

AFRICAN UNION

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UNION AFRICAINE

UNIÃO AFRICANA

Addis Ababa, ETHIOPIA

P. O. Box 3243

Telephone 517 700

Fax : 517844

**EXECUTIVE COUNCIL
Sixth Ordinary Session
24-28 January 2005
Abuja, Nigeria**

EX.CL/167 (VI)

**REPORT OF THE 17TH ANNUAL ACTIVITY
REPORT OF THE AFRICAN COMMISSION
ON HUMAN AND PEOPLES' RIGHTS**

SEVENTEENTH ANNUAL ACTIVITY REPORT OF THE
AFRICAN COMMISSION ON HUMAN AND
PEOPLES' RIGHTS 2003 - 2004

I. ORGANISATION OF WORK

A. Period covered by the Report

1. The Sixteenth Annual Activity Report was adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union meeting in July 2003 in Maputo, Mozambique.

The Seventeenth Annual Activity Report covers the 34th and the 35th Ordinary Sessions of the African Commission held from 6th to 20th November 2003 and from 21st May to 4th June 2004 respectively in Banjul, The Gambia.

B. Status of ratification

2. All Member States of the African Union are parties to the African Charter on Human and Peoples' Rights.

C. Sessions and Agenda

3. Since the adoption of the Sixteenth Annual Activity Report in July 2003, the African Commission has held two Ordinary Sessions.

The agenda of the abovementioned sessions can be found on the Website of the African Commission, which is www.achpr.org

D. Composition and participation

4. In accordance with Rule 17 of its Rules of Procedure, the African Commission during the 34th Ordinary Session, elected its Bureau to serve for a term of two years. Commissioner Salamata Sawadogo was elected Chairperson and Commissioner Yassir Sid Ahmed El Hassan was elected Vice-Chairperson.
5. The following Members of the African Commission participated in the deliberations of the 34th and 35th Ordinary Sessions -:
 - Commissioner Salimata Sawadogo (Chairperson);
 - Commissioner Yassir Sid Ahmed El Hassan (Vice-Chairperson);
 - Commissioner Mohammed Abdulahi Ould Babana;
 - Commissioner Andrew R Chigovera;
 - Commissioner Vera M Chirwa;
 - Commissioner E.V.O. Dankwa;
 - Commissioner Angela Melo ;
 - Commissioner Jainaba Johm;
 - Commissioner Sanji Mmasenono Monageng;
 - Commissioner Bahame Tom Mukirya Nyanduga;

- Commissioner M. Kamel Rezag-Bara.
6. During the 34th Ordinary Session the following three new members of the African Commission, elected during the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union held in Maputo, Mozambique in July 2003, took their oath of office:-
- Mrs Sanji Mmasenono Monageng
 - Mr. Bahame Tom Mukirya Nyanduga
 - Mr. Mohammed Abdulahi Ould Babana
7. Representatives from the following twenty six (26) Member States participated in the deliberations of the 34th Ordinary Session and made statements, namely, -:
- Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Congo, Cote D'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, The Gambia, Guinea, Guinea Bissau, Kenya, Libya, Mali, Rwanda, Senegal Sudan, South Africa, Tunisia and Zimbabwe
8. Representatives from the following twenty six (26) Member States participated in the deliberations of the 35th Ordinary Session and made statements -:
- Algeria, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo, Cote D'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Guinea Bissau, Kenya, Kingdom Lesotho, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Senegal, Republic of South Africa, Sudan, Tanzania, Tunisia and Zimbabwe.
9. Representatives from UN Specialised Agencies, National Human Rights Institutions and Inter-Governmental and Non-Governmental Organisations (NGOs) also participated in the deliberations of the two Ordinary Sessions.

E. Adoption of the Activity Report

10. The African Commission considered and adopted its Seventeenth Annual Activity Report at its 35th Ordinary Session.

II. ACTIVITIES OF THE AFRICAN COMMISSION

A. Retreat of Members of the African Commission

11. The Retreat of Members of the African Commission facilitated by the Office of the High Commissioner for Human Rights (OHCHR), was held from 24th to 26th September 2003 in Addis Ababa, Ethiopia. Twenty-eight participants comprising members of the African Commission, members of the NEPAD APRM Panel of Eminent Persons, Chairperson of the African Coordinating Committee of National Institutions, Vice Chairperson of the African Committee on the Rights and Welfare of the Child, Representatives of the African Union (AU) units and

programmes such as CSSDCA as well as representatives of partner institutions and the donor community participated in the Meeting.

12. Issues discussed at the Retreat included the consideration of States Reports, the handling of communications, the relationship between the African Commission and the African Union, and the relationship between the African Commission with other bodies of the African Human Rights System and the initiatives of the African Union.
13. At the 34th Ordinary Session held in November 2003 in Banjul, The Gambia, the African Commission discussed the Report of the Retreat and adopted it. At its 35th Ordinary Session held in May to June 2004 in Banjul, The Gambia, Members of the African Commission continued reflecting on how to implement the recommendations suggested in the Report.

B. Commemoration of the tenth (10th) Anniversary of the Rwanda Genocide

14. The Executive Council of the African Union in its Decision on the 10th Anniversary of the Rwandan Genocide – Decision 16(II), decided that the Commission of the African Union should commemorate the 10th Anniversary of the Rwandan Genocide, being 7th April 2004 as a day of remembrance of the victims of the genocide in Rwanda and reaffirmation of Africa's resolve to prevent and fight genocide on the continent.
15. On 7th April 2004, the Secretariat of the African Commission commemorated this event in Banjul, The Gambia at the Kairaba Hotel. Members of the Diplomatic Corps, Representatives from the UN Specialised Agencies based in the Gambia, Civil Society NGOs and the public were invited and participated in this event. A minute of silence was observed in remembrance of the victims of the genocide and a panel discussion held to discuss and reflect on the events that happened 10 years ago in Rwanda with a resolve never to let it happen again.

C. Consideration of Initial/Periodic Reports of State Parties

16. In accordance with the provisions of Article 62 of the African Charter on Human and Peoples' Rights, each State Party undertakes to present every two years from the date of entry into force of the African Charter, a report on legislative and other measures taken with a view to giving effect to the rights and freedoms guaranteed under the African Charter.
17. The status of submission of Initial and Periodic reports by States Parties is contained in **Annex I** of this report.
18. At its 34th Ordinary Session, the African Commission examined the following reports -:
 - Initial Report of the Democratic Republic of Congo (combining all the overdue reports);
 - Periodic Report of the Republic of Senegal (combining all the overdue reports).

19. At its 35th Ordinary Session, the African Commission examined the following reports -:
 - Initial Report of the Republic of Niger (combining all the overdue reports);
 - Periodic Report of the Republic of Sudan;
 - Periodic Report of Burkina Faso.
20. The African Commission expressed its satisfaction with the dialogue that took place between itself and the delegations from the Democratic Republic of Congo, the Republic of Senegal, Republic of Niger, Republic of Sudan and Burkina Faso and encouraged the States Parties to continue their efforts in fulfilling their obligations under the African Charter.
21. The African Commission adopted Concluding Observations on the five (5) State Reports which will be published together with the reports.
22. The African Commission strongly appeals to those States Parties that have not yet submitted their initial reports or have overdue periodic reports to submit them as soon as possible, and where applicable, compile all the overdue reports into one report.

D. Promotional Activities

23. All the Members of the African Commission undertook promotional activities during the inter-sessions. The activities could be classified as follows -:
 - Promotional missions were undertaken to the following Member States, Democratic Republic of Congo, Rwanda, Burundi, Sierra Leone and Mali;
 - Seminars and Workshops;
 - Conferences, Lectures and Training;
 - Sensitisation on the ratification of the Protocols on the African Court and on the Rights on Women Africa;
 - Thematic issues such as freedom of expression, prevention and prohibition of torture, situation of refugees and displaced persons, prisons and conditions of detention in Africa, situation of women in Africa and situation of indigenous populations/communities in Africa
24. Inter-session activity reports of the Commissioners can be found on the website of the African Commission.
25. The African Commission at its 34th and 35th Ordinary Sessions adopted the following Mission Reports -:
 - *Reports of Promotional Missions undertaken to the following Member States:-*
 - Cote D'Ivoire – 2nd to 4th April 2001**
 - Seychelles – 2nd to 6th July 2001**
 - Djibouti – 9th to 11th September 2002**
 - Libya – 17th to 23rd March 2002**
 - *Report of the Fact-finding Mission to :-*
 - Zimbabwe – 24th to 28th June 2002**

- *Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to :-*

Benin – 24th January to 5th February 2003

- *Report of the High Level Mission to :-*

Cote D'Ivoire – 24th to 26th April 2003

26. The distribution of State Parties among Commissioners for their promotion activities is contained in **Annex II** of the report.

(a) Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa

27. Penal Reform International (PRI) the principal donor for the office of the Special Rapporteur on Prisons and Conditions of Detention in Africa discontinued its provision of financial support to the Special Rapporteur. PRI however, negotiated with the Foreign and Commonwealth Office (FCO) for the recruitment of an assistant who is on a seventeen months contract and assumed duty in June 2003.

28. Thus during the period under review, the Special Rapporteur, Commissioner Vera Chirwa was constrained in terms of the activities she could undertake because of the poor financial situation of the African Commission. The following are the activities she was able to undertake -:

- Drew up a strategic plan for the next three years and prioritised activities to be undertaken within the next twelve months;
- Undertook visits to prisons and places of detention in Ethiopia from 15th to 29th March 2004 and in Lilongwe, Malawi;
- Followed up on the implementation of the recommendations made during her visit to the prisons in Uganda in March 2002. Uganda indicated the difficulties faced in implementing some of the recommendations and requested the African Commission to assist it in implementing them.

(b) Report of the Special Rapporteur on the Rights of Women in Africa

29. During the period under review, the Special Rapporteur on the Rights of Women, Commissioner Dr. Melo placed special emphasis on the process of adopting and ratifying the Protocol on the Rights of Women in Africa.

30. The Special Rapporteur undertook a Mission to Sao Tome and Principe from 15th to 19th March 2004. In addition the Special Rapporteur undertook the following activities -:

- Mobilised funds, established contacts with potential donors with a view to financing the activities of the Special Rapporteur;
- Participated in meetings on strategies for the speedy ratification of the Protocol on the Rights of Women in Africa;

31. The Special Rapporteur carried out the following activities geared towards its speedy ratification by Member States following its adoption by the Assembly of Heads of State and Government in July 2003 and sent letters to -:

- The Chairperson of the Committee of Permanent Representatives in Addis Ababa to sensitise her and her colleagues with a view to seeking the speedy ratification of the Protocol in their respective countries;
- The Current Chairperson of the African Union (AU), H.E. Mr. Joaquim Chissano requesting him to encourage Member States of the AU to ratify the Protocol;
- The Parliament, the Special Commission in charge of Social Affairs, the Commission on Legality and Human Rights, the Minister of Women's Affairs and Social Welfare of Mozambique and the Ministry of Foreign Affairs of Mozambique requesting them to start of the process of ratifying the Protocol;
- All Members of the African Commission requesting them to encourage their governments to ratify the Protocol;
- Headquarters of organisations and regional economic communities such as COMESA, UEMOA, IGAD and SADC requesting them to encourage their Member States to ratify the Protocol.

(c) Special Mechanisms of the African Commission

Focal Persons of the African Commission

32. Because the Special Rapporteur Mechanism of the African Commission was not very successful, the African Commission decided to undertake a review of this Mechanism. However, there were projects already underway between the African Commission and its partners. In view of this, the African Commission decided to appoint focal persons as a stop gap measure until such a time when the African Commission had finalised its review of the special rapporteur mechanism. In this regard, at the 34th Ordinary Session, the African Commission appointed the following Members of the African Commission as Focal Persons -:
 - Commissioner Andrew Ranganayi Chigovera – Focal Person on Freedom of Expression;
 - Commissioner Jainaba Johm – Focal Person on Human Rights Defenders in Africa;
 - Commissioner Bahame Tom Mukirya Nyanduga – Focal Person on Refugees and Displaced Persons in Africa;
 - Commissioner Sanji Mmasenono Monageng – Focal Person for the implementation of the Guidelines on the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).
33. The Bureau of the African Commission considered the Report submitted by Commissioner Pityana on the review of the mechanism of the Special Rapporteur and drafted Guidelines for its review. At its 35th Ordinary Session, the African Commission considered the Guidelines drafted by the Bureau of the African Commission and adopted them.
34. The African Commission nominated the following Members of the African Commission as Special Rapporteurs -:

- Commissioner Bahame Tom Mukirya Nyanduga - Special Rapporteur on Refugees and Internally Displaced Persons in Africa;
 - Commissioner Jainaba Johm – Special Rapporteur on Human Rights Defenders in Africa.
35. In conformity with its Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa adopted at the 32nd Ordinary Session, the African Commission at its 35th Ordinary Session nominated Members of the Follow Up Committee on the Guidelines. The Follow Up Committee is chaired by Commissioner Sanji Mmasenono Monageng and is composed of the following African Experts -:
- Mr. Jean Bapiste Niyizurugero – Association for the Prevention of Torture (APT);
 - Mrs Hannah Forster – African Centre for Democracy and Human Rights Studies (ACDHRS);
 - Mrs Leila Zerrougui – Magistrate and Professor of Law at the National Institute of Magistracy in Algiers and Member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights;
 - Advocate Karen McKenzie – Independent Complaints Directorate of South Africa.

(d) Seminars and Conferences held

NGO Forum

36. During the period under review, the African Centre for Democracy and Human Rights Studies (ACDHRS) in collaboration with the African Commission and other Human Rights NGOs organised an NGO Forum prior to the 34th and 35th Ordinary Sessions to prepare human rights NGOs for participation in the Ordinary Sessions of the African Commission.

All Africa Conference on Freedom of Expression

37. The African Commission in collaboration with ARTICLE 19, Media Institute for Southern Africa and Media Foundation for West Africa organised an All Africa Conference on Freedom of Expression with support from the Foreign and Commonwealth Office and the Open Society Initiative for Southern Africa. The Conference was held from 19th to 20th February 2004 in Pretoria, South Africa and brought together representatives from Member States, intergovernmental organisations, national human rights institutions, academia, national media regulatory bodies, the media and human rights and media advocacy NGOs. The main objective of the Conference was to raise awareness about the Declaration and other international standards relating to freedom of expression. In addition, the Conference discussed the activities of the African Commission with a view to enhancing its capacity to promote and protect the right to free expression.

Consultative Workshop on the Role of the Focal Point on Human Rights Defenders in Africa

38. Following her nomination as Focal Person on Human Rights Defenders in Africa Commissioner Jainaba Johm convened a Consultative Meeting in order to draw up her Terms of Reference and plan of activities for the duration of her mandate. The Consultative Meeting was held from 19th to 20th March 2004 in Banjul, The Gambia and brought together experts in the field of human rights defenders from the UN Office of the High Commissioner for Human Rights, the Inter-American Commission on Human Rights and international and African human rights organisations.

Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

39. In keeping with its decision made at the 33rd Ordinary Session, the African Commission in collaboration with the Association for the Prevention of Torture (APT) decided to launch and publicise the Robben Island Guidelines in a parallel event during the African Union Assembly of Heads of State and Government in July 2003 in Maputo, Mozambique. The launch of the Robben Island Guidelines took place on 11th July 2003 in Maputo, Mozambique.
40. Following the nomination of Commissioner Sanji Mmasenono Monageng as the Focal Person for the implementation of the Robben Island Guidelines, the African Commission in collaboration with APT held a Consultative Meeting on the implementation of the Robben Island Guidelines. At the invitation of the government of Burkina Faso, the Consultative Meeting took place in Ouagadougou, Burkina Faso, from 8th to 9th December 2003.

Indigenous Populations/Communities in Africa

41. At the 34th Ordinary Session of the African Commission, the Working Group of Experts on Indigenous Populations/Communities in Africa presented its report to the African Commission in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' that was adopted by the African Commission at its 28th Ordinary Session held in Cotonou, Benin, in October 2000.
42. The Report of the Working Group was adopted by a resolution which further established a Working Group of Experts for an initial term of 2 years with the mandate to promote and protect the rights of indigenous populations/communities in Africa.

Cooperation between the African Commission and the United Nations High Commissioner for Refugees (UNHCR)

43. At its 34th Ordinary Session, the African Commission discussed and adopted the Modalities for the Operationalisation of the Memorandum of Understanding (MOU) between the African Commission and the UNHCR (**See Annex III**).
44. Following his appointment as the Focal Person charged with the responsibility to ensure the implementation of the MoU, Commissioner Bahame Tom Mukirya

Nyanduga met with officials from UNHCR Regional Liaison Office in Addis Ababa, Ethiopia from 17th to 18th May 2004. The Meeting developed a more detailed plan of future activities to be undertaken based on the areas of interaction laid out in the modalities of operationalisation of the MoU.

Seminars and Conferences to be organised

45. In accordance with its Strategic Plan of 2003 to 2006 the African Commission resolved to organise a number of Seminars and Conferences as part of its promotional activities¹.
46. The Seminar on *Economic, Social and Cultural Rights* scheduled to take place from 20th to 24th September 2003 in Cairo, Egypt did not take place due to lack of funding. Funding for the Seminar has been secured and arrangements are underway to hold the Seminar **in September 2004**.
47. On the whole, the African Commission has been unable to organise all the Seminars that were planned and hereby seeks the support of Member States, International Organisations and NGOs in undertaking this activity.

E. Ratification of the Protocol to the African Charter on the Rights of Women in Africa

48. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government on 11th July 2003 in Maputo, Mozambique.
49. While twenty nine (29) Member States have signed the Protocol, only one (1) Member State – Comoros, has ratified the Protocol and deposited its instruments of ratification with the Commission of the African Union. The African Commission urges Member States to ratify the said Protocol and calls upon human rights organisations to encourage States Parties to quickly ratify this important instrument in order for it to come into force.

F. Ratification of Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

50. The requisite fifteen (15) instruments of ratification were deposited with the Commission of the African Union and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights entered into force on 25th January 2004. The following are the fifteen (15) Member States that have ratified the Protocol, namely, Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, The Gambia, Lesotho, Libya, Mali, Mauritius, Senegal, Republic of South Africa, Rwanda, Togo and Uganda.

¹ The list of the Seminars and Conferences to be organised can be found on the African Commission's website, which is, www.achpr.org.

51. The African Commission continues to urge Member States that have not yet done so, to ratify the said Protocol and calls upon human rights organisations to encourage States Parties to quickly ratify this instrument.

G. Adoption of Resolutions

52. At its 34th Ordinary Session, the African Commission adopted the following Resolutions -:
- Resolution on the adoption of the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities;
 - Resolution on the Renewal of the Term of the Special Rapporteur on the Rights of Women in Africa;
 - Resolution on the Adoption of the "Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa".
53. At its 35th Ordinary Session, the African Commission adopted the following Resolutions -:
- Resolution on the Protection of Human Rights Defenders in Africa;
 - Resolution on the situation of human rights in Cote D'Ivoire;
 - Resolution on the situation of human rights in Darfur, Sudan;
 - Resolution on the situation of human rights in Nigeria;
 - Resolution on the Situation of Women and Children in Africa.

The texts of these resolutions are contained in **Annex IV** of this report.

54. At its 34th Ordinary Session, the African Commission adopted the following documents² -:
- The Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa;
 - The Ouagadougou Plan of Action and Declaration on Accelerating Penal Reform in Africa.

H. Relations with observers

55. At its 34th and 35th Ordinary Sessions the African Commission deliberated further on its co-operation with National Human Rights Institutions and NGOs. The matter remains on the Agenda of the African Commission.
56. At its 35th Ordinary Session, the African Commission granted Affiliate Status to three (3) National Human Rights Institutions³. This brings the number of National Human Rights Institutions to which the African Commission has granted affiliate status to fifteen (15).

