknowledging that it had no control of Limbe. The Commission believes that the security and customs authorities could have effectively monitored the movement of persons and goods, even if the seaport had continued to be at Limbe.

162. The Commission states that the relocation of business enterprises and location of economic projects to Francophone Cameroon, which generated negative effects on the economic life of Southern Cameroon constituted violation of Article 19 of the Charter.

**Alleged violation of Article 20.**

163. The Complainants state that the “alleged unlawful and forced annexation and colonial occupation” of Southern Cameroon by the Respondent State constituted a violation of Article 20 of the Charter. They claim that Southern Cameroonians are entitled to exercise the rights to self determination under Article 20 of the Charter as a separate and distinct people from the people of “*La Republic du Cameroon.*” Article 20 stipulates that:

1. *All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.*
2. *Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.*
3. *All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.*

164. The Complainants submit that the UN plebiscite was premised on certain conditions, including the convening of a conference of equal representative delegations from the Republic of Cameroon and Southern Cameroon to work out the conditions for the transfer of sovereign powers to the future federation. It is further submitted that such arrangements should have been approved by the separate parliaments of the Republic of Cameroon and Southern Cameroon before sovereignty was transferred to a single entity representing both sides. The Complainants submit that the results of the plebiscite were never submitted to the parliament of the Southern Cameroon for approval.

165. The Respondent State did not respond to the allegations concerning “unlawful annexation and colonialism.” It submitted instead that the issues are incapable of adjudication by the Commission on account of its lack of jurisdiction.

166. The Respondent State contested further the claim that Southern Cameroonians are a “separate and distinct people”. The Commission shall examine this issue.

167. The Complainants reiterate that their “separate and distinct” identity is based on the British administration over Southern Cameroon. They submit that they speak the English language, and apply the common law legal tradition, as opposed to the Francophone zone, where French is spoken and the civil law system is applicable.
168. The Respondent State submitted that it does not dispute the basic historical facts concerning the Trust administration, but denies that Southern Cameroonians exist as a “people.” It states the following;
- “ [t]he complainants raise in order to shore up this assertion the use of the English language (working language), the specificity of the legal system, of the educational system, of the system of government, traditional cultures. In fact, the specificities of former Southern Cameroons stem solely from the heritage of British administration and the legacy of Anglo-Saxon culture. No ethno-anthropological argument can be put forward to determine the existence of a people of Southern Cameroons, the Southern part being of the large Sawa cultural area, the northern part being part of the Grass fields’ cultural area. Since 1961, although some specificities had been preserved on more than one aspect, there had been remarkable rapprochement at the administrative and legal levels. The ‘separate and distinct people’ thesis is no longer valid today.”*
169. The Commission shall clarify its understanding of “peoples’ rights,” under the African Charter. The Commission is aware the controversial nature of the issue, due to the political connotation that it carries. That controversy is as old as the Charter. The drafters of the Charter refrained deliberately from defining it.<sup>18</sup> To date, the concept has not been defined under international law. However, there is recognition that certain objective features attributable to a collective of individuals, may warrant them to be considered as “people”.
170. A group of international law experts commissioned by UNESCO to reflect on the concept of “people” concluded that where a group of people manifest some of the following characteristics; a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life, it may be considered to be a “people.”. Such a group may also identify itself as a people,

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<sup>18</sup> See the Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples’ Rights held in Banjul, the Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rapt. Rpt (II), p.4.

by virtue of their consciousness that they are a people.<sup>19</sup> This characterisation does not bind the Commission but can only be used as a guide.

171. In the context of the African Charter, the notion of “people” is closely related to collective rights. Collective rights enumerated under Articles 19 to 24 of the Charter can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds. .