² The texts of the abovementioned documents are available at the Secretariat of the African Commission. They can also be found on the Website of the African Commission, which is www.achpr.org.

³ This brings the number of National Human Rights Institutions to which the African Commission has granted affiliate status to fifteen (15).

57. The African Commission reiterated its appeal to States Parties to create National Human Rights Institutions and strengthen the capacities of those already in existence.
58. At its 34th and 35th Ordinary Sessions, the African Commission granted Observer Status to thirteen (13) NGOs⁴.

I. Protection Activities

59. At its 34th Ordinary Session, the African Commission considered thirty two (32) communications and was seized of eleven (11) new communications. It delivered decisions on the merits on three (3) communications, declared two (2) communications inadmissible and deferred further consideration on twenty seven (27) communications to the 35th Ordinary Session.
60. At its 35th Ordinary Session, the African Commission considered thirty eight (38) communications and was seized of four (4) communications. It delivered decisions on the merits on three (3) communications and declared two (2) communications inadmissible. One (1) communication was withdrawn at the request of the Complainant and the filed closed. Thirty two (32) communications were deferred to the 36th Ordinary Session for further consideration.

The decisions on communications adopted by the African Commission are contained in **Annex V** of the report.

J. Administrative and Financial Matters**a) Administrative Matters**

61. At the 34th and 35th Ordinary Sessions of the African Commission, the Secretary to the African Commission presented his report on the financial and administrative situation of the Secretariat. He reported on the administrative situation of the Secretariat and the situation of the members of staff serving at the Secretariat of the African Commission. Members of the African Commission discussed this matter extensively.

b) Financial matters**A.U Budget**

62. Under Article 41 of the African Charter, the General Secretariat of the OAU (now the Commission of the African Union) is responsible for meeting the costs of the African Commission's operations including provision of staff, resources and services.

Extra-Budgetary Funds

⁴ This brings the total number of NGOs granted Observer Status with the African Commission to three hundred and fourteen (314) as at 4th June 2004.

63. In order to complement the limited resources allocated by the African Union, the African Commission continues to solicit for financial and material assistance and presently receives such assistance from the following partners -:

a) The Danish Institute for Human Rights (DIHR)

64. The Secretariat of the African Commission still receives extra budgetary funding from the Danish Institute for Human Rights (formerly the Danish Centre for Human Rights) to finance the post of Technical Assistant.

b) Swedish International Development Agency (SIDA)

65. SIDA still funds the Commission's promotional and protection activities. This grant is designated for the African Commission's activities and for strengthening the Secretariat's Staff capacity.

c) The Government of The Netherlands

66. The Ministry of Foreign Affairs of the Netherlands continues to support the Documentation Centre, the Public Relations Section and two positions of Legal Officers.

d) Droits et Démocratie

67. Droits et Démocratie has given the African Commission a grant of fifty two thousand, five hundred and twenty one Canadian dollars and fifty cents (52,521.50) for specific activities, namely -:

- The campaign to ratify the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights;
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and
- The Meeting on democracy and elections in Africa.

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

K. Adoption of the 17th Annual Activity Report by the Assembly of Heads of State and Government of the African Union

69. The Assembly of Heads of State and Government of the African Union, after due consideration, adopted the 17th Annual Activity Report by a decision in which it expressed its satisfaction with the Report and authorised its publication.

LIST OF ANNEXES

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Annex II	Distribution of State Parties among Members of the African Commission
Annex III	Operationalisation of the Memorandum of Understanding Between the African Commission on Human and Peoples' Rights and the United Nations High Commissioner for Refugees
Annex IV	Resolutions adopted during the 34th and 35th Ordinary Sessions
Annex V	Decisions on Communications brought before the African Commission and adopted during the 34th and 35th Ordinary Sessions

Annex I

*Status of Submission of Initial & State Periodic
Reports to the African Commission on
Human and Peoples' Rights
(As at May 2004)*

Annex II

*Distribution of State Parties
among Members of the African Commission*

DISTRIBUTION OF COUNTRIES AMONG COMMISSIONERS
FOR THEIR PROMOTION ACTIVITIES

- | | |
|-----------------------------------|--|
| 1. H.E. Amb. Salamata Sawadogo | Burundi, Gabon, Ethiopia, Niger and Republic of Congo (Brazzaville) |
| 2. Mr. Yaser El Hassan | Mauritania, Somalia, Djibouti, Libya, Chad and Egypt |
| 3. H.E. Amb. Kamel Rezag Bara | Algeria, Saharawi Arab Democratic Republic, Central African Republic, Comoros and Madagascar |
| 4. Mrs. Jainaba Johm | Nigeria, Togo, Senegal, Gambia, Benin and Tunisia |
| 5. Prof. Emmanuel E.V.O. Dankwa | The Ghana, Sierra Leone, Liberia and Guinea Bissau |
| 6. Mr. Andrew Ranganayi Chigovera | South Africa, Namibia, Zambia and Democratic Republic of Congo |
| 7. Dr. Vera Mlangazuwa Chirwa | Swaziland, Kenya, Tanzania and Uganda |
| 8. Dr. Angela Melo | Angola, Sao Tome & Principe, Cape Verde, Equatorial Guinea and Cameroon |
| 9. Mr. Mohamed A. Ould Babana | Côte d'Ivoire, Burkina Faso, Guinea, Mali Rwanda and Sudan |
| 10. Ms. Sanji M. Monageng | Mauritius, Zimbabwe, Mozambique and Lesotho |
| 11. M. Bahame Tom M. Nyanduga | Malawi, Eritrea, Seychelles and Botswana |

Annex III

*Modalities for the Operationalisation of the
Memorandum of Understanding between the
African Commission on Human and Peoples,
Rights and the United Nations High
Commissioner for Refugees*

**THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
AND
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

1. Joint mechanism for implementation:

- Establish a focal person in each institution:
 - One Member of the African Commission to be appointed as focal person.
 - If possible, have a Committee composed of 2 additional Commissioners with the focal Commissioner designated as Chair, and with the assistance of a Legal Officer
 - Focal persons to be designated within UNHCR (Africa Bureau and RLO Addis)
- The African Commission should request the Commission of the African Union to invite it to become a Member of the Coordinating Committee on Assistance to Refugees.
- In carrying out these activities, the African Commission and UNHCR should involve as much as possible the Division of Humanitarian Affairs, Refugees and Displaced Persons of the Commission of the African Union.

2. Areas of interaction:

2.1 Submission of Communications to ACHPR

In furtherance of paragraphs 1 and 4 of Article II of the Memorandum of Understanding, the African Commission will encourage NGOs and other partners to submit communications on violations of the rights of refugees, returnees, asylum seekers and other persons of concern to UNHCR. The African Commission will ensure that this does not compromise the confidential character of communications.

2.2 Missions

- In the context of the African Commission's promotional missions, ensure that refugee rights are an integral part of the terms of reference;
- Where feasible, joint seminars to be organized during the course of such promotional missions, for the benefit of refugees, IDPs, government officials, NGOs and other concerned actors;
- Joint field missions to be undertaken comprising Members of the African Commission, members of the African Union's Commission on Refugees and UNHCR;
- The African Commission to ensure that at least one promotional mission in each year coincides with the commemoration of World Refugee Day, during which emphasis will be on the promotion of refugee rights;

2.3 Periodic Reports of States Parties

- The African Commission to request States Parties to ensure that information on the implementation of refugee rights form an integral part of their periodic reports;

- The African Commission will inform the UNHCR of reports of States Parties scheduled to be considered at the African Commission's ordinary sessions; and request the UNHCR to provide information on refugees, returnees, asylum seekers and IDPs in order to better inform the process of consideration of State reports by the African Commission;

2.4. Sessions of the African Commission

- An agenda item on refugees to be a standing item on the agenda of each ordinary session of the African Commission;
- UNHCR to provide the African Commission with information on areas of concern to better inform the discussion of this agenda item;
- Annual activity report of the Commission to the Assembly of Heads of State and Government to include report on the status of implementation of refugee rights in Africa;

2.5 Monitoring Implementation

- Bi-annual meetings between African Commission and UNHCR to review status of implementation of the Memorandum of Understanding and to determine further areas of co-operation, as deemed appropriate.

Annex IV

Resolutions Adopted During The 34th and 35th Ordinary Sessions

- *Resolution on the adoption of the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities;*
- *Resolution on the Renewal of the Term of the Special Rapporteur on the Rights of Women in Africa*
- *Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa*
- *Resolution on the Protection of Human Rights Defenders in Africa*
- *Resolution on the situation of human rights in Cote D'Ivoire*
- *Resolution on the situation of human rights in Darfur, Sudan*
- *Resolution on the situation of human rights in Nigeria*
- *Resolution on the Situation of Women and Children in Africa*

**RESOLUTION ON THE ADOPTION OF THE
“REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP ON
INDIGENOUS POPULATIONS/COMMUNITIES”**

The African Commission on Human and Peoples’ Rights, meeting at its 34th Ordinary Session, in Banjul, The Gambia from 6th to 20th November 2003;

Recalling the provisions of the African Charter on Human and Peoples’ Rights which entrusts it with a treaty monitoring function and the mandate to promote human and peoples rights and ensure their protection in Africa;

Conscious of the situation of vulnerability in which indigenous populations/communities in Africa frequently find themselves and that in various situations they are unable to enjoy their inalienable human rights;

Recognising the standards in International law for the promotion and protection of the rights of minorities and indigenous peoples, including as articulated in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the International Labour Convention 169 on Indigenous and Tribal Peoples in Independent Countries, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child;

Considering the emphasis given in International law to self identification as the primary criterion for the determination of who constitutes a minority or indigenous person; and the importance of effective and meaningful participation and of non discrimination, including with regard to the right to education;

Considering that the African Commission at its 28th Ordinary Session held in Cotonou, Benin in October 2000, adopted the “*Resolution on the Rights of Indigenous Populations/ Communities*” which provided for the establishment of a Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa with the mandate to:

- Examine the concept of indigenous populations/communities in Africa;
- Study the implications of the African Charter on Human and Peoples Rights on the well being of indigenous communities;
- Consider appropriate recommendations for the monitoring and protection of the rights of indigenous populations/communities.

Noting that a Working Group of Experts comprised of three Members of the African Commission, three Experts from indigenous communities in Africa and one Independent Expert was established by the African Commission at its 29th Ordinary Session held in Tripoli, Libya in May 2001 and consequently held its first meeting prior to the 30th Ordinary Session held in Banjul, the Gambia in October 2001 where it agreed on developing a *Conceptual Framework Paper* as a basis for the elaboration of a final report to the African Commission, and where it agreed on a work-plan;

Noting further that the Working Group of Experts convened a Roundtable Meeting prior to the 31st Ordinary Session of the African Commission in April 2002 in Pretoria, South Africa where it discussed the first draft of the *Conceptual Framework Paper* with African human rights experts whose contributions were taken into account in the elaboration of the second draft of the *Conceptual Framework Paper* which was further discussed at a Consultative Meeting held in January 2003, in Nairobi, Kenya;

Emphasising that the Final Report of the Working Group of Experts is the outcome of a thorough consultative process involving various stakeholders on matters relating to indigenous populations/communities in Africa;

Reaffirming the need to promote and protect more effectively the human rights of indigenous populations/communities in Africa;

Taking into account the absence of a mechanism within the African Commission with a specific mandate to monitor, protect and promote the respect and enjoyment of the human rights of indigenous populations/communities in Africa;

Decides to:

Adopt the “*Report of the African Commission’s Working Group on Indigenous Populations/Communities*”, including its recommendations

Publish as soon as possible and in collaboration with International Working Group of Indigenous Affairs (IWGIA) the report of the Working Group of Experts and ensure its wide distribution to Member States and policy makers in the international development arena;

Maintain on the agenda of its ordinary sessions the item on the situation of indigenous populations/communities in Africa

Establish a Working Group of Experts for an initial term of 2 years comprising of -:

1. Commissioner Andrew Ranganayi Chigovera (Chair)
2. Commissioner Kamel Rezag Bara,
3. Marianne Jensen (Independent Expert)
4. Naomi Kipuri
5. Mohammed Khattali
6. Zephyrin Kalimba

for the promotion and protection of the rights of indigenous populations/communities in Africa and with the following Terms of Reference;

- With support and cooperation from interested Donors, Institutions and NGOs, raise funds for the Working Group’s activities relating to the promotion and protection of the rights of indigenous populations/communities in Africa;
- Gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous populations and their communities and organisations, on violations of their human rights and fundamental freedoms;
- Undertake country visits to study the human rights situation of indigenous populations/communities;
- Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/communities;
- Submit an activity report at every ordinary session of the African Commission;
- Co-operate when relevant and feasible with other international and regional human rights mechanisms, institutions and organisations.

Done in Banjul, The Gambia, 20th November 2003

**RESOLUTION ON THE RENEWAL OF THE MANDATE
OF THE TERM OF THE SPECIAL RAPPORTEUR
ON THE RIGHTS OF WOMEN IN AFRICA**

The African Commission on Human and Peoples' Rights at its 34th Ordinary Session that took place from 6th to 20th November 2003 in Banjul, The Gambia,

Recalling the resolution it adopted at its 25th Ordinary Session that took place from 26th April to 5th May 1999 in Bujumbura, Burundi, in which it appointed a Special Rapporteur on the Rights of Women in Africa;

Recalling further the provisions of Article 18(3) of the African Charter on Human and Peoples' Rights;

Referring further the provisions of Article 45(1)(a) of the African Charter on Human and Peoples' Rights;

Recalling its decision taken at the 30th Ordinary Session, in October 2001 in Banjul, the Gambia, nominating Commissioner Angela Melo as the Special Rapporteur on the Rights of Women in Africa;

Considering the necessity to allow the Special Rapporteur to continue to carry out her mandate;

Decides to renew the mandate of Angela Melo as Special Rapporteur on the Rights of Women in Africa for a period of one (1) year;

Requests the Secretariat of the African Commission to enhance its efforts to mobilise resources that could assist the Special Rapporteur to carry out her mandate.

Done in Banjul, The Gambia, 20th November 2003

**RESOLUTION ON THE ADOPTION OF THE “OUAGADOUGOU
DECLARATION AND PLAN OF ACTION ON ACCELERATING PRISON
AND PENAL REFORM IN AFRICA”**

The African Commission on Human and Peoples’ Rights meeting at its 34th Ordinary Session held in Banjul, The Gambia from 6 - 20 November 2003;

Recalling Article 30 of the African Charter on Human and Peoples’ Rights which mandates it to promote and protect human and peoples’ rights and to ensure their protection in Africa;

Recalling its resolution on prisons in Africa adopted by the African Commission at its 17th Ordinary Session held in Lome, Togo in 1995;

Recalling further the appointment of the Special Rapporteur on Prisons and Conditions of Detention in Africa at its 20th Ordinary Session held in Grand Bay, Mauritius in 1996;

Considering the adoption of the Kampala Declaration on Prison Conditions in Africa in 1996 and the progress made in raising general prison standards in Africa since then;

Bearing in mind the various international instruments relating to the promotion of the rights of persons deprived of their liberty in general and penal reform in particular;

Reaffirming the necessity to promote and protect the rights of persons deprived of their liberty through penal reform;

Adopts the “Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa”.

Decides to publish as soon as possible the “Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa” and ensure its wide distribution to Member States of the African Union, Civil Society Organisations and decision makers in the field of penal reform and the administration of justice;

Request the Special Rapporteur on Prisons and Conditions of Detention in Africa to report on the implementation of this resolution at its 35th Ordinary Session.

Done in Banjul, The Gambia, 20th November 2003

**RESOLUTION ON THE PROTECTION OF HUMAN RIGHTS
DEFENDERS IN AFRICA**

The African Commission on Human and Peoples' Rights meeting at its 35th Ordinary Session held from 21st May to 4th June 2004, in Banjul, The Gambia;

Recognising the crucial contribution of the work of human rights defenders in promoting human rights, democracy and the rule of law in Africa;

Seriously concerned about the persistence of violations targeting individuals and members of their families, groups or organisations working to promote and protect human and peoples' rights and by the growing risks faced by human rights defenders in Africa;

Noting with deep concern that impunity for threats, attacks and acts of intimidation against human rights defenders persists and that this impacts negatively on the work and safety of human rights defenders;

Recalling that it is entrusted by the African Charter on Human and Peoples' Rights with the mandate to promote human and peoples' rights and ensure their protection in Africa;

Reaffirming the importance of the observance of the purposes and principles of the African Charter for the promotion and protection of all human rights and fundamental freedoms for human rights defenders and all persons on the continent;

Bearing in mind the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders);

Mindful that in the Grand Bay (Mauritius) Declaration, the Organisation of African Unity called on Member States "to take appropriate steps to implement the UN Declaration on Human Rights Defenders in Africa";

Mindful that the Kigali Declaration recognises "the important role that the human rights defenders play in the promotion and protection of human rights in Africa"

Recalling its decision to include on its agenda the situation of human rights defenders and to nominate a Special Rapporteur on human rights defenders;

1. ***Now decides to appoint*** a Special Rapporteur on Human Rights Defenders in Africa for a period of two years with the following mandate -:
 - a. To seek, receive, examine and to act upon information on the situation of human rights defenders in Africa;
 - b. To submit reports at every ordinary session of the African Commission on the situation of human rights defenders in Africa;
 - c. To cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders and other stake holders;

- d. To develop and recommend effective strategies to better protect human rights defenders and to follow up on his/her recommendations;
 - e. To raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa
2. **Further decides** to nominate Commissioner Jainaba Johm as Special Rapporteur on Human Rights Defenders in Africa for the current duration of her mandate within the African Commission;
 3. **Reiterates** its support for the work carried out by human rights defenders in Africa;
 4. **Calls upon** Member States to promote and give full effect to the UN Declaration on Human Rights Defenders, to take all necessary measures to ensure the protection of human rights defenders and to include information on measures taken to protect human rights defenders in their periodic reports;
 5. **Invites** its members to mainstream the issue of human rights defenders in their activities;
 6. **Urges** Member States to co-operate with and assist the Special Rapporteur in the performance of his/her tasks and to provide all necessary information for the fulfilment of his/her mandate;
 7. **Requests** the African Union to provide adequate resources, assistance and support in the implementation of this Resolution.

Done in Banjul, The Gambia, 4th June 2004

**RESOLUTION ON THE SITUATION OF HUMAN RIGHTS
IN COTE D'IVOIRE**

The African Commission on Human and Peoples' Rights at its 35th Ordinary Session held in Banjul from 21st May to 4th June 2004, in Banjul, The Gambia;

Considering the provisions of the Constitutive Act of the African Union, the Charter of the United Nations, as well as those of the African Charter on Human and Peoples' Rights (African Charter), and other regional and international human rights and international humanitarian law treaties, to which the Republic of Cote d'Ivoire is a party;

Deploring the events of 24th to 26th March 2004, which were marked by shootings, wounding and massacres of innocent civilians;

Welcoming with appreciation the Government's statement that a Commission of enquiry will be set up;

Considering the findings of the Commission of Inquiry of the Office of the United Nations High Commission for Human rights which found the Government authorities responsible for the March 2004 gross human rights violations;

Considering the grave concerns expressed on 27 May 2004, by the Peace and Security Council of the African Union, at the situation prevailing in Cote d'Ivoire and its repercussions on peace and security, stability for the country and for the entire sub-region;

Deeply concerned over the deadlock in the implementation of the Linas-Marcoussis Agreement and the continuing deterioration of the situation in Côte d'Ivoire and the impunity enjoyed by perpetrators of gross human rights violations against civilians since 1999;

Recalling the missions carried out by the African Commission from 2nd to 4th April 2001 and from 24th to 26th April 2003;

Considering the initiative of the United Nations High Commission for Human Rights to set up a Commissioner to investigate the human rights violations perpetrated since the beginning of the crisis in Côte d'Ivoire;

Noting the laudable role of ECOWAS in its efforts to bring peace to Côte d'Ivoire and the efforts of the President of the African Union Commission to facilitate an effective re-launch of the peace process in Côte d'Ivoire and, more particularly, to contribute to the promotion of dialogue and understanding among the leaders of the countries of the region;

1. **Deplores** the grave and rampant human rights violations committed against the civilian populations, such as summary and arbitrary executions, torture and arbitrary detention and disappearances;
2. **Requests** the President of the Republic of Cote d'Ivoire, National Reconciliation Government and all Ivorian political parties to implement the Linas-Marcoussis agreement;

3. ***Urges*** the Ivorian authorities to spare no efforts in ensuring that the perpetrators of the violation of human rights during the period of 24th to 26th March 2004 and any other violations perpetrated are brought to justice and the victims and their families appropriately compensated;
4. ***Calls upon*** the Ivorian Government to ensure full compliance with the provisions of the African Charter on Human & Peoples' Rights and other international human rights instruments.
5. ***Undertakes*** to send a fact-finding mission to investigate human rights violations committed in Cote d'Ivoire since the beginning of the crisis.

Done in Banjul, The Gambia, 4th June 2004

**RESOLUTION ON THE SITUATION OF HUMAN RIGHTS
IN DARFUR, SUDAN**

The African Commission on Human and Peoples' Rights at its 35th Ordinary Session held in Banjul from 21st May to 4th June 2004, in Banjul, The Gambia

Considering the provisions of the Constitutive Act of the African Union, the Charter of the United Nations, as well as those of the African Charter on Human and Peoples' Rights (African Charter), and other regional and international human rights and international humanitarian treaties, to which the Sudan is a party;

Mindful that, Sudan, as a State Party to the aforementioned instruments, is legally bound to fully and effectively implement the provisions of these instruments and respect the human rights and fundamental freedoms set therein without discrimination on any grounds;

Recalling the report of the UN High Commissioner for Human Rights, Situation of Human Rights in the Darfur region of the Sudan, 7th May 2004;

Deeply concerned over the prevailing situation in Darfur, particularly the continuing humanitarian crisis and the reported human rights violations committed in that region since the beginning of the crisis such as the mass killings, sexual violence as a means of warfare and the abduction of women and children;

Alarmed by the large number of internally displaced persons and the continuing exodus of refugees mainly from Darfur;

Recalling the Resolution on Sudan adopted by the African Commission on Human and Peoples' Rights at its 17th Ordinary session in Lome, Togo;

Recalling the decision on the crisis in the Darfur region of Sudan, adopted by the Peace and Security Council of the African Union on the 25th May 2004, urging the Parties to fully and scrupulously implement the Humanitarian Ceasefire Agreement signed on 8 April 2004, in N'djamena, Chad, between the Government of Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A), and the Justice and Equality Movement (JEM);

Mindful of the mandate of the African Commission in terms of the Charter to "promote human and peoples' rights and ensure their protection in Africa" and especially in a situation of serious or massive violation of human and peoples' rights (Article 58 (1));

1. **Deplores** the ongoing gross human rights violations in the Darfur region of Sudan;
2. **Calls upon** all parties to the armed conflict to immediately cease using military force to interfere with the delivery of humanitarian assistance to the civilian population and to allow such assistance to be delivered unhindered;
3. **Welcomes** the announcement by the Sudanese authorities of their decision to allow and facilitate access of humanitarian agencies and organizations and the deployment of observers from the African Union and the international community to Darfur, as well as to facilitate the return of IDPs and refugees;

4. *Further welcomes* the announcement by the Sudanese Government of their decision to allow and facilitate access of a fact-finding mission of the African Commission;
5. *Accepts* to send a fact-finding mission to Darfur to investigate reports on human rights violations in Darfur and to report back to it.

Done in Banjul, The Gambia, 4th June 2004

**RESOLUTION ON THE SITUATION OF HUMAN RIGHTS
IN NIGERIA**

The African Commission on Human and Peoples Rights at its 35th Ordinary Session held from 21st May to 4th June 2004, in Banjul, The Gambia.

Considering the provisions of the Constitutive Act of the African Union, the Charter of the United Nations, as well as those of the African Charter on Human and Peoples' Rights and other regional and international human rights and international humanitarian law treaties to which the Republic of Nigeria is a party;

Deeply concerned over the prevailing situation in the Northern States of Nigeria, particularly the recent ethnic and religious violence in Yelwa, Plateau State and Kano State respectively in May 2004;

Alarmed by the large number of internally displaced persons and enormous loss of life as a result of the recent ethnic and religious violence;

Recalling the declarations of the United Nations Secretary-General on May 10, 2004 urging the Nigerian Government to ensure the security of individuals and property and to promote reconciliation in conformity with the principles of the rule of law;

Mindful of the mandate of the African Commission in terms of the Charter to promote and protect human and peoples rights

1. ***Deplores*** the grave and rampant human rights violations committed against the civilian populations in the Northern part of Nigeria
2. ***Urges*** the Nigerian Government to bring the perpetrators of any human rights violation to justice, and to compensate victims and their families;
3. ***Calls upon*** the Nigerian Government to ensure full compliance with the provisions of the African Charter on Human and Peoples Rights and other international human rights instruments;
4. ***Decides*** to send a fact-finding mission to investigate all human rights violations committed in the northern part of Nigeria.

Done in Banjul, The Gambia, 4th June 2004

**RESOLUTION ON THE SITUATION
OF WOMEN AND CHILDREN IN AFRICA**

The African Commission on Human and Peoples' Rights during its 35th ordinary session held from 21st May to 4th June 2004 in Banjul, The Gambia,

Considering the provisions of the UN Convention on the elimination of all Forms of Discrimination Against Women and other regional and international human rights treaties relating to the rights of women;

Recalling that the Assembly of Heads of State and Government of the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa at its 2nd Ordinary Session held in July 2003 in Maputo, Mozambique;

Noting that the African Charter on the Rights and Welfare of the Child entered into force on 29th November 1989;

Noting further that the 11 Members of the African Committee of Experts on the Rights and Welfare of the Child were elected by OAU Member States at the 37th Ordinary Session of the OAU Assembly of Heads of States and Governments held in Lusaka, Zambia in July 2001;

Considering that the situation of the women and children in Africa needs to be thoroughly addressed;

Considering that women and children are victims of multiple human rights violations;

Considering deportation, slavery, child trafficking and the proliferation of street children in some countries of our continent;

Considering the persistence of traditional practices that are harmful to women and children in some African countries ("talibes" children and genital mutilation);

Concerned about widespread poverty among women and the stigmatization of women and children with HIV/AIDS;

1. **Urges** member states of the African Union to ratify the Protocol to the African Charter on the Rights of Women in Africa in order to facilitate its entry into force;
2. **Urges** all AU member states to ratify the United Nations Convention against All Forms of Discrimination against Women, and member states that have ratified it with reservations to withdraw them;
3. **Launches** an appeal to Member States to incorporate the above-mentioned international instrument into their national laws;
4. **Urges** member states to set up a special protection mechanism for women and children in war zones;

5. **Appeals** to member states to disarm and demobilize child soldiers, and put in place a system for their social reintegration;
6. **Appeals** to Member States to implement programmes to fight against HIV/AIDS;
7. **Appeals** to Member States to devise a system to help women benefit from social security.

Done in Banjul, The Gambia, 4th June 2004

Annex VII

Decisions On Communications Brought Before The African Commission

**Decisions adopted at the 34th and 35th Ordinary Session
of the African Commission**

Decisions on the Merits

1. Communication 157/1996 - Association Pour la Sauvegarde de la Paix au Burundi /Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia
2. Communication 197/1997 – Bah Ould Rabah/Mauritania
3. Communication 199/97 – Odjouoriby Cossi Paul/Benin
4. Communication 240/2001 – Interights et al (on behalf of Mariette Sonjaleen Bosch)/Botswana
5. Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme*/Mauritania
6. Communication 250/2002 – Liesbeth Zegveld and Mussie Ephrem/Eritrea

Communications declared inadmissible

1. Communication 248/2002 – Interights and OMCT/Nigeria
2. Communication 256/2002 – Samuel Kofi Woods, II and Kabineh M. Ja'neh/Liberia
3. Communication 258/2002 – Miss A/Cameroon

Communication withdrawn by the Complainant

1. Communication 283/2003 – B/Kenya

*DECISIONS ON THE
MERITS*

157/96 - Association Pour la Sauvegarde de la Paix au Burundi /Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia

Rapporteur:

20th session: Commissioner Duarte
21st session: Commissioner Ondziel-Gnelenga
22nd session: Commissioner Ondziel-Gnelenga
23rd session: Commissioner Ondziel-Gnelenga
24th session: Commissioner Ondziel-Gnelenga
25th session: Commissioner Ondziel-Gnelenga
26th session: Commissioner Rezag Bara
27th session: Commissioner Rezag Bara
28th session: Commissioner Rezag Bara
29th Session: Commissioner Rezag Bara
30th session: Commissioner Rezag Bara
31st session: Commissioner Rezag Bara
32nd session: Commissioner Rezag Bara
33rd session: Commissioner Rezag Bara

Summary of Facts:

1. The communication was submitted by the *Association Pour la Sauvegarde de la Paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi), a non-governmental organisation based in Belgium. The communication pertains to the embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire (now Democratic Republic of Congo), Ethiopia, and Zambia following the overthrow of the democratically elected government of Burundi and the installation of a government led by retired military ruler, Major Pierre Buyoya with the support of the military.
2. The Respondent states cited in the communication are all in the Great Lakes region, neighbouring Burundi and therefore have an interest in peace and stability in their region. At the Summit of the Great Lakes summit held in Arusha, Tanzania on 31 July 1996 following the unconstitutional change of government in Burundi, a resolution was adopted imposing an embargo on Burundi. The resolution was later supported by the United Nations Security Council and by the OAU. All except the Federal Republic of Ethiopia were, at the time of the submission of the communication, state parties to the African Charter on Human and Peoples' Rights. Ethiopia acceded to the African Charter on 17 June 1998.

The Complaint:

3. The Complainant claims that the embargo violates -:
 - Article 4 of the African Charter, because it prevented the importation of essential goods such as fuel required for purification of water and the preservation of drugs; and prevented the exportation of tea and coffee, which are the country's only sources of revenue;
 - Article 17 (1) of the African Charter, because the embargo prevented the importation of school materials;

- Article 22 of the African Charter, because the embargo prevented Burundians from having access to means of transportation by air and sea;
 - Article 23(2) (b) of the African Charter, because Tanzania, Zaire and Kenya sheltered and supported terrorist militia.
4. The communication also alleges violation of Articles 3(1), (2) and (3) of the OAU Charter, because the embargo constitutes interference in the internal affairs of Burundi.

Procedure:

5. The communication is dated 18th September 1996 and was received at the Secretariat on 30th September 1996.
6. At its 20th session, held in October 1996 in Grand Bay, Mauritius, the Commission decided to be seized of the communication.
7. On 10th December 1996, the Secretariat sent copies of the communication to the Ugandan, Kenyan, Tanzanian, Zambian, Zairian and Rwandan governments.
8. On 12th December 1996, a letter was sent to the Complainant indicating that the admissibility of the communication would be considered at the 21st session.
9. At its 21st session, held in April 1997, the Commission decided to be seized of the communication and deferred consideration of its admissibility to the following session. It also requested the Respondent States Parties to send in their comments within the stipulated deadline.
10. At its 22nd session, the Commission declared the communication admissible and asked the Secretariat to obtain clarification on the terms of the embargo imposed on Burundi from the Secretary General of the OAU. The Respondent States Parties were also, once again, requested to provide the Commission with their reactions, as well as their comments and arguments as regards the decision on merit.
11. On 18th November 1997, letters were addressed to the parties to inform them of the Commission's decision.
12. On 24th February 1998, the Secretariat of the Commission wrote to the OAU Secretary General requesting clarification on the terms of the embargo imposed on Burundi.
13. On 19th May 1998, the Secretariat received the Zambian government's reaction to the allegations made against it by the plaintiff. It claims that the sanctions imposed on Burundi ensued from a decision taken by Great Lakes countries in reaction to the coup d'état of 25 July 1996, which brought Major Pierre Buyoya to power, ousting the democratically elected government of President Ntibantuganya.
14. According to Zambia, the said sanctions were aimed at putting pressure on the regime of Major Buyoya with a view to causing it to restore constitutional legality, reinstate Parliament, which is the symbol of democracy, and lift the ban on political parties. It was also aimed at causing the regime to immediately and unconditionally initiate negotiations with all Burundian groups so as to re-establish peace and stability in the

country, in accordance with the decisions of the Arusha regional Summit of 31 July 1996.

15. Regarding the allegation that Zambia violated resolution 2625(XXV), adopted on 24th October 1970 by the General Assembly of the United Nations, the Zambian government claims that the United Nations Security Council, in resolution n° 1072(1996), upheld the decision of the Arusha regional Summit to impose sanctions on Burundi.
16. Furthermore, Zambia states that it has derived no benefit of any sort from the embargo imposed on Burundi. On the contrary – the embargo had affected not only the inhabitants of Burundi, but also those of the States that imposed it. In Zambia for example, it continues, many workers at the Mpulungu port were sent on unpaid leave because there was no work, as a result of the embargo. The Zambian State thereby lost many billion Kwacha in revenue. This, according to the Zambian government, is the cost Zambia accepted to pay to contribute to the international effort to promote democracy, justice and the rule of law.
17. Regarding the allegation of violation by Zambia of Article 3(1), (2) and 3 of the Charter of the Organisation of African Unity on non-interference in the internal affairs of member States, the Zambian government recalls that the Organisation of African Unity, through its Secretariat, has held many meetings on the situation in Burundi. It concludes, therefrom that the decisions of the Arusha Regional Summit were endorsed by the Organisation of African Unity. Moreover, it points out that the sanctions imposed on Burundi were decided in consultation with the United Nations Organisation and the Organisation of African Unity.
18. As regards the allegation of violation by Zambia of the provisions of article 4 of the African Charter on Human and Peoples' Rights on the right to life and physical and moral integrity, Zambia points out that the sanctions monitoring committee had authorised the importation into Burundi, through United Nations agencies, of essential items such as infants' food, medical and pharmaceutical products for emergency treatment, among others. It concludes therefore that the embargo is far from being a total blockade.
19. To the allegation of violation of article 17 of the African Charter on Human and Peoples' Rights on the right to education, Zambia responds with the same arguments indicated above.
20. Zambia stresses that it is a democratic State. This, it states, is enshrined in article 1.1 of its Constitution, which states that the country "...is a sovereign, unitary, indivisible, multiparty democratic State". It thereby justifies what it refers to as its support for the ongoing democratisation process in Africa and claims to abhor regimes led by ethnic minorities. The Great Lakes countries in general and Zambia in particular, it continues, were right in imposing sanctions on Burundi to bring about the restoration of democracy and discourage coups d'état in Africa.
21. On 8th September 1998, the Secretariat received the reaction of the Tanzanian government on the communication under consideration. The latter rejected the allegations made against its country and ended with a plea for inadmissibility of the communication on the grounds among others that it contains several contradictions

which were only aimed at defending the aggrieved state's interests. This country proceeded to argue its case as follows -:

22. "There is great confusion in the facts as presented by the Complainant; there are also many lies contained therein, particularly the accusation that Tanzania was preparing to send its army to Burundi at the request of the International Monetary Fund and the World Bank which had promised to fund the operation. The undeniable truth, and ASP-Burundi knows it well, is that the essential reason why Tanzania and the other countries in the region decided to impose sanctions is to bring about the negotiation of a lasting peace among all Burundian parties. The sanctions are used as a means of pressure, and the results are palpable, as in the restoration of the National Assembly, the lifting of the ban on political parties and the initiation of unconditional negotiations among all parties to the conflict. The discrete contacts with Mr. Léonard Nyangoma of CNDD are a step in the right direction envisaged in the imposition of the sanctions".
23. Regarding the allegation that Tanzania violated article 4 of the African Charter, citing the article, it stresses, "it is rather surprising to see ASP-Burundi using this article to support an allegation of human rights violations resulting from the sanctions. This association forgets or pretends to be unaware that the security situation in Burundi took a turn for the worse before and after the coup d'état and that it can be said emphatically that this provision of the Charter had been violated in a shameless way during this period. In June 1996, President S. Ntibantuganya and the then Prime Minister, Mr. Nduwayo, came to Arusha to solicit sub-regional assistance in the form of troops". Tanzania then goes on to enumerate some cases of violation of human rights by the Burundian government. It emphasises, inter alia, "that the war being waged against the Hutu militia by the Burundian army is conducted with ever increasing vigour, the massacre by the Burundian army of 126 refugees on their way back to their country from Tanzania, the establishment of concentration camps in Karugi, Mwamanyana and Kayanza, camps that are populated by Hutus who are denied food even to the point of death, the detention of the Speaker of the National Assembly, Mr. Léons Ngandakumana...etc."
24. Reacting to the allegation of violation of article 17(1) of the Charter, Tanzania points out that "education and educational institutions were not the targets of the embargo; however, due to its multiplier effect, they were affected. In view of this, at the meeting held in Arusha on 6 April 1997, the leaders of the countries that had imposed the embargo decided to exclude educational materials on the list of items that are not subject to the embargo. This was with a view to alleviating the suffering of ordinary citizens".
25. Responding to the allegation of violation of article 22 of the Charter, Tanzania argues that it is "difficult to conceive that it is possible to enjoy economic and socio-cultural rights without enjoying the fundamental rights, which are the political rights that condition the others. The most fundamental and important rights, which deserve to be recognised and which are currently being trampled upon by the regime in power are political rights. The Great Lakes countries, other African countries and the international community at large would like to see an end to the cycle of violence in Burundi. This can only be achieved by way of a political settlement negotiated among the various Burundian factions".

26. Tanzania argues “the enjoyment of economic, cultural and social rights cannot be effective in the morass that Burundi has fallen into. Constitutional legality has first to be restored. That is the reinstatement of a democratically elected Parliament, the lifting of the ban on political parties, and the beginning of political talks involving all parties to the conflict...”. In reaction to the allegation of violation of article 23,2 of the Charter, Tanzania states “it has never granted shelter to terrorists fighting against Burundi. However, Tanzania admits that it has always welcomed in its territory streams of refugees from Rwanda and Burundi each time trouble fares up in those two countries. Tanzania has always refused to serve as a rear base or staging post for any armed movement against its neighbours. Leaders of political parties and factions are welcomed in Tanzania just like other refugees are. But they are not allowed to carry out military activity against Burundi from Tanzanian territory”.
27. In response to the accusation that it violated the provisions of article III paragraphs 1,2 and 3 of the OAU Charter, Tanzania states that “it has not violated any of the principles enshrined in those texts”. It emphasises that “despite its [small] size, Burundi remains a sovereign State like any other African State. The sanctions imposed on it by its neighbouring countries do not undermine its sovereignty or its territorial integrity, nor much less its inalienable right to its own existence”. On the contrary, continues Tanzania, “the sanctions could play an important role in reminding the Burundian authorities of the content of the preamble to the OAU Charter, which states that all members of the OAU are conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. Another provision states that in order to create conditions for human progress, peace and security must be established and maintained. Peace and security are lacking in Burundi and the sanctions imposed on it could be one of the means of achieving them through dialogue”.
28. As regards the allegation of violation of article III paragraph 4 de of the OAU Charter, Tanzania comments “ASP-Burundi deliberately ignores one very important provision of the OAU Charter which states that OAU members solemnly affirm their adherence to the principle of the peaceful resolution of disputes by negotiation, mediation, conciliation and arbitration. The idea behind the imposition of the sanctions is precisely that of causing the application of this principle which a view to achieving lasting peace in Burundi. Contrary to ASP-Burundi’s contention that a dangerous precedent had been set, Tanzania believes that the countries of the Great Lakes region had set a favourable precedent. In the pursuit of the goals and objectives of the OAU, article II paragraph 2(2) states “to these ends, the member States shall cooperate and harmonise their general policies in the political and diplomatic fields” Tanzania concludes its exposition with a response to ASP-Burundi’s accusation that it had violated certain texts adopted by the United Nations, including some provisions of the Organisation’s Charter. It emphasises in particular that “the concept of regional arrangement adopted by the Great Lakes countries is straight out of chapter VIII of the United Nations Charter: “article 52 of the said Charter stipulates that regional arrangements may be used for keeping international peace and security, with the proviso that such actions shall be consistent with the goals and principles of the United Nations. This provision allows for regional arrangements to be used for peaceful settlements before having recourse to the Security Council. And indeed, the Council encourages regional arrangements”.