172. The drafters of the Charter provided for the protection of “peoples rights” under the Charter. In his book, entitled; The Law of the African (Banjul) Charter on Human and Peoples’ Rights, Justice Hassan B. Jallow,<sup>20</sup> an eminent African Jurist, who participated in the drafting the African Charter, sheds light on this issue. He says that:

*“[t]he concept of peoples’ rights, to which a whole chapter had been devoted in the draft did not mean there was any grading of rights. There were economic, social and cultural rights which have particular importance to developing countries and which together with civil rights and political rights in one complementary whole should henceforth be give an important place.”<sup>21</sup>*

173. Justice Jallow cites the late President Leopold Sedar Senghor, the first President of Senegal and an eminent African Statesman, who told the inaugural meeting of African Legal Experts to draft the Charter, the following:

*“People will perhaps expatiate for a long time upon the ‘People Rights’ we were very keen on referring to. We simply meant, by so doing, to show our attachment to economic, social, and cultural rights, to collective rights in general, rights which have a particular importance in our situation of a developing country. We are certainly not drawing lines of demarcation between the different categories of rights. We want to show essentially that beside civil and political rights, economic, social and cultural rights should henceforth be given the important place they deserve. We wanted to lay emphasis on the right to development and the*

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<sup>19</sup> See the Final Report and Recommendations of the Meeting of Experts on extending of the debate on the concept of “peoples’ rights” held in Paris, France, from 27 to 30 November 1989,(SHS-89/CONF.602/COL.1) § 22.

<sup>20</sup> Trafford Publishing, Canada 2007.

<sup>21</sup> Hassan B. Jallow, *ibid*, page 28.

*other rights which need the solidarity of our States to be fully met; the right to peace and security, the right to a healthy environment, right to participate in the equitable share of the common heritage of mankind, the right to enjoy a fair international economic order and, finally the right to natural wealth and resources.*<sup>22</sup>

174. The African Commission has itself dealt with the issues of peoples' rights without defining the term "people" or "peoples' right." In its acclaimed Report of the Working Group of Experts on Indigenous Populations/Communities,<sup>23</sup> the African Commission described its dilemma of defining the concepts in the following terms:

*"[d]espite its mandate to interpret all provisions of the African Charter as per Article 45(3), the African Commission initially shied away from interpreting the concept of 'peoples'. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESR do not define 'peoples'. It is evident that the drafters of the African Charter intended to distinguish between the traditional individual rights where the sections preceding Article 17 make reference to "every individual". Article 18 serves as a break by referring to the family. Article 19-24 make specific reference to "all peoples"*

175. It continues:

*"Given such specificity, it is surprising that the African Charter fails to define "peoples" unless it was trusted that its meaning could be discerned from the prevailing international instruments and norms. Two conclusions can be drawn from this. One, that the African Charter seeks to make provision for a group or collective rights, that is, that set of rights that can conceivably be enjoyed only in a collective manner like the right to self determination or independence or sovereignty..."<sup>24</sup>*

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<sup>22</sup> Ibid page 29.

<sup>23</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005

<sup>24</sup> Ibid, at page 72-73, Part 3.4 Jurisprudence from the African Commission on Human and Peoples' Rights, under Chapter 3; An analysis of the African Charter and its Jurisprudence on the Concept of 'Peoples'

176. The Commission deduces from the foregoing discourse that peoples' rights are equally important as are individual rights. They deserve, and must be given protection. The minimum that can be said of peoples' rights is that, each member of the group carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity, i.e. common rights which benefit the community such as the right to development, peace, security, a healthy environment, self determination, and the right to equitable share of their resources.
177. It is in the light of the above that the Commission shall examine the allegations against the Respondent State, concerning the violations of the collective rights cited hereinabove.
178. The Commission states that after thorough analysis of the arguments and literature, it finds that the people of Southern Cameroon can legitimately claim to be a "people." Besides the individual rights due to Southern Cameroon, they have a distinct identity which attracts certain collective rights. The UNESCO group of Experts report referred to hereinabove, states that for a collective of individuals to constitute a "people" they need to manifest some, or all the identified attributes. The Commission agrees with the Respondent State that a "people" may manifest ethno- anthropological attributes. Ethno-anthropological attributes may be added to the characteristics of a "people." Such attributes are necessary only when determining indigenology of a "people," but cannot be used as the only determinant factor to accord or deny the enjoyment or protection of peoples' rights. Was it the intention of the State Parties to rely on ethno anthropological roots only to determine "peoples' rights," they would have said so in the African Charter? As it is, the African Charter guarantees equal protection to people on the continent, including other racial groups whose ethno anthropological roots are not African.
179. Based on that reasoning, the Commission finds that "the people of Southern Cameroon" qualify to be referred to as a "people" because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection, and political outlook. More importantly they identify themselves as a people with a separate and distinct identity. Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it.
180. The Respondent State might not recognise such innate characteristics. That shall not resolve the question of self identification of Southern Cameroonians. It might actually postpone the solution to the problems in Southern Cameroon, including those already highlighted hereinabove. The Respondent State acknowledges that there have been problems created regularly by the secessionist SCNC and SCAPO, in that part of its territory, which calls itself the "Southern Cameroon".