29. “Tanzania does not believe that the imposition of sanctions is an interference in the internal affairs of Burundi. Tanzania is more concerned about the potential consequences of the instability currently prevailing in Burundi. All neighbouring countries share the same concern, since it is true that the instability in Burundi signifies for them inflow of refugees, instability in their own territory as a consequence of that prevailing in Burundi and which could transform into a generalised conflagration in the entire region. The imposition of sanctions should be seen as a preventive means of self defence aimed at avoiding seeing the region plunge into instability and chaos”.
30. Tanzania further emphasises that “in fact, all the sanctions that were adversely affecting the ordinary Burundian citizen were softened when the leaders of the Great Lakes countries met in Arusha on 16 April 1997. This included the lifting of the sanctions on food products, school materials, construction materials, as well as all medical items, and agricultural products and inputs”.
31. “The sixth Summit of the Great Lakes countries held in Kampala on 21 February 1998, unanimously decided to maintain the sanctions against the Burundian military regime. In this vein, the enforcement of the sanctions shall be scrupulously monitored by the organ established for this purpose; this is with a view to ensuring the implementation of the decisions taken by the countries of the region. It is important to note that the sanctions were declared by the countries of the region and not unilaterally by Tanzania. Hence, if ASP-Burundi has a just cause to defend, it should do so against the region and not against Tanzania”.
32. At its 24th session held in Banjul, The Gambia, after hearing the Rwandan Ambassador, who presented his government’s position on this affair, and considering the responses of Zambia and Tanzania, the Commission decided to address a recommendation to the Chairman in Office of the Organisation of African Unity (OAU), with a copy to the Secretary General, requesting the States involved in the affair to find means of reducing the effects of the embargo. It was however stressed that this should be without any prejudice to the decision that the Commission would take on the merit of the communication.
33. The Secretariat wrote to the parties informing them of the Commission’s decision.
34. On 26th March 1999, the Secretariat received the reaction of the author of the communication to the Tanzanian and Zambian memoranda. In its view, Tanzania’s argument that it did not violate art. 4 of the African Charter is baseless. It argues that “after the coup d’état security in the country improved considerably. On the contrary, the embargo deprived the Burundian people of their basic needs, especially as regards health care and nutrition, claiming many victims”.
35. It continues: “Tanzania claims not to have violated art. 17 of the Charter with the argument that the embargo was relaxed in April 1997. This shows a *contrario* that before the relaxation, which had no effect in reality, the said provision had been violated; that is from 31/07/96 to April 1997”.
36. According to the plaintiff, “Tanzania also claims not to have violated art. 22 of the Charter with the argument that of all human rights, it is what it refers to as the “political right” that matters most”. It continues by saying that Tanzania’s argument is unfounded since “...the right to life for example is more important than any “political

right”. The choice is clear between someone who takes your life and someone who denies you your right to elect your head of State”.

37. According to the plaintiff, “all groups that are attacking Burundi – PALIPEHUTU, FROLINA, CNDD... etc. – operate from that country”.
38. The Complainant avers, “Tanzania claims not to have violated art. 3 items 1, 2, 3 of the OAU Charter. But imposing on Burundi a manner whereby it can “resolve” its internal problems, under the pressure of an embargo, undoubtedly constitutes interference in the internal affairs of Burundi”.
39. The Complainant continues: “it is evident that Tanzania violated international law by imposing an embargo on Burundi. ASP-Burundi hereby calls on the African Commission on Human and Peoples’ Rights to declare that country guilty and condemn it to pay damages”. As regards the memorandum submitted by Zambia, the plaintiff states that:
40. “Zambia claims not to have violated resolution 2625 of the United Nations with the argument that the UN had approved the decision to impose the embargo. Whether the UN approved the measure or not changes nothing, for the initiative should have come from the United Nations and not the other way around! Hence, the decision to impose the embargo had no legal basis”.
41. It continues: “along the same line of thought, Zambia claims that it did not violate Art. 3(1), (2), and (3) of the OAU Charter for the reason that the OAU had approved the embargo. Once again, the approval came after the fact. It was not the OAU that mandated these countries to impose the embargo”.
42. According to the petitioner, “Zambia claims [...] that it did not violate art. 4 of the African Charter on Human and Peoples’ Rights with the argument that in April 1997, some alleviation measures were introduced. ASP-Burundi points out that this provision was violated from the time of the imposition of the embargo (August 96) to the date those measures were introduced (April 97), and the measures did not even bear any effect in reality”.

From the foregoing, the Complainant draws the following conclusion:

43. “It is abundantly clear that Zambia, as well as Tanzania, have violated international law and that this violation caused very serious injury to the Burundian people. ASP - Burundi therefore urges the African Commission on Human and Peoples’ Rights to declare Zambia guilty of this and to constrain it to pay the relevant damages”.
44. On 24 March 2000, the Secretariat received a Note Verbale from the Kenyan Ministry of Foreign Affairs requesting a copy of the communication submitted by ASP-Burundi. The request was met, and a reaction is still being awaited.
45. At its 27th ordinary session held in Algeria, the Commission examined the case and deferred its further consideration to the next session.
46. The Commission’s decision was communicated to the parties on 20 July 2000.

47. On 17th August 2000, the Secretariat of the Commission received a Note Verbale from the Ministry of Foreign Affairs of the Republic of Uganda claiming that it had never been notified of the existence of this communication.
48. On 21st August 2000, the Secretariat of the Commission replied the said Ministry stating among other things that such notification had long been served the competent authorities of the Republic of Uganda, in 1996, as soon as the case was filed. A copy of the communication was however forwarded to the Ministry.
49. During the 28th ordinary session held in Cotonou, Benin, from 26 October to 6 November 2000, the Commission considered the communication and noted that although Ethiopia was a party to the case, it had never received notification of the communication.
50. The Commission therefore asked the Secretariat to check whether Ethiopia had ratified the African Charter at the time the decision on the embargo was taken.
51. If it had, the Secretariat should then send it notification of the communication opposing that embargo and ask for its comments and observations on the issue.
52. Given that Ethiopia ratified the African Charter two years after the decision to impose the embargo on Burundi was taken, the Secretariat of the Commission did not send a copy of the case file to Ethiopia for notification.
53. The Secretariat acted in this manner in accordance with the decision taken by the 28th ordinary session of the Commission.
54. Moreover, this decision of the Commission is in line with the principle of non-retroactivity of the effects of agreements, which is contained in Article 28 of the Vienna Convention on Treaties.
55. The Secretariat informed the concerned parties about the decision of the 30th session, and the Tanzanian and Zambian Embassies in Addis Ababa reacted by saying that their respective Governments were never informed of this case and they requested to be given a copy of the case-file.
56. In reply, the Secretariat conveyed the documents requested to the two Embassies, as well as all necessary information that could help elucidate the progress of the case submitted to the Commission, in respect of which their States had contributed by submitting defence statements.
57. At the 31st session (2-16 May 2002, Pretoria, South Africa), delegates from some of the accused States (DRC, Rwanda, Tanzania, Uganda and Zambia) presented some oral comments on the position of their respective Governments during the Commission's consideration of the communications.
58. The said delegations in turn flatly rejected the allegations levelled against their Governments pointing out in a nutshell, that :-
 - The sanctions adopted by the summit of the countries of the Great Lakes region held on 31 July 1996, in Arusha, Tanzania, was not aimed at providing advantages to the countries that made the decisions but, were meant to put pressure on the Government brought about by the military coup d'etat of 25 July 1996 in Burundi,

with a view to bringing it to restore constitutional legality, democracy, peace and stability.

- The joint initiative taken by their Governments were part of their contribution to the international efforts aimed at promoting the rule of law, in spite of the sacrifices that this initiative entailed for the people of the countries that initiated the embargo against Burundi, who also suffered from the consequences of the said embargo.
59. After the session, the Secretariat informed the States concerned and the Complainants about the status of the communication by Note Verbale and by letter respectively.
60. At the 32nd Session held from 17th to 23rd October 2002, in Banjul, The Gambia, the Commission was unable to consider the merits of Communication, because of time constraints occasioned by the reduction of this session's duration.
61. The African Commission consequently deferred consideration of the matter to its 33rd Ordinary Session scheduled to take place from 15th to 29th May 2003, in Niamey, Niger.
62. The African Commission considered this communication during the 33rd Ordinary Session and decided to deliver its decision on the merits.

LAW

Admissibility

63. The Commission had to resolve the matter of the *locus standi* of the author of the communication. It would appear that the authors of the communication were in all respects representing the interests of the military regime of Burundi. The question that was raised was whether this communication should not rather be considered as a communication from a state and be examined under the provisions of Articles 47-54 of the African Charter. Given that it has been the practice of the Commission to receive communications from non-governmental organisations, it was resolved to consider this as a calls action. In the interests of the advancement of human rights this matter was not rigorously pursued especially as the Respondent states did not take exception by challenging the *locus standi* of the author of the communication. In the circumstances the matter was examined under Article 56.
64. Under article 56(5) and (6) of the African Charter on Human and People's Rights, communications other than those referred to in Article 55 received by the Commission and relating to human and people's rights shall be considered if they -:
- (5) "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged";
 - (6) "are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter".
65. These provisions of the African Charter are hardly applicable in this matter inasmuch as the national courts of Burundi have no jurisdiction over the state Respondents herein. This is yet another indication that this communication appropriately falls under *Communications from States* (Articles 47-54).

66. However, drawing from general international law and taking into account its mandate for the protection of human rights as stipulated in Article 45(2), the Commission takes the view that the communication deserves its attention and declares it admissible.

Merits

67. The communication was submitted by the *Association pour la Sauvegarde de la Paix au Burundi* against States of the Great Lakes region (DRC, Kenya, Rwanda, Tanzania, Uganda, Zambia) and Ethiopia, in the wake of an embargo declared by these countries against Burundi on 31 July 1996, following the coup d'état carried out by the Burundian army on 25 July against the democratically elected government.
68. The communication alleges that by its very existence this embargo violated and continues to violate a number of international obligations to which these States have subscribed, including those emanating from the provisions of the Charter of the Organisation of African Unity (OAU), the African Charter on Human and Peoples' Rights, as well as Resolution 2625 (XXV) of the General Assembly of the United Nations on the principles of international law applicable to friendly relations and cooperation between States on the basis of the United Nations Charter.
69. The States accused in the communication, particularly Zambia and Tanzania which submitted written conclusions on the case, reject the allegations against them, stating among other things, that while it is true that the decision to impose an embargo against Burundi was taken at the Arusha summit of 31 July 1996 at which they participated, (with the exception of Zambia, which only joined the others after the Arusha decision), it is equally true that following this, the decision to impose an embargo against Burundi was endorsed by the Organisation of African Unity and the United Nations Security Council.
70. The decision to impose the embargo against Burundi is thus based, by implication, on the provisions of Chapters VII and VIII of the United Nations Charter, regarding "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" and "Regional Arrangements", in the sense that the military coup which deposed the democratically elected government constituted a threat to, indeed a breach of, the peace in Burundi and the region.
71. The Respondent States took collective action as a sub-regional consortium to address a matter within the region that could constitute a threat to peace, stability and security. Their action was motivated by the principles enshrined in the Charters of the OAU and of the United Nations. The Charter of the OAU stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples." It goes on to promote international cooperation "to achieve a better life for the peoples of Africa..."
72. The resolution to impose the embargo on Burundi was taken at a duly constituted summit of the states of the Great Lakes Region who had an interest in or were affected by the situation in Burundi. The resolution was subsequently presented to the appropriate organs of the OAU and the Security Council of the United Nations. No breach attaches to the procedure adopted by the states concerned. The embargo was not a mere unilateral action or a naked act of hostility but a carefully considered act of intervention which is sanctioned by international law. The endorsement of the

embargo by resolution of the Security Council and of the summit of Heads of State and Government of the OAU does not merit a further enquiry as to how the action was initiated.

73. The United Nations Security Council is vested with authority to take prompt and effective action for the maintenance of international peace and security. In doing so, states agree that the Security Council “acts on their behalf...” This suggests that, once endorsed by resolution of the Security Council, the embargo is no longer the acts of a few neighbouring states but that it imposes obligations on all member states of the United Nations.
74. The Charter of the United Nations allows that member states of the UN may be called upon to apply measures including, “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations...” Economic sanctions and embargoes are legitimate interventions in international law.
75. The critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of. The Human Rights Committee has adopted a General Comment in this regard precisely in order to create boundaries and limits to the imposition of sanctions.
76. We are satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and situation was monitored regularly. As a result of these reports adjustments were made accordingly. The report by the Secretary General of the OAU is indicative of the sensitivity called upon in international law: “...besides their political, economic and psychological impact, they (the sanctions) continue to have a harsh impact on the people. The paradox is that they enrich the rich and impoverish the poor, without effectively producing the desired results... It would, perhaps, be appropriate to review the question of the sanctions, in such a way as to minimise the suffering of the people, maximise and make effective the pressures on the intended target” (CM/2034 (LXVIII), 68th Ordinary Session of the Council of Ministers, Ouagadougou, 1-6 June 1998).
77. We accept the argument that sanctions are not an end in themselves. They are not imposed for the sole purpose of causing suffering. They are imposed in order to bring about a peaceful resolution of a dispute. It is self-evident that Burundians were in dispute among themselves and the neighbouring states had a legitimate interest in a peaceful and speedy resolution of the dispute.
78. With regard to the allegations of interference in the domestic affairs of other sovereign states, the Commission recognises that international law has provided careful procedures where such interference may be legitimate. It is our view that the present matters falls on all fours with the provisions of international law.

79. Having thus dismissed the seminal charges against the Respondent states, however, the Commission wishes to observe that the matters complained of here have now been largely resolved. The embargo has been lifted and by the agency of the OAU and with the active participation of neighbouring states a peace process is underway in Burundi.

For these reasons, the African Commission,

Finds that the Respondent States are not guilty of violation of the African Charter on Human and Peoples' Rights as alleged.

Takes note of the entry into force of the Burundi Peace and Reconciliation Agreement, alias Arusha Accords, and that the Respondent States in the communication are among the States that have sponsored the said Accord.

Also notes the efforts of the Respondent States aimed at restoring a lasting peace, for the development of the rule of law in Burundi, through the accession of all Burundian parties to the Arusha Accord.

Welcomes the entry into force of the Constitutive Act of the African Union in 2000 to which the Republic of Burundi and all the Respondent States are now party, and which also provides for the promotion and respect of human and peoples' rights and the explicit censure of States that "come to power by unconstitutional means".

**Done at the 33rd Ordinary Session held in Niamey, Niger
from 15th to 29th May 2003**

197/97 - Bah Ould Rabah/Mauritania

Rapporteurs:

22nd session: Commissioner Ondziel-Gnelenga
23rd session: Commissioner Ondziel-Gnelenga
24th session: Commissioner Ondziel-Gnelenga
25th session: Commissioner Ondziel-Gnelenga
26th session: Commissioner Rezag-Bara
27th session: Commissioner Rezag-Bara
28th session: Commissioner Rezag-Bara
29th session: Commissioner Rezag-Bara
30th session: Commissioner Rezag-Bara
31st session: Commissioner Rezag-Bara
32nd session: Commissioner Rezag-Bara
33rd session: Commissioner Rezag-Bara
34th session: Commissioner Rezag-Bara
35th session: Commissioner Rezag-Bara

Summary of facts

1. In November 1975, four years after the death of his mother, Mr. Bah Ould Rabah, a Mauritanian national (the plaintiff) and his family were forcefully expelled from their ancestral domicile by the man named Mohamed O. Bah on the grounds that the mother of the plaintiff, the late Aichetou Valle, was his slave and that subsequently, the house bequeathed to her descendants and the whole estate around it became legally the property of Mohamed O. Bah, the alleged "owner" of the deceased.
2. When the plaintiff approached them, the local authorities and the courts decided in favour of his opponent and the Supreme Court upheld this decision. The plaintiff wrote to the highest authorities, including the President of the Republic, to contest this decision which he qualifies as "flagrant support of the Government to the illegal institution of slavery". To date, however, he has received no reply.

Complaint

3. The Communication alleges violation of Articles 2, 3, 4, 5, 6, 7, 9 and 11 of the African Charter.

Procedure

4. Communication 197/97 is dated 11th April 1997.
5. The African Commission assumed jurisdiction in the case during its 21st ordinary session held in Nouakchott, Mauritania, in April 1997.
6. On 7th July 1997, a note verbale of notification was sent to the Government concerned urging it to reply to the allegations contained in the Communication.
7. On 7th July 1997, the plaintiff was informed of the decision of seizure.
8. During the 22nd ordinary session, the Commission deferred any decision on this Communication pending the reception of the comments from the Government of Mauritania on the report of the mission undertaken to that country.
9. The African Commission continued the process of exchanging information between the parties.
10. The African Commission considered this communication at its 35th Ordinary Session held in Banjul, The Gambia and decided to deliver its decision on the merits.

LAW **Admissibility**

11. Article 56(5) of the African Charter on Human and Peoples' Rights requires that Communications received within the context of the provisions of Article 55 should be submitted "after exhaustion of all local remedies, if they exist, unless it is clear to the Commission that this procedure is being unduly prolonged".

12. In the case under consideration, the plaintiff filed court decisions attesting that he used and exhausted the remedies before the competent national courts with a view to obtaining compensation for the alleged violation of his rights.
13. The Complainant furnished the African Commission with the judgement of the Boutilimitt District Court of 26th December 1998, the decision of the Rosso Regional Court of 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott of 11th November 1990.
14. The African Commission contacted the Respondent State demanding for information with respect to exhaustion of local remedies and the Respondent State responded by stating that local remedies had been exhausted.
15. It is therefore unquestionable that the Complainant had met the provisions of Article 56(5) of the African Charter.
16. On these grounds, the African Commission declares the Communication admissible.

Merits

17. The Complainant alleges a violation of the following Articles of the African Charter:
 - a) *Article 2: right to enjoyment of the rights and freedoms recognized and guaranteed in the Charter, such as the right to property, without any distinction;*
 - b) *Article 3: right to equality and to equal protection of the law;*
 - c) *Article 4: inviolability of the human being, the right to physical and moral integrity;*
 - d) *Article 5: right to human dignity, recognition of his legal status, prohibition of all forms of exploitation and degradation, particularly slavery;*
 - e) *Article 6: right to liberty and security;*
 - f) *Article 7: right to have his cause heard (particularly paragraph 1(d), impartiality of the courts);*
 - g) *Article 8: freedom of conscience;*
 - h) *Article 9: right to information, freedom of opinion;*
 - i) *Article 11: right to assemble freely with others.*
18. The Complainant states that in particular that his sisters, brothers and himself have been deprived of the inheritance of their parents, 4 years after the death of his mother, by Mr. Bah Ould Mohamed, on the grounds that their late mother was his slave.
19. In order to get round the ban on slavery in force in Mauritania, Mohamed Moustapha made mention of a donation supposedly given to him by the late mother of the plaintiff.
20. In a letter of 7th April 1990 addressed to the Head of State by Bah Ould Rabah (the Complainant) and copied to the case file, it is stated that to support his claims on the property of his late mother, Mohamed Moustapha (his opponent) had produced the certificate of occupancy No. 453 dated 24th November 1972.