181. The Commission is aware that post colonial Africa has witnessed numerous cases of domination of one group of people over others, either on the basis of race, religion, or ethnicity, without such domination constituting colonialism in the classical sense. Civil wars and internal conflicts on the continent are testimony to that fact. It is incumbent on State Parties, therefore, whenever faced with allegations of the nature contained in the present communication, to address them rather than ignore them under the guise of sovereignty and territorial integrity. Mechanisms such as the African Commission were established to resolve disputes in an amicable and peaceful manner. If such mechanisms are utilised in good faith, they can spare the continent valuable human and material resources, otherwise lost due to conflicts fighting against ethnic, religious domination or economic marginalisation.
182. The Commission shall address the question, whether the people of Southern Cameroon are entitled to the right to self determination. In so doing it shall contextualise the question by dealing, not with the 1961 UN Plebsicite, or the 1972 Unification, but rather the events of 1993 and 1994 on the constitutional demands *vis-à-vis* the claim for the right to self determination of the Southern Cameroonian people.
183. The Complainants allege that the 1993 Buea and 1994 Bamenda Anglophone conferences submitted constitutional proposals, which were ignored by the Respondent State. This forced the Complainants to conduct a signature referendum of Southern Cameroonians in 1995, which endorsed separation.
184. The Complainants argued that the people of Southern Cameroon through the 1993, 1994 conferences, and the 1995 signature referendum, raised issues of constitutional, political and economic marginalisation. They allege further that the Constitution adopted by the Respondent State in December 1995 did not address their appeals for autonomy. The Commission is of the view that these complaints merit its determination.
185. The Complainants submit that the Respondent State's refusal or failure to address their grievances amounted to a violation of Article 20. They claim therefore that they are entitled to exercise their right to self determination under the Charter. The Respondent State responds that these grievances constitute a secessionist agenda by SCNC and SCAPO. It denies that the Complainants are entitled to exercise the right to self determination under Article 20.
186. The Respondent State submitted that the Buea Declaration of 3 April 1993 recognised that the Southern Cameroonians had freely joined *La République du Cameroun* in 1961, and further that the transition to a unitary state in 1972 was approved by both Francophones and Anglophones who voted 98.26%

and 97.9% respectively through a national referendum. It states further that the so called referendum of September 1995 by SCNC does not invalidate the 1972 data. The Respondent State doubts the accuracy of the referendum. It states that:

*“[s]ince 1996, the State of Cameroon is a unitary decentralised State, adopted by members of parliament, including those from the Anglophone part of the country. Legal instruments relating to putting in place of the decentralised regional and local authorities, ...were enacted in July 2004’*

187. The Respondent State argues further that:

*“[t]he self determination of the “people” of Southern Cameroon, following the logic of the Commission (cf per the Katanga case) would be understandable where there are tangible evidence of massive violations of human rights, and where there is evidence ascertaining the refusal of the nationals of Southern Cameroon, the right to take part in the management of public affairs of the State of Cameroon. There is no such proof.....:*

188. The Commission recalls that the Katangese had urged the Commission to recognise the independence of Katanga. In reaching its decision in that case, the Commission stated the following:

*“The claim is brought under Article 20(1) of the African Charter....There are no allegations of specific breaches of other human rights apart from the claim of the denial of self determination.*