21. This permit produced by Mohamed Moustapha had been prepared by the Cadi on the basis of evidence relating to the donation made by the late mother of the plaintiff to Mohamed Moustapha, his opponent.
22. The donation to Mohamed Moustapha was supposedly meant to render freedom to Lady Merien, daughter of the plaintiff's mother, his slave, but Mohamed Moustapha's submissions show no tangible evidence of the reason for his being the beneficiary of this donation.
23. The Complainant alleges that some of the witnesses who supported the argument of donation to his opponent later retracted, and he made mention of names such as Imam Mohamed Hamed and others in the letter addressed to the Head of State.
24. The Complainant further alleges, in the same letter, that in opposition to the certificate of occupancy produced by opponent, he had produced a certificate occupancy No. 66 of 24th April 1971, issued in the name of his mother a few months before her death; that the said document dates before that produced by his opponent.
25. The Complainant also pointed out serious procedural irregularities in the processing of the case in that he had requested the competent legal Authorities in vain, to order an investigation which would have proved Mohamed Moustapha's allegations baseless and proved as a result, the pertinence of the said violations of Article 14 of the African Charter relating to the guarantee of his and his family's right to property.
26. The Government of the Islamic Republic of Mauritania provided an explanation, through the statement made by its delegation at the 29th Ordinary Session of the African Commission; this statement was confirmed and supplemented by a document dated 19th June 2001 filed in court. From these documents it would appear that where the Respondent State is concerned -:
 - a) The Communication 197/97 introduced against the State of Mauritania by Mr. Bah Ould Rabah is based on a dispute relating to the ownership of a real estate which opposes two Mauritania citizens, Mr. Bah Ould Rabah (the Complainant) and Mr. Mohamed Moustapha Ould Bah;
 - b) This case is simply a classical dispute about real estate property between members of the same family in which the intervention of the Cadi is in keeping with the existing law and practice in Mauritania;
 - c) It was on the request of Mr. Bah Ould Rabah that the Mauritanian Courts, had, within a reasonable period, passed judgement through the District Court of Boutilimitt on the 26th December 1998, the decision of the Regional Court of Rosso on the 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott on 11th November 1990;
 - d) It would appear from his own submission that the plaintiff recognized that the Courts seized had arrived at a final decision on the basis of facts derived from the documents presented by himself and his opponent (namely the certificates of occupancy), which is in conformity with the rules within their competence and thereby indicates that the dispute relates to the right to ownership of property and that the conflicting

- parties have enjoyed the conditions of a fair trial, with the participation of their lawyers in the proceedings and in the hearings;
- e) His allegations relative to slavery and the violation of his rights were baseless;
 - f) The Government of Mauritania admits that undoubtedly the consequences of slavery, against which it continues to fight, still linger on in the country. But this is not sufficient to justify the allegations of Rabah Ould Bah (the Complainant) relative to the issue of slavery raised by Mohamed Bah (his opponent) before the Mauritanian Courts, in violation of the African Charter and its provisions as mentioned above;
 - g) Accordingly, Bah Ould Rabah (the Complainant) should have all his claims dismissed.
27. The African Commission has noted that no document exists in the case file which clearly delineates the reason for the donation made to Mohamed Moustapha by the late mother of the Complainant and also that there is no opposing statement to the effect that the witnesses named by the plaintiff had retracted their statements after having given evidence before the Cadi in support of Mohamed Moustapha.
28. The African Commission realises that Mr. Bah Ould Rabah had enjoyed all the conditions of a fair trial and had thus exhausted all the local remedies. The fact that he had lost the case after exhausting the procedures he had initiated was due to a weak judicial system and not on the basis of the practice of slavery or slave like practices. In fact, slavery had been abolished (order No. 81.234 of 9th June 1981 and 1991 Constitution).
29. The African Commission further noted that from the information in its possession (report of the mission to Mauritania, statements made by NGOs and the delegates from Mauritania during the various Sessions of the African Commission as well as from diverse documents from the Government of the Republic of Mauritania), that the consequences of slavery still persist in Mauritania and that, for people to act as Mohamed Moustapha Ould Bah has done has become common practice in the country.
30. Furthermore in the African Commission's view, to accept that someone, and a mother for that matter, can deprive her own children of their inheritance for the benefit of a third party, with no specific reason as in this case, is not in conformity with the protection of the right to property (Article 14 of the African Charter).
31. The African Commission thus calls upon all the public institutions in the Islamic Republic of Mauritania to persevere in their efforts so as to control and eliminate all the offshoots of slavery.

For these reasons;

- a) **The African Commission considers that the dispossession of the plaintiff of part of his mother's heritage, through a donation without well-substantiated reasons, constitutes a violation of Article 14 of the African Charter on Human and Peoples' Rights.**

b) The African Commission recommends to the Government of the Islamic Republic of Mauritania to take the appropriate steps to restore the plaintiff his rights.

Dissenting Opinion by Commissioner Yasir Sid Ahmad El Hassan, Vice-Chairperson of the African Commission On Human And Peoples' Rights

1. This is a dissenting opinion from the one that was adopted by a simple majority⁵ of the members of the Commission on communication 197/1997 during the 35th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21st May to 4th June 2004. The present dissenting opinion is based on facts and arguments derived from the original documents⁶ contained in the communication file.
2. Furthermore, most of the documents submitted by the parties to the communication were originally in Arabic and were never translated into English or French, the languages of the Commissioner, who was the first rapporteur or the legal officer working on the file at the Secretariat of the Commission. These documents contained the ruling of different local courts of the respondent state. So the Commissioners made a decision relying only on the short and inaccurate summary of file that was given to them.
3. The essence of facts of this communication as extracted from the file shows that it was a normal civil litigation between two members of the same family over a plot of land. The complainant, a banker born in 1949, filed in 1986, a lawsuit in local courts in which he claimed the full title over this real estate.
4. The complainant originally argued before courts that the disputed land belongs to his father, and that his mother has no separate title to dispose of the land. The respondent⁷ claimed that the mother of the complainant has a separate property and transferred to himself and his sisters by the way of donation, this plot of land which constitutes part of her property. He further claimed that he was de facto in peaceful, continuous and uninterrupted possession of that land for 27 years consecutive before the claim of the complainant, which was brought before the courts only in 1986.
5. A decision of the District Court of Boutilimitt, the Court of Rosso, dated 26/12/1988, a decision of the Court of Appeal of Nouakchott dated 11/3/1990, and a decision of the Supreme Court dated 5/11/1990, ruled all in

⁵ The decision on merits of the communication was taken in the absence of two Commissioners including the one who was the second rapporteur on the case. A third Commissioner abstained from the process because he is a national of the respondent state. Two other Commissioners did not take part in the deliberations made in Pretoria, South Africa upon and which the decision in this communication was taken by the Commission.

⁶ The decision on this communication was taken on the basis of the deliberations that took place during the 31st session of the Commission in Pretoria, South Africa in May 2002. The Secretariat of the Commission was requested to provide the Commissioners with transcripts of the oral statements by Commissioners. However, the Secretariat failed to make available the transcripts of the deliberations made in Arabic because of its inability to address the matter in Arabic due to the fact that no staff of the Secretariat can work in Arabic.

⁷ Mohamed bin Mohamed Almustaffa.

favour of the respondent on the grounds that the failure of the complainant to refute the strong evidence composes of antiquity of deeds and testimonies of reliable and credible witnesses as well as de facto possession of the disputed land. The Final ruling from the Supreme Court was delivered on 5/11/1990.

6. On April 11, 1997, the complainant filed this communication 97/1997 against the Islamic Republic of Mauritania.
7. The complainant claimed before the commission that in November 1975, that is four years after the death of his mother, he himself and his family were forcefully expelled from their ancestral home by Mohamed Ould Bah (his opponent) on the grounds that the complainant's mother, Aichetou Valle had been his slave and that, the house and the surrounding land therefore rightfully belonged to him.
8. The complainant further claimed that the courts of his country, which are State institutions, deprived him from his property and since then he wrote to the highest governmental authorities including the President of the Republic, protesting against this blatant governmental support for the illegal institution of slavery, but has received no reply as of this date.
9. Article 56 paragraph 6 of the African Charter on Human and Peoples' Rights requires that communication should be submitted within a reasonable period from the time when local remedies have been exhausted or from the date the Commission is seized with the matter
10. The complainant resorted to local courts only in 1986 whereas he alleged that he had been forcefully expelled from his home in 1975. And again he took more than six years after the Supreme Court delivered its final decision to submit his communication to the Commission in April 1997. In my view, this can be considered as unreasonable period in term of Article 56 paragraph 6 of the African Charter, and accordingly the Commission ought to declare this communication inadmissible.
11. From the documents in the file, which contains the rulings of the Mauritanian courts at all levels and which were submitted to the Commission by both parties, it was not indicated anywhere that the recipient of the donation had claimed that the complainant's mother had donated the land because she was the slave of the recipient. On the contrary, the recipient indicated clearly that the complainant's mother donated the land to him because of the existence of good ties and relationship between the two of them. The complainant himself stated in his memo to the Court of Appeal of Nouakchott that his family is well-known for its good reputation and generosity.
12. The documents from the communication file also show that the claimant had neither raised these matters before the District Court of Boutilimitt, nor before the Court of Rosso or before the Court of Appeal.
13. The claimant has come up before the Commission with new arguments that he did not advance before the courts in Mauritania in the process of his case. Consequently, by bringing new elements which are neither raised nor disputed

before national courts he wanted to use this Commission as a court of first instance. In my view, this is another reason for declaring this communication inadmissible.

14. The inability of the Secretariat of the Commission to work in Arabic whereas the original documents of the communication file are in this language, do inhibited the Commissioners ability to have first hand information. This made the Commission to act only on the translated summary of part of the documents of the communication, which in my view, was not built on facts but on the mere allegations of the complainant. Allegations, which were neither raised before National Courts nor well substantiated before the Commission.
15. The Commission in acting upon the assumption that those allegations are facts, wrongly decided that the Islamic Republic of Mauritania has violated Article 14 of the African Charter on Human and peoples` Rights.
16. The date of claim of donation (by opponent to the complainant) goes back to 1959 - according to complainant - or to 1975 when the complainant claims that the forceful eviction from disputed land took place.
17. One must note that the practice of slavery was legal in 1959 and 1975. Slavery was banned by the Mauritanian authorities in 1980. The recipient could therefore have easily based his claim of property over the disputed land on slavery. However, he did not do that. Instead, he claimed that the land was donated to him because the good relationship he had with the mother of the complainant.
18. The events in question took place by any way before 1986 when Mauritania became a party to the African Charter on Human and Peoples` Rights; the admissibility of such a communication raises the question of the principle of retroactivity of laws which was not discussed by the commission in this very case.
19. The erection of building permissions No.453 dated 24th November, 1972, and No.66 of 24th April, 1971, (and not certificate of occupancy as mentioned in paragraphs 46 and 50 of the commission ruling) both discussed by Courts and ruled over that the later does not relate to the same plot of land.
20. I do agree with the Commission's conclusion that there is no evidence brought before the Commission that the witnesses retracted from their statements made before the Cadi in support of donation as stated in the last part of paragraph 53 the communication decision. This part of the above-mentioned mentioned paragraph negates the complainant's allegations as stated in paragraph 49 of the same document, and contradicts the final findings of the Commission.
21. Paragraphs 51 of the decision of the Commission states that the plaintiffs (complainant) requested an investigation to prove as a result, the pertinence of the said violations of article 14 of the African Charter on Human and peoples` Rights. This paragraph does not reflect the accuracy that the complainant claimed the violation of Article 14 of the Charter. The lengthy discussions by Commissioners, on whether the Commission could invoke article 14 of the

charter that was not mentioned by the complainant prove this. Moreover, paragraphs 3 and 43 of the decision did not mention article 14 of the Charter.

22. The Mauritanian courts cannot restrain the right or freedom of the claimant's mother to dispose part of her property by way of donation to a member of her family without a legal basis, neither do they have the right to compel the claimant's mother to explain the reasons why she donated such property to one of her family members, while she is sane, mature and not restrained from disposing her property by a court order.
23. Had the Mauritanian courts prevented the claimant's mother from disposing of part of her property by donating it to a relative and deprived her son of that portion of property, they would have violated Article 14 of the African Charter on Human and Peoples' Rights, which related to the right to property and also embodies the rights to freely dispose of one's property.
24. The Mauritanian courts, by confirming the right of ownership of the claimant's mother and confirming her right to dispose of part of her property by the way of donation, confirmed that the claimant's mother's freedom to own her property and to dispose of it. By doing so, Mauritanian Courts furthermore, proved that she was neither a slave nor a servant.
25. The Commission, by deciding that the Islamic Republic of Mauritania had contravened Article 14 of the African Charter on Human and Peoples' Rights and recommending that the government should return the property to the claimant, had deprived the recipient from a property that was donated to him. The Commission has also, without a legal basis, restrained, the right and freedom of the claimant's mother to freely dispose of a part of her property in a manner she deemed fit. The Commission wanted to protect what it considered to be the right of a citizen (the complainant). However, in doing so it advised the government to do what constitutes a violation of the rights of two citizens: the mother of the complainant and the recipient.
26. For all the foregoing reasons, I believe that the Commission had erred in this communication, by deciding that the Islamic Republic of Mauritania had violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights.

**Done at the 35th Ordinary Session held in Banjul, The Gambia from
21st May to 4th June 2004**

199/97 Odjouoriby Cossi Paul/Benin

Rapporteur:

22nd Session: Commissioner Nguéma
23rd Session: Commissioner Nguéma
24th Session: Commissioner Nguéma
25th Session: Commissioner Nguéma
26th Session: Commissioner Nguéma
27th Session: Commissioner Nguéma
28th Session: Commissioner Nguéma
29th Session: Commissioner Nguéma
30th Session: Commissioner Sawadogo Salimata
31st Session: Commissioner Sawadogo Salimata
32nd Session: Commissioner Sawadogo Salimata
33rd Session: Commissioner Sawadogo Salimata
34th Session: Commissioner Sawadogo Salimata
35th Session: Commissioner Sawadogo Salamata

Summary of facts:

1. The Complainant is a national of Benin who alleges violation of his rights by the judiciary of his country.
2. It is alleged that the Appeal Court of Cotonou refused to restore his rights in a case pending before the said court since 1995 which sets him up against Mr. Akitobi Honoré whom he accuses of having despoiled him of his real estate property with the complicity of some judges.
3. The Complainant considers that the attitude of the Appeal Court constitutes a denial of justice.

Complaint

4. The Complainant alleges violation of Articles 7 and 14 of the African Charter

Procedure

5. The Secretariat of the African Commission acknowledged having received the communication on 8th April 1997.
6. The African Commission was seized of the communication at its 22nd ordinary session and deferred its decision on admissibility to its 23rd ordinary session scheduled for April 1998.
7. During its 23rd session held from 20th to 29th 1998 in Banjul, The Gambia, the African Commission declared the communication admissible and deferred consideration of the merits of the case to its 24th ordinary session.
8. On 1st June 1998, a note was sent to the Government of Benin informing them that the communication had been declared admissible by the African Commission, pursuant to Article 56 paragraph 5, and that the Commission would

rule on the merits during its 24th ordinary session scheduled for October 1998. A letter with the same message was sent also to the Complainant.

9. During the 28th Ordinary Session, the African Commission heard both parties. Through its representative, the Respondent State asked the African Commission to review its decision on admissibility as the Complainant had not exhausted local remedies.
10. The African Commission, noting that the Complainant had not put his case across logically, advised some NGO's to assist him. To this end, the case was entrusted to Interights and to the Institute for Human Rights and Development in Africa on behalf of the Complainant.
11. In any case, the African Commission took note of the undue delay of the Complainant's case before the courts.
12. From the submissions, it became apparent that in a civil case like this one, the conduct of proceedings is the responsibility of the parties in the case. The appeal filed against the judgment of the court of first instance is dated 19th September 1995 and the Commission was seized of the case on 8th April 1997, that is 20 months after the filing of the appeal. It appears from the practice of the Appeal Court accepted by the Supreme Court that average period ranges between 4 and 5 years.
13. The African Commission upheld its decision on admissibility and deferred its decision on the merits to the 30th Ordinary Session held in Banjul, The Gambia, from 13th to 27th October 2001.
14. The communication was deferred on several occasions because the Complainant was not very familiar with the procedures of the African Commission.
15. The African Commission considered this communication at its 35th Ordinary Session held in Banjul, The Gambia and decided to deliver its decision on the merits.

LAW

Admissibility

16. Article 56 of the Charter provides, among other things, that communications shall be considered by the Commission if they -:
(5) : "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".
17. Odjouoriby Cossi Paul (the Complainant) claims that the case opposing him to Mr Akitobi Honore has been pending before the Appeal Court of Cotonou since 19th September 1995 and that up to now the Court has delivered no judgment.

18. And yet, it is obvious that the local proceedings will remain in impasse as long as the Appeal Court has not made any ruling on the appeal pending before it.
19. The African Commission has moreover established the evidence of silence of the State of Benin to all the notifications and other requests for clarification addressed to it through its Secretariat.
20. This situation has led the African Commission to rule on the admissibility of the communication submitted to it on the basis of the facts brought to its attention by the Complainant.
21. In accordance with the provisions of Article 7, paragraph 1(d) of the African Charter and its previous decisions, (cf. in particular ²communication 39/90, Annette Pagnouille – on behalf of A. Mazou/Cameroon⁸)), the Commission considered that the waiting period before the Appeal Court of Cotonou had been unduly prolonged and on these grounds, it had declared the communication admissible.
22. Details brought later to the case file by Interights and the Institute for Human Rights and Development as well as by the Government of Benin indicate that:
 - Following an appeal lodged by the two parties, the case was the subject of a joinder by interlocutory decision dated 9th March 1996.
 - After several adjournments due mainly to non attendance by one or the other party at the hearings, the court gave judgment by default on 5th August 1999 indicating that non production of the disputed decision and conclusions by the parties causes damage to the smooth administration of justice.
 - Mr. Akitobi Honoré, the opponent of Mr. Odjouoriby, lodged an appeal against this decision and Mr. Yansunnu, counsel of Mr. Odjouoriby, submitted further pleadings in defence before the chamber of the Supreme Court on 27th June 2001.
23. But the African Commission maintains that in any case, the State of Benin remains the guarantor of a good administration of justice on its territory and for the reasons, the African Commission upholds its decision on admissibility.

Merits

24. The African Charter on Human and Peoples' Rights stipulates in Article 7, paragraph 1(d) that « every individual shall have the right to have his cause heard. This comprises...the right to be tried within a reasonable time ».
25. On 19th September 1995, the plaintiff lodged an appeal against judgment No. 75/95 4° CCM delivered on 7th August 1995 by the civil chamber of the court of first instance of Cotonou in its provisions on damages granted to him by the said court.

⁸ Communication N°39/90: Annette Pagnouille on behalf of Abdoulaye Mazou c/ Cameroon. The victim had unsuccessfully initiated many proceedings both non-contentious and contentious. The Commission felt then that local remedies had been exhausted

26. On his part, Mr. Honore Akitobi (the opponent of Mr. Odjouoriby) filed a cross-appeal in reply to the principal appeal and as pointed out earlier, the proceedings pending before the appeal court are unduly prolonged.
27. Accordingly, the African Commission observes that the case before the Appeal Court has been unduly prolonged.
28. The African Commission is of the view that this undue prolongation of the case at the level of the Appeal Court is contrary to the spirit and the letter of above-mentioned Article 7(1)(d).
29. Concerning the allegations of the plaintiff of violation of his right to property, the Commission recalls that the right to property is recognized and guaranteed by the African Charter of which Article 14 stipulates that this right may be encroached upon only “in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.
30. The African Commission, however, is of the opinion that to the extent that there has been no definitive decision in this case, it cannot substitute itself to the national courts to appreciate violation of the enjoyment of the right to property of the plaintiff.

For these reasons the African Commission,

Finds the Republic of Benin in violation of Article 7(1)(d) of the African Charter;

Requests the Republic of Benin to take appropriate measures to ensure that the Complainant’s appeal is determined by the Court of Appeal as quickly as possible; and

Urges the Republic of Benin to take the necessary steps to pay appropriate compensation for damages suffered by Mr Odjouoriby Cossi Paul due to the unduly prolonged proceedings in the processing of his case.

240/2001 – Interights et al (on behalf of Mariette Sonjaleen Bosch)/Botswana

Rapporteur:

29th Session: Commissioner Andrew R. Chigovera
30th Session: Commissioner Andrew R. Chigovera
31st Session: Commissioner Andrew R. Chigovera
32nd Session: Commissioner Andrew R. Chigovera
33rd Session: Commissioner Andrew R. Chigovera
34th Session: Commissioner Andrew R. Chigovera

Summary of Facts:

1. The communication is submitted by Edward Luke II of Luke and Associates, Saul Lehrfreund of Simons Muirhead and Burton (practising advocates based in the United Kingdom and Botswana) and Interights, a human rights NGO based in the United Kingdom on behalf of Mariette Sonjaleen Bosch who is of South African nationality.
2. Mrs. Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30th January 2001.
3. The Complainant alleges that the judge who convicted Mrs. Bosch wrongly directed himself that the burden of proof was on the accused *"to prove on a balance of probabilities"* that someone else was responsible for the killing and thereby reversing the presumption of innocence. That the Court of Appeal wrongly upheld the conviction despite recognising the fact that the judge had fundamentally erred by reversing the onus of proof.
4. The Complainant further alleges that her right to life has been violated by the imposition of the death penalty for what was alleged to be a crime of passion, in circumstances where there were clearly extenuating circumstances.
5. It is also alleged that Mrs. Bosch is likely to suffer inhuman treatment and punishment because the execution will be carried out by the cruel method of death by hanging, which exposes the victim to unnecessary suffering, degradation and humiliation.

Complaint

6. The Complainant alleges a violation of **Articles 1, 4, 5 and 7(1)** of the African Charter on Human and Peoples' Rights.

Procedure

7. The communication was received at the Secretariat of the Commission 7th March 2001 by fax.
8. On 12th March 2001, the Secretariat of the African Commission wrote to Interights requesting for complete copies of the judgements of the High Court and Court of Appeal of Botswana.
9. On 26th March 2001, the Secretariat of the Commission received by courier the full text of the judgement of the Court of Appeal of Botswana delivered on 30th January 2001 and expert affidavits relating to the manner and speed in which a person executed by hanging would meet their death.
10. On 27th March 2001, the Chairman of the Commission wrote to the President of Botswana appealing for a stay of execution pending consideration of the communication by the Commission.
11. The President of Botswana did not respond to the appeal but information received at the Commission indicates that Mrs. Bosch was executed by hanging on **31st March 2001**.
12. At its 29th ordinary session, the Commission decided to be seized of the Complaint and the parties to the communication were informed of this decision.
13. At its 30th ordinary session held in Banjul, The Gambia, the Commission heard oral submissions from the Complainants and declared the communication admissible.
14. On 9th November 2001, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility and on the merits to the Secretariat.
15. The African Commission continued the process of exchanging information between the parties.
16. At its 34th Ordinary Session, held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

LAW

Admissibility

17. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant for a communication to be declared admissible.
18. The Complainants submit that they have fulfilled all the conditions of Article 56 of the African Charter. They argue that Mrs Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which

dismissed her appeal on 30th January 2001. On 7th March 2001, 35 days after the Court of Appeal of Botswana had handed down its decision dismissing Mrs Bosch's appeal, the Complainant filed this communication with the African Commission. They submit that this matter has not been submitted for examination under any other procedure of international investigation or settlement. The Complainants also state that all local remedies were exhausted and the complaint was filed with the African Commission within a reasonable time from the time local remedies were exhausted. Therefore the African Commission should declare the communication admissible.

19. In their response, the Respondent State concedes that all local remedies in this matter were exhausted, as the Court of Appeal is the last and final court in Botswana.
20. The Commission notes that the Respondent State and the Complainants agree that all domestic remedies were exhausted and thus declares the communication admissible.

Merits

21. Three issues relating to alleged violations of the African Charter were originally raised on behalf of the applicant. A fourth issue, namely whether or not there was a violation of Articles 1,4, and 7(1) in declining to respect the indication of provisional measures was added when consolidated submissions were made. Two further issues were added in the document entitled "Note of Applicant's Submissions" circulated at the 31st Session bringing the total number of issues to six. One of the six issues namely "whether the methods of execution in Botswana, by hanging, breached Article 5 of the African Charter" was abandoned during the hearing of the matter at the African Commission's 31st Ordinary Session. Each of the remaining issues will be dealt with in turn.

Alleged Violation of the Right to Fair Trial

22. With regard to the alleged violation of the right to fair trial under Article 7 (1)(b) of the African Charter, the issue is whether the misdirection by the trial judge in regard to the onus of proof was so fatal as to negate the right to fair trial in the circumstances of this case. Simply put, does a misdirection per se vitiate the holding of a fair trial in violation of Article 7 of the African Charter and of necessity leads to the quashing of a conviction with capital consequences.
23. In this regard, it was submitted that the placing of the burden of proof on the applicant was a violation of a fundamental right such as would negate the holding of a fair trial and that the court of appeal wrongly held that this did not result in a miscarriage of justice.
24. In dealing with this issue it is important to recognise that there is no general rule or international norm stating that any misdirection per se vitiates a verdict of guilt. As pointed out by the State Party, what is generally accepted in several countries particularly common law countries is the rule that a misdirection will vitiate a verdict of guilt only where such misdirection either on its own or "cumulatively is or are of

such a nature as to result in a failure of justice.” The legal position is aptly stated in Archbold, Criminal Pleading and Practice⁹ as follows”.

“The very basic and fundamental function of the courts of justice is to ensure that no substantial miscarriage of justice is allowed through the operation of the judicial process. The courts cannot be seen to undermine the very foundation for the existence of the judiciary, namely justice, unaffected by technicalities and sophistry of the legal profession”.

In other words, where a court is satisfied that despite any misdirection or irregularity in the conduct of the trial the conviction was safe, the court would uphold such conviction.

25. The Court of Appeal thoroughly examined the evidence led at the trial and the effect of the misdirection and came to the conclusion that there was a massive body of evidence against the Applicant which would lead to no other conclusion than that it was the applicant and no one else who murdered the victim and that the quality of the evidence was such that no miscarriage of justice was occasioned.
26. A breach of Article 7 (1) of the African Charter would only arise if the conviction had resulted from such misdirection. As pointed out by the Court of Appeal at page 47 of the judgement, the trial judge “meticulously evaluated the evidence and came to the only conclusion possible on the evidence”.
27. A number of decisions have been taken in the European Court of Justice on Article 6 (2) of the European Convention on Human Rights which also provides for the presumption of innocence. In discussing Article 6(2), R. Clayton and H. Tomilson observe¹⁰ that the Article does not prohibit presumption of facts and law and citing *Salabiaku v France* (1988) 13 EHRR 379 paragraph 28 states that the State must however,

“Confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”¹¹.

A more appropriate discussion of Article 6(2) can be found in the Digest of Case-Law Relating to the European Convention on Human Rights (1955-1967)¹² where it is stated that,

“If the lower court has not respected the principle of presumption of innocence, but the higher court in its decision has eliminated the consequences of this vice in the previous proceedings, there has been no breach of Article 6 (2)”¹³

28. As already discussed above, the Court of Appeal ‘meticulously evaluated the evidence’ between pages 11-20, 62-74 and 77-111 of the judgement and was satisfied that despite the misdirection, there was adequate evidence to convict the Applicant of murder.
29. It should be noted here that it is for the courts of State Parties and not for the Commission to evaluate the facts in a particular case and unless it is shown that the courts’ evaluation of the facts were manifestly arbitrary or amounted to a denial of

⁹ 200 Ed at page 18

¹⁰ Page 114, paragraph 11.238.

¹¹ See also *Hoang v France* (1992) 16 EHRR 53.

¹² 1970, UGA Huele, Belgium

¹³ Digest of Case-Law Relating to the European Convention on Human Rights 1955-1967 U.G.A Huele, Belgium paragraph 153 on page 140

justice, the Commission cannot substitute the decision of the courts with that of its own. It has not been shown that the courts evaluation of the evidence was in any way arbitrary or erroneous as to result in a failure of justice. The Commission therefore finds that there is no basis for finding that the State Party violated its obligations under Articles 4 and 7 (1).

Alleged Violation of Article 5

30. The second issue relates to the allegation that the sentence of death in this case was a disproportionate penalty in the circumstances of this case and hence a violation of Article 5 of the Charter.
31. While it is accepted that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence but also the circumstances of the individual offender, (Inter-American Commission of Human Rights in *Downer and Tracey v. Jamaica* (41/2000) 14 April 2000), there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed. It should be pointed out here that apart from stating the trend in other jurisdictions and decisions of other Human Rights bodies governed by specific statutes, it has not been established that the courts in this case did not consider the full circumstances before imposing the death penalty. If anything, the courts fully considered all the circumstances in this case (See pages 48 to 55 of the judgement of the Court of Appeal). It is clear that the submission that the imposition of the death penalty was disproportionate to the gravity of the crime in this case is based on an erroneous assumption of what amounts to extenuating circumstances.
32. Extenuating circumstances are facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability. First, the facts or circumstances must be directly related to or connected with the criminal conduct in question. The court is only concerned with facts which lessen the seriousness or culpability of that particular criminal conduct.
33. Second, extenuation relates to moral blameworthiness. It is the state of mind of the offender at the time of the commission of the offence that is a relevant consideration otherwise offenders would use any personal circumstance totally unrelated to the conduct complained of to escape punishment.
34. In considering whether or not extenuating circumstances exist, the inquiry is:
 - a) Whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation
 - b) Whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what s/he did; and
 - c) Whether this influence was of such a nature as to reduce what he did.
35. The claimed capacity for redemption or reformation and or good character is certainly not connected with the commission of the particular murder and therefore not relevant considerations to this finding of extenuating circumstances.
36. In deciding on the proportionality of a sentence one would have to fully weigh the seriousness of the offence against the sentence. It is quite evident from the Court of

Appeal records that the murder committed by Mrs Bosch involved considerable effort and careful planning.

37. Thus while the African Commission acknowledges that the seriousness or gruesome nature of an offence does not necessarily exclude the possibility of extenuation, it cannot be disputed that the nature of the offence cannot be disregarded when determining the extenuating circumstances. As such, the African Commission finds no basis for faulting the findings of both the trial court and Court of Appeal as it relates to this issue.

Issue of reasonable notice

38. It was submitted that failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman and degrading punishment and treatment in breach of Article 5 of the African Charter and that execution under such circumstances violates the protection of law provisions under Article 3 as it deprives an individual the right to consult a lawyer and obtain such relief from the courts as may be open to him or her.
39. It should be noted that this issue was not addressed by the Respondent State in its written submissions primarily because it had not been communicated to it. The issue was not even raised in the Authors' consolidated submissions of the record of their oral submissions on admissibility made at the 30th Session and submitted to the African Commission's Secretariat on 18th March 2002.
40. The issue only surfaced with the Author's written submissions distributed shortly before the hearing of the matter at the 31st Session of the African Commission. It was therefore not surprising that no useful submissions or submissions at all were made on behalf of the Respondent State on the issue. Neither was there any debate on the issue at the instance of the Commissioners, as they had not had an opportunity to consider those submissions.
41. In the circumstances it would be fundamentally unfair to the Respondent State to deal with the substance of this issue save to observe that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to "arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal"¹⁴.

Alleged violation of Article 4: Clemency Procedure was unfair

42. This is one of the two issues raised rather belatedly and the approach in issue 3 above applies and the comments made hereunder are for future guidance in matters of this nature it being pointed out that the communication procedure is an attempt to achieve or address failed justice at the domestic level which follows the rules of natural justice and would not permit any springing of surprises.
43. Applicant alleges that in exercising his clemency, the President acts "arbitrarily". The main issue is whether or not the Presidential clemency is what is envisaged in Article 4 of the Charter. Article 4 proscribes the arbitrary deprivation of the right to life. A

¹⁴ Guerra v Baptiste [1996] AC 397 at P.418

process is put in all jurisdiction to ensure that due process is had in ensuring that the right to life is not violated. This process includes the holding of a trial so that an accused is given an opportunity to defend his cause. It is that process that can be challenged to be arbitrary. The intervention of the President does not in any way affect the non-arbitrariness of the process. The due process in Botswana was followed with the Applicant's case following the process that has been established to guarantee Applicant's rights. Her matter was heard in both the High Court and the Appeal Court.

44. It should also be noted that the exercise of clemency unlike the process described above, is discretionary in most jurisdictions and are for the most part discretionary; they are given to him to be exercised in his own judgement and discretion¹⁵. Whilst the Constitution of Botswana provides for the constitution of an Advisory Committee on Prerogative of Mercy, the President is only required to request and get advice from that committee if he so wishes. However, he can only exercise his power of clemency after presentation of a written report of the case from the trial judge together with any other information that he may require.

45. The question then is whether or not the President arbitrarily deprived the Applicant of her right to life. The word "arbitrarily" is defined in Black's Dictionary¹⁶

"as fixed or done capriciously or at pleasure, without adequate determining principle, not founded, not done or acting according to reason or judgement, depending on the will alone, absolute in power, capriciously tyrannical, despotic, without fair solid and substantial cause, that is without cause based on law.....Ordinarily "arbitrary" is synonymous with bad faith or failure to exercise honest judgement and an arbitrary act would be one performed without adequate determination of principle and one not founded in nature of things..."

A similar definition is provided in Stround's Judicial Dictionary¹⁷ and Classen's Dictionary of Legal Words and Phrases¹⁸

46. The other factor that needs to be considered is the time factor. On 30 January 2001, the court of Appeal dismissed the Applicant's case. On 5 February 2001 a memo from the Gaborone Women's Prison to the divisional Commander states that applicant was advised of her right to petition the President. On 7 February 2001 the Attorney General of Botswana wrote to the Applicant's Lawyers on the issue. The Lawyers wrote to the Clemency Committee on 26 February 2001 requesting for more time to prepare a clemency petition. The preliminary submissions were only submitted on 15 March 2001, one and half months after the Appeal was dismissed. It is acknowledged that on 6 March the lawyers wrote to the President requesting for information as to when the clemency hearing was to be held. Attendance of the Applicant or her lawyers at the hearing is clearly impractical. One can envisage the President now sitting as a court to hear oral submissions from petitioners. Not only is the suggestion misconceived and implications thereof impractical, but the implications will also result in undermining the office and dignity of the President.

47. In any event, the right to be heard does not entail entitlement to the benefit of all the facilities which are allowed to a litigant in a judicial trial. Thus the 'right to be heard'

¹⁵ Executive independence and the Courts Presidentialism in commonwealth Africa B.O Nwabueze at Page 33

¹⁶ 5th Ed, West Publishing Company, 1979.

¹⁷ 5th Sweet and Maxwell Limited, 1986

¹⁸ Volume 1. Butterworths, 1975.

in appropriate circumstances may be confined to the submission of written representations. These are clearly appropriate circumstances for written representations.

48. However, it should be noted that a person must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations (See also Baxter *op cit* at p 552.)

Alleged Violation of Articles 1, 4 and 7(1): Execution of Applicant pending consideration of Applicant's Communication by the African Commission

49. The last argument is that Article 1 of the African Charter obliges a State Party to comply with the requests of the African Commission. The Complainants base this argument on the letter written by the Chairperson of the African Commission to the President of Botswana on 27th March 2001 seeking a stay of execution. The letter was communicated by fax.
50. In its oral submissions during the 31st Ordinary Session, the Respondent State argued that the fax was never received by the President. However, in this particular case, the African Commission is not in possession of any proof that the fax was indeed received by the President of Botswana.
51. Article 1 obliges State Parties to observe the rights in the African Charter and to 'adopt legislative or other measures to give effect to them.' The only instance that a State Party can be said to have violated Article 1 is where the State does not enact the necessary legislative enactment¹⁹.
52. However, it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty. This is illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the ICCPR and the general reluctance by those States that have retained capital punishment on their Statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a "*Resolution Urging States to envisage a Moratorium on the Death Penalty*"²⁰ and therefore encourages all States party to the African Charter on Human and Peoples' Rights to take all measures to refrain from exercising the death penalty.

For the above reasons, the African Commission,

Finds that the Republic of Botswana is not in violation of Articles 1, 4, 5 and 7(1) of the African Charter on Human and Peoples' Rights;²¹

Strongly urges the Republic of Botswana to take all measures to comply with the Resolution urging States to envisage a Moratorium on the Death Penalty;

Requests the Republic of Botswana to report back to the African Commission when it submits its report in terms of Article 62 of the African Charter on measures taken to comply with this recommendation.

¹⁹ See the Case of Young, James and Webster which discusses Article 1 of the European convention which is similar to Article 1 of the Charter

²⁰ Adopted at the 26th Ordinary Session of the African Commission held from 1st to 15th November 1999, Kigali, Rwanda

²¹ Commissioner N Barney Pitso asked to be recused from participating in consideration of this communication at the 29th Ordinary Session of the African Commission and as such did not take part in all discussions relating to this matter

*Done at the 34th Ordinary Session held in Banjul, The Gambia
from 6th to 20th November 2003*

242/2001 – Interights, Institute for Human Rights and Development in Africa,
and *Association Mauritanienne des Droits de l'Homme*/Islamic Republic of
Mauritania

Rapporteur:

30th Session: Commissioner Rezag Bara
31st Session: Commissioner Rezag Bara
32nd Session: Commissioner Rezag Bara
33rd Session: Commissioner Rezag Bara
34th Session: Commissioner Rezag Bara
35th Session: Commissioner Rezag Bara

Summary of facts

1. The complaint was submitted by Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme* (Mauritanian Human Rights Association), on behalf of Mr. Ahmed Ould Daddah, Secretary General of *Union des Forces Démocratiques-Ere nouvelle* (UFD/EN, Union of Democratic Forces-New Era), a Mauritanian political party, which was established on 2 October 1991.
2. The Complainants, mandated by Mr. Ahmed Ould Daddah, allege the following facts. By Decree No. 2000/116.PM/MIPT, dated 28 October 2000, *Union des Forces Démocratiques/ Ere nouvelle* (UFD/EN), the main opposition party in Mauritania, led by Mr. Ahmed Ould Daddah was dissolved by the Prime Minister of the Islamic Republic of Mauritania, Mr. Cheick El Avia Mohamed Khouna.
3. This measure, taken pursuant to Mauritanian law, (in particular articles 11 and 18 of the Mauritanian Constitution, and Ordinance No. 91.024 of 25 July 1991 which deals with political parties in articles 4, 25 and 26), was imposed, according to this senior official, following a series of actions and undertakings committed by the leaders of this political organisation, and which:
 - were damaging to the good image and interests of the country;
 - incited Mauritians to violence and intolerance; and
 - led to demonstrations which compromised public order, peace and security.
4. On account of this, all the movable and immovable assets of the said political organisation were, *ipso jure*, seized.
5. A few weeks after the proscription of UFD/EN, the Mauritanian authorities arrested several leaders of the party who had participated in a demonstration against the measure, which they considered illegal and illegitimate, for breach of public order.
6. The Secretary General of the party, Mr Ould Daddah, on arrival from a journey abroad, was himself arrested on 9 December 2000, at Nouakchott airport, and was only released a few days later.