*All peoples have a right to self determination. There may however be controversy as to the definition of peoples and the content of the right. The issue in this case is not self determination for all Zaireoise as a people but specifically the Katangese. Whether the Katangese consist of one or more ethnic groups is, fore this purpose immaterial and no evidence has been adduced to that effect.*

*The Commission believes that Self determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism or any form of relations that accords with the*

*wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity*<sup>25</sup>

189. The Respondent State condemns the Complainants' secessionist agenda. This Commission stated in the Katangese case that, it;  
*"... is obliged to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter of Human and peoples' Rights."*
190. The Commission notes that the Republic of Cameroon is a party to the Constitutive Act (and was a state party to the OAU Charter). It is a party to the African Charter on Human and Peoples' Rights as well. The Commission is obliged to uphold the territorial integrity of the Respondent State. As a consequence, the Commission cannot envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons. That will jeopardise the territorial integrity of the Republic of Cameroon.
191. The Commission states that secession is not the sole avenue open to Southern Cameroonians to exercise the right to self determination.<sup>26</sup> The African Charter cannot be invoked by a complainant to threaten the sovereignty and territorial integrity of a State party. The Commission has however accepted that autonomy within a sovereign state, in the context of self government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised under the Charter. In their submission, the Respondent State implicitly accepted that self determination may be exercisable by the Complainants on condition that they establish cases of massive violations of human rights, or denial of participation in public affairs.
192. The Complainants have submitted that the people of the Southern Cameroon are marginalised, oppressed, and discriminated against to such an extent that they demand to exert their right to self-determination.
193. The Respondent States submitted that the 1996 Constitution was adopted by the National Assembly, which included representatives of the people of Southern Cameroon. The Respondent State argues that, within the framework of the 1996 Constitution, three laws on decentralisation, which "will enable Cameroon to resume the development of local potentials," were adopted by the Parliament. The Respondent State submits further that since 2004 measures are being taken to give more autonomy to regions. Whether the laws shall be applied to address the concerns of South Cameroonians, will depend on the goodwill of both sides.

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<sup>25</sup> Communication 75/92, 8<sup>th</sup> Annual Activity Report, §4.

<sup>26</sup> See above para 185.

194. The Commission has so far found that the Respondent has violated Articles 2, 4, 5, 6, 7, 11, and 19 of the Charter. It is the view of the Commission, however that, in order for such violations to constitute the basis for the exercise of the right to self determination under the African Charter, they must meet the test set out in the Katanga case, that is, there must be:

*“concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by Article 13 (1).” (emphasis added)*

195. The Commission has already made a finding that Article 13 was not violated. The Commission saw ample evidence that the people of Southern Cameroon are represented in the National Assembly, at least through an opposition party, the SDF. Information on the record suggests that there has been some form of representation of the people of Southern Cameroon in the national institutions prior to, and after 18 December 1989. The Complainants may not recognise the representatives elected to the national institutions under the current constitutional arrangement. The Respondent State on the other hand may not share the same views or even recognise the SCNC and SCAPO as representing a section of the people of Southern Cameroon.

196. The Complainants’ main complaint is that the people of Southern Cameroon are denied equal status in the determination of national issues. They allege that their constitutional demands have been ignored by the Respondent State. In other words they assert their right to exist and hence the right to determine their own political, and social economic affairs under Article 20(1).

197. The Commission is not convinced that the Respondent State violated Article 20 of the Charter. The Commission holds the view that when a Complainant seeks to invoke Article 20 of the African Charter, it must satisfy the Commission that the two conditions under Article 20(2), namely oppression and domination have been met.

198. The Complainants have not demonstrated if these conditions have been met to warrant invoking the right to self determination. The basic demands of the SCNC and SCAPO as well as the two Anglophone Conferences, is the holding of constitutional negotiations to address economic marginalisation, unequal representation and access to economic benefits. Secession was the last option after the demands of Buea and Bamenda Conferences were ignored by the Respondent State.

199. Going by the Katanga decision, the right to self determination cannot be exercised, in the absence of proof of massive violation of human rights under the Charter. The Respondent State holds the same view. The Commission states that the various forms of governance or self determination such as

federalism, local government, unitarism, confederacy, and self government can be exercised only subject to conformity with state sovereignty and territorial integrity of a State party. It must take into account the popular will of the entire population, exercised through democratic means, such as by way of a referendum, or other means of creating national consensus. Such forms of governance cannot be imposed on a State Party or a people by the African Commission.

200. The African Commission finds that the people of Southern Cameroon cannot engage in secession, except within the terms expressed hereinabove, since secession is not recognised as a variant of the right to self determination within the context of the African Charter.
201. The Commission, however, finds also that the Respondent State violated various rights protected by the African Charter in respect of Southern Cameroonians. It urges the Respondent State to address the grievances expressed by the Southern Cameroonians through its democratic institutions. The 1993 Buea and 1994 Bamenda Anglophone conferences raised constitutional and human rights issues which have been a matter of concern to a sizable section of the Southern Cameroonian population for quite a long time. The demand for these rights has lead to civil unrest, demonstrations, arrests, detention, and the deaths of various people, which culminated in the demand for secession.
202. The Respondent State implicitly acknowledges the existence of this unwelcome state of affairs. It is evident that the 1995 Constitution did not address the Southern Cameroonians' demands, particularly since it did not accommodate the concerns expressed through the 1993 Buea Declaration and 1994 Bamenda Proclamation.
203. The Commission believes that the Southern Cameroonians' grievances cannot be resolved through secession but through a comprehensive national dialogue.

#### **Alleged violation of Article 21**

204. The Complainants allege violation of Article 21. They did not bring any evidence to support their allegation. In the absence of any such evidence, the Commission finds no violation against the Respondent State.

#### **Alleged violation of Article 22**

205. The Complainants alleged cases of economic marginalisation, and lack of economic infrastructure. The lack of such resources, if proven would constitute violation of the right to development under Article 22.

206. The Commission is cognisant of the fact that the realisation of the right to development is a big challenge to the Respondent State, as it is for State Parties to the Charter, which are developing countries with scarce resources. The Respondent State gave explanations and statistical data showing its allocation of development resources in various socio-economic sectors. The Respondent State is under obligation to invest its resources in the best way possible to attain the progressive realization of the right to development, and other economic, social and cultural rights. This may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances. This alone cannot be a basis for the finding of a violation. The Commission does not find a violation of Article 22.

#### **Alleged violation of Article 23(1)**

207. The Complainants did not substantiate their allegations on the violation under Article 23(1). The Commission therefore finds that there was no violation of article 23(1) of the Charter.

#### **Alleged violation of Article 24**

208. No evidence was brought to support the allegation that article 24 has been violated. Consequently, the Commission finds no violation.

#### **Alleged violation of Article 26.**

209. The Complainants alleged violation of Article 26. They submitted that the judiciary in the Respondent State is not independent. They allege that the Executive branch influences the judiciary through the appointments, promotions, or transfer policy. It is also alleged that the President of the Republic convenes and presides over the Higher Judicial Council.
210. The Respondent State avers that judicial independence is guaranteed by the Constitution. It states that Article 37 of the 1972 Constitution requires every institution and person, including the President to respect it. The State argues further that the Higher Judicial Council which is the appointing and disciplinary authority for magistrates does not necessarily require magistrates to pledge allegiance to the President. It concedes that the President of the Republic chairs the Higher Judicial Council, the Minister for Justice, is the Vice Chairperson, three members of Parliament, three members of the bench, and an independent personality.
211. The Commission states that the doctrine of separation of powers requires the three pillars of the state to exercise powers independently. The executive branch must be seen to be separate from the judiciary, and parliament. Likewise in order to guarantee its independence, the judiciary, must be seen to be independent from the executive and parliament. The admission by the

Respondent State that the President of the Republic, and the Minister responsible for Justice are the Chairperson and Vice Chairperson of the Higher Judicial Council respectively is manifest proof that the judiciary is not independent.