7. On 25 December 2000, the leaders of UFD/EN filed a motion for the repeal of the government's measure before the Administrative Chamber of the Supreme Court, citing:
 - Lack of a just cause for the dissolution Decree;
 - The unjustified nature of the punishment of a political party due to the alleged machinations of its leaders;
 - Lack of competence on the part of the authority by whom the Decree was signed; and
 - Absence of any deliberation by the Council of Ministers on the matter of the dissolution, as foreseen by law.
8. On 14 January 2001, the Administrative Chamber of the Supreme Court, ruling as court of original and final jurisdiction, delivered its verdict (No. 01/2001 UFD/EN vs/ Prime Minister and Minister of Interior, Post and Telecommunications of 14 January 2001), throwing out Mr. Ahmed Ould Daddah's appeal, without really giving the grounds, stating that the claim lacked merit.
9. Since then, the principal leaders and activists of UFD/EN, who did not have the recourse of appealing the Supreme Court's judgement before any other Mauritanian court, have been subjected to a veritable witch-hunt, throughout the Mauritanian territory, and have suffered acts of intimidation and harassment by the security services.
10. They have also been excluded from participating, under the banner of their political organisation, in the various elections that have been organised in the country.

Complaint

11. The Complainant claims that there has been a violation of the following provisions of the African Charter on Human and Peoples' Rights: **Articles 1, 2, 7, 9(2), 10(1), 13 and 14.**

Procedure

12. The communication was submitted on the 25th April 2001, during the 29th Ordinary Session, held in Tripoli from 23 April to 7 May 2001.
13. The Secretariat acknowledged receipt of the communication on 2 May 2001.
14. At the 30th ordinary session, the African Commission considered the communication and decided to be seized of the case. Consideration of its merits was deferred until the next session and the Commission asked that the parties be informed accordingly.
15. The Secretariat informed the Respondent State of the decision of the Commission in its Note Verbale of 15th November 2001 and the Complainant was informed of the same decision in an official letter dated 19th November 2001.
16. On 22nd January 2002, the Secretariat received the observations on the admissibility and merits of the case from the Respondent State. Those observations were forwarded to the Complainant.

17. The following documents in Arabic were attached to the observations of the Respondent State:
- *Petition dated 27/01/2001 of Mr Mohamed Oula Gonj requesting the review of the decision of the supreme court No. 01/2002 of 14/01/2001;*
 - *Letter of the Assistant Secretary General of UDF/EN dated 24/01/2001;*
 - *Letter of Mr Mohamed O. Gonj cancelling his petition of 27/01/2001;*
 - *Statement of no appeal issued by the Registrar of the Supreme Court dated 12/01/2001*
 - *Communiqué of UDF/EN to development partners;*
 - *Statement of general policy of UDF/EN.*
18. On 25 March 2002, the Complainants, comprising of Interights, *l'Association Mauritanienne des Droits de l'Homme* and *l'Institut pour les Droits Humains et le Développement*, presented the Secretariat of the Commission with their written observations on the admissibility of the complaint, in reply to the arguments on admissibility of the complaint as advanced by the Respondent State.
19. At its 31st Session, held from 2 - 16 May 2002 in Pretoria, South Africa, the African Commission declared the communication admissible and called on both parties to submit their observations on the merits of the case without undue delay.
20. By letter dated 29 May 2002, the Secretariat of the Commission informed both of the concerned parties of the Commission's decision.
21. On 7 August 2002, the Secretariat of the Commission acknowledged receipt of the written observations on the merits of the communication, received on 5 August 2002 from the Complainant. A copy of these observations was forwarded to the Respondent State.
22. At its 33rd ordinary session held in Niamey, Niger, the African Commission listened to the oral remarks of both parties and decided to defer its decision on the merits to the 34th ordinary session. The parties concerned were notified of the decision on 4th July 2003.
23. At its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered this communication and decided to deliver its decision on the merits.

LAW

Admissibility

24. Article 56 of the African Charter on Human and Peoples' Rights sets out seven conditions, which, under normal circumstances, must be fulfilled for a communication to be admissible. Out of the seven conditions, the government raised the issue regarding the exhaustion of local remedies as provided under Article 56(5) of the Charter, which stipulates -:
- "Communications..... to be considered, are sent after exhausting local remedies, if any unless it is obvious this procedure is unduly prolonged".*
25. In its submission of 7th January 2002, the Respondent State requested that the African Commission: "...enquire whether the complainants had duly seized the

African Commission...”. The Respondent State also informed the African Commission that the rulings of the Administrative Chamber of the Supreme Court could not be appealed against. It however went on to say: “ appeal is not the only legal remedy in Mauritanian law. The rulings made by this jurisdiction an often required for revision on the basis of Article 197 and in accordance with the Civil Commercial and Administrative Procedure Code (CPCCA). Practically, the respondent state affirmed that applications for revision have recently culminated into rulings of withdrawal by the same Chamber.

26. To support its line of reasoning, the respondent state indicated that one the lawyers of UDF/EN, Lawyer Mohamed Ould Gowf made a plea in the same vein on 27/01/2001 but withdrew it the same day. Based on the above facts and on Article 56(5) of the African Charter, the Respondent state requested that the communication be declared inadmissible due to the fact that the local remedies were not exhausted.
27. However, the fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.
28. However, it is a known fact that the revision procedure is an extraordinary legal remedy that exists only if a number of conditions specifically stipulated by the law are fulfilled. In this regard, Articles 197 and 198 CPCCA of the Republic of Mauritania do not allow access to revision unless it is proven that the legal decision taken was wrong or due to the fact that the other party is in possession of decisive evidence.
29. Furthermore, the fact that one of the lawyers of the complainants who was probably not empowered to do so, had indeed applied for a revision and withdrew it the same day, was a clear indication of the complainant’s intention not to resort to such a remedy. In fact, this does not affect at all the exceptionally legal nature of such a legal remedy as outlined above.
30. Consequently, it is a fact that the party that seized the African Commission had indeed exhausted, with regard to this particular case, the entire local remedies of common law that exist and can be resorted to before Mauritanian jurisdictions.
31. In view of the above-stated reasons, the African Commission declared the communication admissible.

Merits

32. The communication relative to the dissolution of the Mauritanian Political Party UFD/Ere nouvelle in accordance with established and legally confirmed regulations is attacked by the Complainant before the African Commission for being in violation of Articles 1, 2, 9(2), 10(1), 13 and 14 of the African Charter, on the basis of the following points:
 - The non-conformity of the legal ruling ratifying the dissolution on the principles governing the right to a fair hearing;
 - The criticism levelled against the legality of the decision for dissolution in accordance with established regulations and illegal and unjustified lapses blamed on the political party UFD/Ere nouvelle.

On the principles governing the right to a fair trial

33. The Complainant contends that the Mauritanian Courts are in violation of the provisions of Article 7 (a) of the African Charter which stipulates:
« Every individual shall have the right to have his cause heard. This comprises 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. »
34. The Complainant alleges that the dissolution of the main Mauritanian opposition Party UFD/EN, the seizing of its assets and the conditions in which the measure has been confirmed by the highest Court in the land have violated the relevant provisions of the African Charter and other Conventions to which the country is signatory.
35. The Complainant contends that these violations are both procedural and substantial. Procedural, because the basic rules and principles of a fair hearing were not respected during the hearing. Substantial, because the dissolution of the UFD/EN party violated the right of association and freedom of expression of the members and leaders of this political party and violated the principles of democracy outlined in the African Charter.
36. The Complainant alleges that the procedure before the administrative chamber of the Supreme Court did not respect the principles relative to the right to a fair hearing in particular that which is relative to two-tier proceedings. The Complainant also alleges that from the investigation of the case up to the public hearing which decided the on destiny of the UFD/EN, the principles of inter parties had not been respected and that the final ruling by the Judge did not contain pertinent legal arguments justifying the dissolution of the said party.
37. The Respondent State emphasises that the judicial examples and arguments and all the documentation on the right to a fair hearing raised by the Complainant are only applicable in a penal case. The Respondent State imagines evidently that the accusations levelled against the UFD/EN may well have a penal qualification according to the law governing the activities of Political Parties, but this is not enough to give this case a penal character since no penal lawsuit had been brought against the leaders of the said Party.
38. The Respondent State indicates that concerning the respect for the principle of two-tier proceedings, which consists of bringing the entire dossier of the merits of a case before a differently composed higher legal authority for examination, it is established that it concerns a broad based rule which can be widely applied, notably in penal cases. This principle forms the basis of proper administration of justice and allows the well-intentioned applicant to obtain the guarantee of a correct application of the Law.
39. The fact remains however that, as stipulated by Article 7 (a) of the African Charter, every individual has the right to have his cause heard, which includes: "...The right to appeal to competent national organs..."
40. In this particular case, and in conformity with Article 26 of the Decree 91-024 of the 25th July 1991 governing the activities of political parties, the Respondent State

underscores the fact that the competent legal authority to examine the legality and validity of a Decree passed by the Prime Minister of the Islamic Republic of Mauritania is the Administrative Chamber of the Supreme Court, according to the procedure in force in this country. However, the Supreme Court is the highest authority in the Mauritanian legal system and in the matter of appeal against decisions taken by the administrative authorities; the existing procedure requires that annulment takes place only as a first and last resort.

41. Finally, it means that the Mauritanian legislator, like other similar legislations, has given exclusive authority to the highest legal body in the country due to the legal and Political importance of the matter relative to the dissolution of a Political Party. It is before this high authority that the entire Mauritanian legislative system is built and it is here that the uniform rules for applying the Law in this country, in all fields, are established.
42. Concerning the respect for the principle of judgement after due hearing, the Respondent State maintains that the Complainant never mentioned in his written submissions, any opposition to or complaint against the holding of audiences, or of the quality of the representation and the defense of the political party which was dissolved before the Mauritanian legal authorities.
43. After having studied the comments made by the Complainant and the Respondent State, it is well established that the representatives of the UFD/Ere nouvelle received, in good time, all the notifications of the actions and documents relating to this litigation, and had had access to the entire dossier of the case to study all the points and make the relevant criticisms both in writing and by oral advocacy before the competent legal authority.
44. However, regarding this particular case, the parties before the Mauritanian administrative court are, on the one hand, the Minister of the Interior, representing the government and, on the other hand, the political party UFD/Ere nouvelle. As for the Government Commissioner, he carries out the functions of the representative of the Department of Public Prosecution i.e. representative of the public interest charged to ensure, on behalf of society, the sound application of the laws. In this regard, he can resort to methods of public nature that might not have been resorted to by the parties which might have escaped the vigilance of the reporting judge.
45. Thus, the criticism levelled against the Government Commissioner, who is the representative of the Department of Public Prosecution, before the Administrative Division of the Supreme Court because of its so called “collusion” with the ruling, seemed to lack merit due to the absence of hard facts and concrete material evidence to back such a value judgment.
46. In seeking to know if the decision of the Mauritanian Highest Court had been sufficiently justified or not, the report on the ruling by the Administrative Chamber of the Mauritanian Supreme Court amply covers all the arguments raised by the Complainant’s Defense, as much in their written submissions as in their oral address before the audience and provides responses based on the provisions of the Mauritanian Laws. From that moment it is not possible to support this grievance with regard to the aforementioned decision.

47. In this context, the African Commission does not admit the violation of the provisions of Article 7 (1a) of the African Charter for it considers that Mr. Ahmed Ould Daddah's case has been adequately heard by the Administrative Chamber.

On the legality of the Act governing dissolution and the illegal and unjustified lapses blamed on the political party UFD/Ere nouvelle.

48. Article 9 (2) of the African Charter stipulates: *“every individual shall have the right to express and disseminate his opinions within the law”*.

- Article 10 (1) of the African Charter stipulates: *« every individual shall have the right to free association provided that he abides by the law »*; and

- Article 13 (1) of the Charter indicates: *“every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”*.

49. The Complainant alleges that by a Decree No. 2000/116/PM/MITP dated 28th October 2000 and signed by the Prime Minister, the Mauritanian Government dissolved the Democratic Forces Union/Ere nouvelle (UFD/EN), the main opposition Party in the country. The same day, Mr. Ahmed Ould Daddah, Secretary General of the said Political Party received, by letter (No. 58/2000) from the Minister of the Interior, Posts and Telecommunications of even date, notification of the measure that the Political group's buildings and assets have been impounded.

50. According to the Decree governing the dissolution, the measure had been taken in application of the provisions of the Constitution of the 20th July 1991 (Articles 11 and 18) and the Decree No. 91 024 of the 25th July 1991 (Articles 4, 25 and 26) which formally prohibited Political Parties from destroying the country's important image and interests, from inciting intolerance and violence and from organising demonstrations that are likely to compromise public order, peace and security.

51. The Complainant contends that the acts by the leaders of the Political Parties mentioned in Articles 4 & 5 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties and liable to lead to the dissolution of their organisation (inciting intolerance and violence, organising demonstrations likely to compromise public order, peace and security, setting up of military or paramilitary organisations, armed militia or combat groups) are already considered by Articles 83 and others of the Mauritanian Criminal Code as offences or punishable crimes.

52. The Complainant points out that the dissolution of the UFD/EN is justifiable by the inflammatory nature of a certain number of documents and expressions attributed to its leaders. In other words, it is the abuse of the freedom of expression by the leaders of this party which gave rise to its expulsion from the Mauritanian Political arena. The Complainant specifies that such assertions are unacceptable in a State which is said to base its activities on the principles of Democracy and on the principles of the African Charter. Indeed, there had been, not only prejudice to the freedom of expression, to the right of association and to the right of the leaders of the UFD/EN to participate in the management of public affairs in Mauritania, but also to the fundamental rights of the said Party which, through this measure, has lost all its assets.

53. The Complainant indicates that the notions of the right of association and of the freedom of expression are complementary in a democratic State, in the sense that the Association or the Political Party is, the means par excellence, for the freedom of expression. It is well known that Political Parties contribute greatly to the political debate of democratic States, notably through elections which are organised periodically to guarantee the freedom of choice of its leaders by the citizens.
54. In paying special attention to the terms used in the Party's declarations, in the statements of its leaders and indeed to the context in which these had been published or delivered, the Complainant voices his surprise to note that the authors of this measure were unaware that the activities for which the UFD/EN was being blamed had taken place in the context of « training and the expression of the political will of its members » and in the context of Mauritians enjoying their right to be differently informed about the political, economic and social situation of their country.
55. The Complainant alleges that the contentious statements and publications had been made and/or distributed during a time when Mauritania was making pre-campaign preparations for the legislative and local elections for the year 2001. In such a context, each Party was endeavouring, with due respect for democratic rules, to put its opponent in a position of weakness before the voters during the electoral campaign.
56. The Complainant exposes that it is for this reason that the statement of the 17th September 1998 had been drafted following the dissemination, by several reliable sources, of information relating to the discovery of a case of misappropriation of public funds, particularly of the aid received from development partners, of financial chaos and of the mismanagement of public affairs²².
57. According to the Complainant, the objective of this document was, among other things, to remind Mauritania's partners that the Mauritanian citizen, in view of the total silence of the authorities on this issue « has the right and the duty to ask for explanations and to know what happened to the money obtained in his name and which should be refunded »²³, that a happy outcome of this crisis which is threatening the existence of Mauritania, since more than 57% of the population lived below the poverty threshold, could only be obtained through « responsible, dispassionate and constructive dialogue the only means to realise consensual solutions to the major problems which exist ». The document also insisted on the need for the country to have a pluralist Parliament resulting from transparent elections, an independent judiciary, a really free press, the opening of the public media for opposition debates and to give free access to airtime. And in conclusion, the authors of the statement affirmed that « the UFD/EN, as a political force of major significance, whilst expressing its sincere gratitude to all of Mauritania's development partners for their large contributions to this country, and in expressing the hope to see this assistance

²² The Complainant refers particularly to the Article which appeared in the French Daily *Le Monde*, which is generally well informed and which was intitled « Mauritania plagued by affairism and a return to tribalism » and in which could be read the following « the word deprivation is not strong enough (to describe the situation of the Mauritanian) and that to remain afloat the only solution available for the Administration is to divert for its own benefit, part of the monies given by the international community to finance development projects »

²³ Cf. Declaration made for the attention of Mauritania's development partners, page 2

increased, invites them to avoid, as much as possible, easy solutions and complacent attitudes which is costing Mauritania enormously for the past several years »²⁴.

58. Concerning the statement of the 30th October 1999 made by the UFD/EN, the Complainant argues that it had been published at the end of the Party's 2nd Ordinary Congress which had brought together some fifteen African Political Parties. The text, a report of the 3-day meeting of the Party, had been divided in two sections, devoted respectively to the political, economic and social situation of the nation and to the Party's internal activities.
59. The Complainant claims that the first part of the document was a presentation of the major facts of life in the nation which had been examined by the participants at the Congress and ideas and solutions, outlined in the resolutions which had been advocated by the Party as definitive solutions. These were obviously problems which the Authorities did not wish and still do not wish to see exposed to the public view, such as: - the threats to national unity brought about by racist, slavlike, tribalistic and regionalistic practices ; the maintenance of repressive texts which legalise the muzzling of the press, the violation of individual and collective freedoms and the regular and shameless rigging of elections ; the economic bankruptcy resulting from the systematic looting of national resources and the diverting of national aid by the ruling clique, giving rise to the aggravation of social inequality, of unemployment, of impoverishment and the abandonment by the State of its essential functions of regulation, health, education and security ; - the diplomatic isolation of Mauritania from its natural arabo-african environment and its most spectacular action which was the elevation of Israel's diplomatic representation to the rank of Ambassador.
60. The Complainant notes that in these two documents, there is no passage that contains an insulting or outrageous word against the Authorities or advocating violence and/or calling on the populations to rise against the leaders of the country. And in the two cases, the Party was acting as an activist in the national political life and playing its natural and important role in drawing public attention to the facts outlined by the information disseminated by independent organisations, and all of this with due respect for the laws and regulations of the country, argues the Complainant.
61. The Complainant party recalls that in a democratic society, « the Authorities should tolerate criticism even where it can be considered as insulting or provocative²⁵ » and one of the characteristics of democracy is « to allow the proposal and the discussion of diverse political projects even those which challenge the State's current mode of organising, so long as these do not cause prejudice to democracy itself²⁶ », this is what the Mauritanian Constitution requires in its Article 11.
62. As for the incriminating speech, the Complainant continues, it had been delivered by Mr. Ahmed Ould Daddah in his capacity as Secretary General of the UFD/EN during one of the rare occasions when the Party had obtained approval to hold a rally. The essence of his speech related, that day, to the respect which should be accorded by the Mauritanian Authorities to the main Opposition Party of the country

²⁴ Cf. Declaration quoted above, page 2.

²⁵ Cf. Cr.EDH, Arrest of Ozgur Gundem c. Turkey of the 16th March 2000, paragraph 60

²⁶ Cf. Cr.EDH, Arrest of Ybrahim Askoy c. Turkey of the 10 January 2001, paragraph 78

as its due. In his view, the Party should no longer accept the harassment to which it was being subjected and if it should continue the changes being fervently called for by its militants would not come about in a peaceful manner for the UFD/EN would no longer leave the initiative to the Authorities. He ended his speech by calling on all the members of the Party to prepare for battle in the coming elections. The Complainant alleges that nowhere in the speech was there use of a word to make people think that his Party was, from henceforth, going to resort to violence. That was all the more important considering that at the end of the meeting the thousands of militants dispersed without any incident in spite of an impressive police presence.