212. The composition of the Higher Judicial Council by other members is not likely to provide the necessary “checks and balance” against the Chairperson, who happens to be the President of the Republic. The allegations by the Complainants in this regard are therefore substantiated. The Commission does not hesitate to find the Respondent State in violation of Article 26.
213. The complainants did not mention Article 1 among the provisions of the African Charter alleged to have been violated by the respondent State. However, according to its well established jurisprudence,<sup>27</sup> the African Commission holds that a violation of any other provision of the African Charter automatically constitutes a violation of Article 1 as it depicts a failure of the State Party concern to adopt adequate measures to give effect to the provisions of the African Charter. Thus, having found violations of several provisions in the above analysis, the African Commission also finds that the Respondent State violated Article 1.
214. For the above reasons, the African Commission:
- Finds that Articles 12, 13, 17(1), 20, 21, 22, 23(1) and 24 have not been violated.
  - Finds that the Republic of Cameroon has violated Articles 1, 2, 4, 5, 6, 7(1), 10, 11, 19 and 26 of the Charter.

## **RECOMMENDATIONS**

215. The African Commission therefore recommends as follows;

1. That the Respondent State:
  - (I) Abolishes all discriminatory practices against people of Northwest and Southwest Cameroon, including equal usage of the English language in business transactions;
  - (II) Stops the transfer of accused persons from the Anglophone provinces for trial in the Francophone provinces;
  - (III) Ensures that every person facing criminal charges be tried under the language he/she understands. In the alternative, the Respondent State must ensure that interpreters are employed in Courts to avoid jeopardising the rights of accused persons;

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- (IV) Locates national projects, equitably throughout the country, including Northwest and Southwest Cameroon, in accordance with economic viability as well as regional balance;
  - (V) Pays compensation to companies in Northwest and Southwest Cameroon, which suffered as a result of discriminatory treatment by banks;
  - (VI) Enters into constructive dialogue with the Complainants, and in particular, SCNC and SCAPO to resolve the constitutional issues, as well as grievances which could threaten national unity; and
  - (VII) Reforms the Higher Judicial Council, by ensuring that it is composed of personalities other than the President of the Republic, the Minister for Justice and other members of the Executive Branch.
2. To the Complainants, and SCNC and SCAPO in particular,
- (i) to transform into political parties,
  - (ii) to abandon secessionism and engage in constructive dialogue with the Respondent State on the Constitutional issues and grievances.
3. The African Commission places its good offices at the disposal of the parties to mediate an amicable solution and to ensure the effective implementation of the above recommendations.
4. The African Commission requests the Parties to report on the implementation of the aforesaid recommendations within 180 days of the adoption of this decision by the AU Assembly.

**Done in Banjul, The Gambia at the 45<sup>th</sup> Ordinary Session, 13 - 27 May 2009.**

## **ANNEX 5: RESOLUTIONS ADOPTED DURING THE 45<sup>TH</sup> ORDINARY SESSION**

- **RESOLUTION ON THE ESTABLISHMENT OF AN  
ADVISORY COMMITTEE ON BUDGETARY AND  
STAFF MATTERS**
  
- **RESOLUTION ON THE TRANSFORMATION OF  
THE FOCAL POINT ON THE RIGHTS OF OLDER  
PERSONS IN AFRICA INTO A WORKING GROUP  
ON THE RIGHTS OF OLDER PERSONS AND  
PEOPLE WITH DISABILITIES IN AFRICA**
  
- **RESOLUTION ON COOPERATION BETWEEN THE  
AFRICAN COMMISSION ON HUMAN AND  
PEOPLES' RIGHTS AND THE AFRICAN  
COMMITTEE OF EXPERTS ON THE RIGHTS AND  
WELFARE OF THE CHILD IN AFRICA**

## **RESOLUTION ON THE ESTABLISHMENT OF AN ADVISORY COMMITTEE ON BUDGETARY AND STAFF MATTERS**

**The African Commission on Human Peoples' Rights (the African Commission) meeting at its 45<sup>th</sup> Ordinary Session in Banjul, The Gambia from 13 – 27 May 2009:**

**Conscious** of its mandate under the African Charter on Human and Peoples' Rights (the Charter) to promote and protect human & peoples' rights in Africa;

**Aware** of the vital role of its Secretariat in ensuring the effective discharge of its mandate and the importance of having an effective Secretariat;

**Further** conscious of the difficulties the Commission has had in the preparation, presentation and execution of its budget, and desirous of facilitating its budgetary preparation process;

**Welcoming** the decision of the Executive Council of the African Union to strengthen the human resources capacity of the Commission through the recruitment of 33 more staff over the next five years;

**Recalling** the decision at its 6<sup>th</sup> Extra Ordinary Session to establish an Advisory Committee to work with the Secretariat to prepare the Programs budget of the Commission;

**Hereby resolves to:**

- a) Establish an Advisory Committee entitled "Advisory Committee on Budgetary and Staff Matters", with the following mandate:
  - (i) To work with the Secretariat to identify activities from the 2008 – 2012 Strategic Plan of the ACHPR that would feature in the Commission's budget Proposals;
  - (ii) To work with the Secretariat to prepare the programs budget of the Commission for presentation to the relevant Organs of the African Union;
  - (iii) To work with the Secretariat to ensure proper execution of the programs; and
  - (iv) To work with the Secretariat on the implementation of the approved new structure of the Secretariat of the Commission
  
- b) Appoint the following to the Committee:
  - (i) Commissioner Musa Ngary Bitaye
  - (ii) Commissioner Kaytesa Zainabou Sylvie

- (iii) Commissioner Reine Alapini-Gansou
- (iv) the Secretary to the Commission (ex-officio)
- (v) 1 Senior Legal Officer (ex-officio)
- (vi) the Admin and Finance Officer (ex-officio)

**Further resolves that:**

- a) The Advisory Committee shall work in conformity with these terms of reference, the Rules of Procedure of the African Commission, the provisions of the African Charter on Human and Peoples' Rights and the relevant African Union Rules and Regulations;
- b) The Advisory Committee shall report at the Ordinary Sessions of the Commission on the implementation of this Resolution;
- c) The Advisory Committee is established for an initial period of two years.

**Done in Banjul, the Gambia on the 27<sup>th</sup> May 2009.**

**RESOLUTION ON THE TRANSFORMATION OF THE FOCAL POINT ON THE RIGHTS OF OLDER PERSONS IN AFRICA INTO A WORKING GROUP ON THE RIGHTS OF OLDER PERSONS AND PEOPLE WITH DISABILITIES IN AFRICA**

**The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 45<sup>th</sup> Ordinary Session in Banjul, The Gambia, from 13 to 27 May, 2009:**

**Recalling** its mandate to promote human and peoples' rights and ensure their protection in Africa under the African Charter on Human and Peoples' Rights (the African Charter);

**Bearing in mind** the African Union Policy Framework and Plan of Action on Ageing in which "*States Parties recognized the fundamental rights of older persons and committed themselves to abolish all forms of discrimination based on age,*" and also committed themselves "*To ensure that the rights of older persons are protected by appropriate legislation, including the right to organize themselves in groups and the right to representation in order to advance their interest;*"

**Recalling** the Resolution of the African Commission of 30 May 2007 on the Rights of Older Persons in Africa, adopted at its 41<sup>st</sup> Ordinary Session held from 16-30 May 2007, in Accra, Ghana;

**Recalling further** its Resolution on the Appointment of a Focal Point on the Rights of Older Persons in Africa, that was adopted at the 42<sup>nd</sup> Ordinary Session held from 15 - 28 November 2007, in Brazzaville, Republic of Congo;

**Considering** that its Resolution **ACHPR/Res.118(XXXII)07: RESOLUTION ON THE ESTABLISHMENT AND APPOINTMENT OF A FOCAL POINT ON THE RIGHTS OF OLDER PERSONS IN AFRICA**, adopted during its 42<sup>nd</sup> Ordinary Session did not take into consideration people with disabilities;

**Considering** that the African Charter makes specific provisions for the protection of these rights, under **Article 18(4)**, which stipulates that "*The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs;*"

**Considering further** paragraph 20 of the Kigali Declaration, which "*calls upon States Parties to develop a Protocol on the protection of the rights of the elderly and people with disabilities;*"

**Bearing in mind** the mandate of the Focal Point which includes, among others, "*Spearheading the process of drafting a Protocol on the Rights of Older Persons*

*for submission to the AU Policy Organs for consideration and adoption as soon as possible;"*

**Appreciating** the work of the Focal Point in advocating for a rights-based approach towards protecting the rights of older persons;

**Underscoring** the need for a Working Group on the Rights of Older Persons and People with Disabilities, as recommended by the members of the Focal Point, to facilitate the process of drafting the Protocol on Ageing, and ensuring compliance by States Parties with the recommendations contained in the AU Policy Framework and Plan of Action on Ageing:

**Hreby resolves to:**

(a) Establish a Working Group on the Rights of Older Persons and People with Disabilities to replace the Focal Point for a two year period. The mandate of the Working Group shall be:

- i. To hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities;
- ii. To draft a Concept Paper for consideration by the African Commission that will serve as a basis for the adoption of the Draft Protocol on Ageing and People with Disabilities;
- iii. To facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the continent, including their socio-economic rights;
- iv. To collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development programmes of Member States;
- v. Identify good practices to be replicated in Member States;
- vi. Submit a detailed Report to the African Commission at each Ordinary Session.

(b) Appoint the following persons as members of the Working Group:

- i. Commissioner Yeung Kam John Yeung Sik Yuen (Chairperson);**
- ii. Commissioner Reine-Alapini Gansou (Member);**
- iii. Mr. Tavengwa Machekano Nhongo (Member);**
- iv. Mr. Papa Malick Fall (Member); and**
- v. Ms. Nadia Abdel-Wahab El-Afify (Member)**

**Done in Banjul, The Gambia, on 27 May 2009.**

**RESOLUTION ON COOPERATION BETWEEN THE AFRICAN COMMISSION  
ON HUMAN AND PEOPLES' RIGHTS AND THE AFRICAN COMMITTEE OF  
EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD IN AFRICA**

**The African Commission on Human and Peoples' Rights, meeting at its 45th Ordinary Session held in Banjul, The Gambia, from 13 to 27 May 2009;**

**Considering** Article 18(3) of the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on the Rights of Women in Africa, in particular Articles 5,6,12, 13, 20 and 24; the African Charter on the Rights and Welfare of the Child; the AU Declaration on an Africa Fit for Children, and the Solemn Declaration on Gender Equality in Africa;

**Recalling** its Resolution No. **ACHPR/Res.38 (XXV) 99**, adopted at its 25th Ordinary Session held from 26th April to 5th May 1999, in Bujumbura, Burundi, on the Establishment of the Mechanism of the Special Rapporteur on the Rights of Women in Africa;

**Taking note** of the important work achieved by this Mechanism since its establishment;

**Considering** that the Protocol to the African Charter on the Rights of Women in Africa takes the situation of the girl child into account and complements the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child;

**Being aware** that to date, the Special Mechanism on the Rights of Women in Africa does not cover the Rights of the Child;

**Concerned** about the unremitting increase of serious violations against the rights of the child in Africa;

**Given** the need to promote and protect the fundamental rights of the child in Africa through enhanced cooperation between the African Commission and the African Committee of Experts on the Rights and Welfare of the Child:

Hereby resolves to:

**(a) Establish** a formal relationship between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child, with the view to enhancing cooperation between the two mechanisms;

**(b) Designate** the Special Rapporteur on the Rights of Women in Africa to collaborate closely with the States parties, Intergovernmental organisations,

and Non Governmental Organisations working on the rights of the child in Africa;

**(c) Call upon** the Special Rapporteur on the Rights of Women in Africa to Report on the status of this cooperation during its Ordinary Sessions.

**Done in Banjul, The Gambia 27 May 2009**

2009

# 26th Activity Report of the African Commission on human and peoples' rights (Achpr) submitted in accordance with Article 54 of the African charter on human and peoples' rights

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