63. The Respondent State alleges that political pluralism in the Islamic Republic of Mauritania has its political bases in Articles 11 and 18 of the 1991 Constitution and its legal basis in Articles 4, 25 and 26 of the Law of 25th July 1991 relative to Political Parties.
64. In this context, Article 11 of the Constitution of the Islamic Republic of Mauritania stipulates: « *Political Parties work towards the formation and the expression of political will. They form and exercise their activities freely on condition that they respect the democratic principles and do not jeopardise, either by object or by action, national sovereignty, territorial integrity and the unity of the nation and of the Republic. The Law fixes the conditions for the creation, operation and dissolution of Political Parties.* »
65. Article 18 of the Constitution of the Islamic Republic of Mauritania puts down all offences committed, which are prejudicial to the security of the State.
66. Article 4 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties reads as follows: « *Political Parties are prohibited all propaganda against the principles of Islam. Islam cannot be the exclusive prerogative of any Political Party. In their Statutes, programmes, in their speeches and in their political activities, Political Parties are prohibited from:*
 - *Any form of incitement to intolerance and to violence;*
 - *Organisation of demonstrations likely to compromise public order, peace and security;*
 - *Any transformation aimed at establishing military or paramilitary organisations or armed militia or combat groups;*
 - *Any propaganda with the objective of causing prejudice to territorial integrity or to the unity of the nation »*
67. Article 25 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties makes it possible for a Political Party to be dissolved if the latter violates the rules, which govern it.
68. The Respondent States argues that it is on the basis of these two texts that the Political Party UFD/Ere nouvelle received its legal sanctioning and was able to carry out its activities normally. These two texts, one of which has a Constitutional value and the other an organic value, fix the framework for the activities of Political Parties as organs for participation in the democratisation of public life and determine the modalities of the sanctions to be imposed in case of transgression of the Constitutional requirements and the legal rules governing the activities of Political Parties in the Islamic Republic of Mauritania.
69. Pertaining to the dissolution of the UFD/EN, the Respondent State alleges that the lack of direction and extremism of this Party was such that the dissolution was not

only justified but also necessary in view of the danger that it represented for the State and for social peace.

70. The Respondent State insists that the UFD/EN, because of its radicalism, constituted a grave threat to public order and seriously threatened the rules of the democratic game. In this context it was quite legitimate for the State, in order to avoid a drifting to unforeseeable consequences, to take all the requisite measures to safeguard the general interest of the country and to preserve the social fabric as well as to maintain public order and security in a democratic society, and this in conformity with the relevant provisions of the Decree for the creation and dissolution of Political Parties.
71. The Authorities clearly defined the legal causes and bases of this measure. On the causes relating to the dissolution, the Respondent State noted as follows:
- (1) The activities carried out both inside and outside the country to discredit and destroy the interests of Mauritania. In this regard, the Respondent State cites the communiqué by the UFD/EN dated 17th September 1998 addressed to Mauritania's development partners with the objective of convincing the donor countries to arrest all economic assistance to Mauritania and the orchestrated disinformation campaign against the country relating to the dumping in the national territory of nuclear waste from Israel;
 - (2) The fact that the UFD/EN had advocated violence as an instrument of its political activities. It also mentioned the Party's General Political Statement of the 30th October 1999 certain passages of which, notably those speaking of the marginalisation and ignorance of the rights of black-africans, are seen by the Respondent as trying to re-ignite ethnic and racial upheavals in a pluriethnic country, disturbances against public law and order blamed on this Party and declarations attributed to certain leaders of this Party who are reported to have said that they would no longer organise peaceful demonstrations.
72. With regard to the legality of the measure, the Respondent State affirms that this legality is based in Article 11 of the Constitution which governs the principle of the freedom to set up political parties, on condition that they respect the democratic principles and do not cause prejudice either by objective or by their actions to national sovereignty, to the territorial integrity, to the unity of the Nation of the Republic and Articles 4, 25 and 26 of Decree 91-024 of the 25th July 1991 relative to Political Parties which prohibits any action that may incite intolerance and violence and any effort to organise demonstrations that may compromise public order, peace and security.
73. The Respondent State reiterates that factual evidence existed whereby the UFD/EN was advocating violence, was carrying out subversive activities which were prejudicial to national unity, was training dangerous hooligans who were likely to jeopardise the lives and property of peaceful citizens.
74. This factual evidence, continues the Respondent State, fully justifies the regulatory measure taken against the UFD/EN decided by the Council of Ministers since the threat against order, peace and security was evident.

75. The Respondent State advances several arguments against the authors of the communication to justify the basis of the decision to dissolve the UFD/EN, in particular:
- The fact that the activities of and positions taken by the leaders of this Party constituted a threat to the fundamental interests and image of the country;
 - The fact that certain actions and declarations by the Party appear to be meant to incite Mauritians to intolerance and violence;
 - The fact that some of its members were involved in activities geared towards pushing people to disobedience and disorder thereby endangering public peace and security.
76. According to the interpretation given by the African Commission to freedom of expression and to the right of association as defined in the African Charter, States have the right to regulate, through their national legislation, the exercise of these two rights. Articles 9(2), 10(1) and 13(1) of the African Charter all specifically refer to the need to respect the provisions of national legislation in the implementation and enjoyment of such rights. In this particular case, the relevant provisions of Mauritanian laws that had been applied are articles 11 and 18 of the Constitution and articles 4, 25 and 26 of the Decree 91-024 of the 25th July 1991 relative to Political Parties.
77. However these regulations should be compatible with the obligations of States as outlined in the African Charter²⁷. In the specific case of the freedom of expression that the African Commission considers as « a fundamental human right, essential for the development of the individual, for his political awareness and his participation in public affairs²⁸, a recent decision²⁹ clearly delineated that the right of States to restrain, through national legislation, the expression of opinions did not mean that national legislation could push aside entirely the right to expression and the right to express one's opinion. This, in the Commission's view, would make the protection of this right inoperable. To allow national legislation to take precedence over the Charter would result in wiping out the importance and impact of the rights and freedoms provided for under the Charter. International obligations should always have precedence over national legislation, and any restriction of the rights guaranteed by the Charter should be in conformity with the provisions of the latter.
78. For the African Commission the only legitimate reasons for restricting the rights and freedoms contained in the Charter are those stipulated in Article 27(2), namely that the rights « shall be exercised with due regard to the rights of others, collective security, morality and common interest »³⁰. And even in this case the restrictions should « be based on legitimate public interest and the inconvenience caused by these restrictions should be strictly proportional and absolutely necessary for the benefits to be realised »³¹.
79. Furthermore, the African Commission requires that for a restriction imposed by the legislators to conform to the provisions of the African Charter, it should be done

²⁷Cf. Resolution on the right to freedom of association, paragraph 3

²⁸ Communication 212/98 Amnesty c/Zambia paragraph 54

²⁹ Communication 105/93, 128/94, 130/94 and 152/96 Media Rights Agenda and Constitutional Rights Project v/Nigeria paragraph 66

³⁰ Ibid, paragraph 68

³¹ Ibid, paragraph 69

« with respect for the rights of others, collective security and common interest³² » that it should be based « on a legitimate public interest ...and should be strictly proportional and absolutely necessary » to the sought after objective³³. And more over, the law in question should be in conformity with the obligations to which the State has subscribed in ratifying the African Charter³⁴ and should not « render the right itself an illusion³⁵ ».

80. It is worthy of note that the freedom of expression and the right to association are closely linked because the protection of opinions and the right to express them freely constitute one of the objectives of the right of association. And this amalgamation of the two norms is even clearer in the case of political parties, considering their essential role for the maintenance of pluralism and the proper functioning of democracy. A political group should therefore not be hounded for the simple reason of wanting to hold public debates, with due respect for democratic rules, on a certain number of issues of national interest.
81. In this particular case it is obvious that the dissolution of the UFD/EN had the main objective of preventing the Party leaders from continuing to be responsible for actions for declarations or for the adoption of positions which, according to the Mauritanian Government, caused public disorder and seriously threatened the credit, social cohesion and public order in the country.
82. Nonetheless, and without wanting to pre-empt the judgement of the Mauritanian Authorities, it appears to the African Commission that the said Authorities had a whole gamut of sanctions which they could have used without having to resort to the dissolution of this Party. It would appear in fact that that if the Respondent State wished to end the verbal « drifting » of the UFD/EN Party and to avoid the repetition by this same Party of its behaviour prohibited by the law, the Respondent State could have used a large number of measures enabling it, since the first escapade of this Political Party, to contain this « grave threat to public order ».
83. The Decree No. 91-024 had in effect, made provision for other sanctions in order to deal with « slips » of Political Parties : either the suspension of the Party's activities for at least three months, in case of violation by the latter « of the laws and regulations in force or of imminent public disorder »³⁶. In such a case extensive powers are accorded by law to the Minister of the Interior to deal with an emergency situation, as, for example, the provisional closure of the premises of the said Political Party³⁷ ; or the imposition of criminal sanctions against the Party's faulty leaders³⁸. And these sanctions can be prison sentences or a large fine. Yet, at the time of these problems, no leader of the UFD/EN had been brought before the Courts for inciting violence or other acts liable to cause public disorder. The Government visibly did not apply the measures which were proportional to the peril to be averted.

³² Cf. Communication 140/94 cited above, paragraph 41

³³ Cf. Communication 140/94 cited above, paragraph 42.

³⁴ Cf. Communication 147/95 and 149/96 Sir Dawda K. Jawara/The Gambia, paragraph 59.

³⁵ Cf. communication 140/94 cited above, paragraph 42.

³⁶ Cf. Paragraph 1 of Article 24 of Decree No. 91-024 of 25th July 1991.

³⁷ Cf. paragraph 2 of Article 24 of Decree cited above.

³⁸ Cf. Article 28 of Decree cited above.

84. The African Commission observes that the UFD/EN Party transformed itself legally into UFD/EN retaining its recognised representatives on the basis of its political statement and its programmes of action. The African Commission also calls on all the Republican political forces in the Islamic Republic of Mauritania to work, within the framework of the Constitution, towards the reinforcement of healthy pluralist and democratic practice which would preserve social unity and public peace.
85. The African Commission notes that the Respondent State which contends rightly that the attitudes or declarations of the leaders of the dissolved Party could indeed have violated the rights of individuals, the collective security of the Mauritians and the common interest, but the disputed dissolution measure was “not strictly proportional” to the nature of the breaches and offences committed by the UFD/EN and “absolutely necessary” in the context of the young Mauritanian democracy.

For these reasons, the African Commission-:

Finds that the dissolution of UFD/Ere nouvelle political party by the Respondent State was not proportional 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.

250/2002 – Liesbeth Zegveld and Mussie Ephrem/Eritrea

Rapporteur:

31 st	Session: Commissioner Rezag Bara
32 nd	Session: Commissioner Rezag Bara
33 rd	Session: Commissioner Rezag Bara
34 th	Session: Commissioner Rezag Bara

Summary of Facts

1. The complaint is filed by Dr. Liesbeth Zegveld, an international lawyer at a Netherlands based firm - **Böhler Franken Koppe De Feijter**, and Mr. Mussie Ephrem, an Eritrean living in Sweden.
2. The Complainants allege that 11 (eleven) former Eritrean government officials, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie were illegally arrested in Asmara, Eritrea on 18th and 19th September 2001 in violation of Eritrean laws and the African Charter on Human and Peoples' Rights. They were part of a group of 15 senior officials of the ruling Peoples Front for Democracy and Justice (PFDJ) who had been openly critical of the Eritrean Government policies. In May 2001, they wrote an open letter to ruling party members criticising the government for acting in an "illegal and unconstitutional" manner. Their letter also called upon "all PFDJ members and Eritrean people in general to express their opinion through legal and democratic means and to give their support to the goals and principles they consider just." The government subsequently announced that the 11 individuals mentioned above, on whose behalf the present complaint is being filed, had been detained "because of crimes against the nation's security and sovereignty."
3. The complaint also alleges that the detainees could be prisoners of conscience, detained solely for the peaceful expression of their political opinions. Their whereabouts is currently unknown. The Complainants allege that the detainees may be held in some management building between the capital Asmara and the port of Massawa. They have reportedly not been given access to their families or lawyers. The Complainants fear for the safety of the detainees.
4. The Complainants state that they have made a request for *habeas corpus* to the Minister of Justice of Eritrea. They claim that they could not submit the same to the courts, as the place of detention of the 11 former officials was unknown. They allege that in the *habeas corpus* the Eritrean authorities were asked, among others, to reveal where the 11 detainees were being held, to either charge and bring them to court or promptly release them, to guarantee that none of them would be ill treated and that they have immediate access to lawyers of their choice, their families and adequate medical care. The Complainants allege that no reaction has been received from the Eritrean authorities.
5. Together with their complaint the Complainants submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission.

Complaint

6. The Complainants allege violations of Articles 2, 6, 7(1), and 9(2) of the African Charter on Human and Peoples' Rights.
7. The Complainants pray that should the detainees be tried, the trial should be held in accordance with international human rights standards and without recourse to the death penalty. They claim that such a trial should not be before the Special Court, which they allege fails to meet international standards of fair trial.

Procedure

8. The complaint was dated 9th April 2002 and received at the Secretariat on 9th April 2002 by fax, and on 9th and 11th April 2002 by email.
9. On 19th April 2002, the Secretariat wrote to the Complainants acknowledging receipt of the complaint, and informing them that their request for provisional measures was noted and would be acted upon accordingly.
10. On 3rd May 2002, the African Commission wrote a letter of appeal to His Excellency Issayas Afewerki, President of the State of Eritrea, respectfully urging Him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the Commission.
11. At its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.
12. On 20th May 2002, the Ministry of Foreign Affairs of the State of Eritrea responded to the Commission appeal and confirming to the latter that the alleged victims on whose behalf the complaint was filed had their quarters in appropriate government facilities, had not been ill-treated, have had continued access to medical services and that the government was making every effort to bring them before an appropriate court of law as early as possible.
13. On 28th May 2002, the Secretariat wrote to the Complainants and the Respondent State of the Commission's decision to be seized of the matter and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.
14. The Secretariat of the African Commission forwarded the Ministry's response to the Chairperson of the African Commission on 7th June 2002 and to the Complainants on 18th June 2002.
15. On 25th October 2002, the African Commission wrote, by way of follow up on its urgent appeal in the matter, to the Respondent State reminding it that it was the responsibility of the Member State's General Prosecutor to bring the accused before a competent court of law in accordance with the rules guaranteeing fair trial under relevant national and international instruments.
16. The two parties made submissions on admissibility.

17. At its 33rd Ordinary Session held from 15th to 29th May 2003, in Niamey, Niger, the African Commission heard oral submissions from both parties to the communication and decided to declare the communication admissible.
18. On 10th June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and requested them to forward their submissions on the merits of the communication within 3 months.
19. The Chairperson of the African Commission forwarded a letter dated 10th June 2003 appealing to H.E the President of Eritrea to intervene in this matter and urge the authorities holding the 11 individuals to release them or bring them before the courts in Eritrea.
20. At its 34th Ordinary Session, held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

LAW

Admissibility

21. 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 generally be fulfilled by a Complainant for a communication to be declared admissible.
22. At issue in the present communication is whether the Complainants have pursued and exhausted the domestic legal remedies of Eritrea, and if not, whether the exception to the exhaustion of domestic remedies rule should apply. This issue of exhaustion of domestic remedies is governed by Article 56(5) of the African Charter and it provides -:
Communications ... received by the Commission shall be considered if they:-
(5) *are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged*
23. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and is premised on the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.
24. In determining whether this communication should be declared admissible or otherwise, the African Commission must have regard to the arguments put forward by the Complainants and the Respondent State.
25. The Complainants submit they have attempted to exhaust local remedies in Eritrea. They state that on 26th November 2001 and on 9th April 2002, they submitted a *habeas corpus* request through the Eritrean Minister of Justice asking the Eritrean Authorities to disclose where the 11 detainees were being held and why. The Complainants also requested that the detainees be brought to court and charged in accordance with the law, however, there was no response to their request. A similar request was made on

26th June 2002 (which is after the African Commission was seized of their complaint) to the Eritrean High Court in Asmara to which there was no reply either.

26. In her oral submissions during the 33rd Ordinary Session of the African Commission, Zegveld stated that in an attempt to access the local courts, they had requested locally based legal practitioners (whom she declined to name) to bring the matter before the local courts. However, the said lawyers later informed her that they would not be able to pursue the detainees' case in the domestic courts for fear of persecution by the authorities and for fear of jeopardising their legal practice.
27. The Complainants further submit that for more than 18 months, the 11 detainees have been held in detention without formal charges and with no access to their lawyers or families thus rendering them unable to seek legal or administrative redress. Furthermore, there has been no response from the government of Eritrea or High Court of Asmara, in relation to the Complainants' requests of 26th November 2001 and 9th April 2002.
28. Under the circumstances presented above, the Complainants aver that the requirement to exhaust local remedies can no longer apply because even where such remedies would have been existent they have been unduly prolonged in this case.
29. The Complainants refer the African Commission to a decision of the European Court of Human Rights in *Ocalan vs Turkey*³⁹ where the court held that Ocalan's isolation and the fact that the Turkish police obstructed his access to lawyers made it impossible for the applicant to have effective recourse to a domestic remedy under Turkish Law.
30. In its written submissions, the Respondent State argues that the Complainants addressed their *habeas corpus* request to the Minister of Justice who is a member of the Executive branch with no capacity to address and take decisions on this matter either in substance or in procedure. They submit that only the judiciary has the authority to take action on any civil, criminal and other issues of judicial nature including, the matter of *habeas corpus*.
31. During the 33rd Ordinary Session, the Representative of the Respondent State submitted that to date the Complainants have not submitted themselves to the courts in Eritrea. He informed the African Commission that he had personally checked with the High Court of Asmara to establish whether the matter had been brought to the court's attention but there was no case file on this matter.
32. The Representative of the Respondent State argues that the Complainants' assertion that they have not been able to access the domestic courts is speculative. He stated that Zegveld should accredit herself to the courts in Eritrea to enable her bring this matter before the local courts.
33. The Respondent State further submits that they have been unable to bring the 11 detainees before a court of law because of the nature of the criminal justice system in Eritrea. The Representative of the Respondent State informed the African Commission that the criminal justice system in Eritrea was inherited from Ethiopia and is therefore lacking. Within the High Court of Asmara, there is only one

³⁹ Application No. 46221/99, 12th March 2003

chamber responsible for handling criminal cases including criminal matters from the lower courts. As such, the Court's calendar is highly congested and difficult to manage. Therefore cases are bound to take time before they are heard by the courts and this is the very reason for the delay in bringing the matter of the 11 detainees before a court of law.

34. There are exceptions to the rule of exhaustion of domestic remedies and the Complainants have argued that they could not exhaust the domestic remedies because the domestic legislation of the Eritrea does not afford due process of law for the protection of the rights that have allegedly been violated.
35. At this stage, it should be made clear that, when a person is being held in detention and accused for committing a crime, the African Commission holds that it is the responsibility of the Member State, through its appropriate judicial bodies, to bring this person promptly before a competent court of law in order to enable him/her to be tried in accordance with rules guaranteeing the right to a fair trial in accordance with national and international standards.
36. The Inter-American Court of Human Rights in the *Velasquez case*⁴⁰ while interpreting Article 46 of the American Convention (similar to Article 56(5) of the African Charter) which relates to the issue of exhaustion of domestic remedies, stated that, for the rule of prior exhaustion of domestic remedies to be applicable, the domestic remedies of the State concerned must be available, adequate and effective in order to be exhausted. The Court also opined that where a party raises non-exhaustion of local remedies because of the unavailability of due process in the State, the burden of proof will shift to "the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective."
37. In *Consolidated communication 147/95 and 149/96*⁴¹, the African Commission also ruled that domestic remedies must be available, effective and sufficient; A domestic remedy is considered available if the petitioner can pursue it without impediment, it is effective if it offers a prospect of success and it is sufficient if it is capable of redressing the complaint.
38. The African Commission notes that by its own admission, the Respondent State has indicated that it has not yet put in place structures that would ensure that cases are handled "within reasonable time". However, the Respondent State goes ahead to assure the African Commission that the detainees will be brought before a court of competent jurisdiction in due course.
39. The State has a constitutional or statutory requirement to provide an accessible, effective and possible remedy whereby alleged victims can seek recognition and restoration of their rights before resorting to the international system for protection of human rights. Such procedures should not be mere formalities that, rather than enable the realisation of those rights, to the contrary, dilute with time any possibility of success with respect to their assertion, recognition or exercise.

⁴⁰ Velasquez Rodríguez Case, Judgement of July 29, 1988, Inter-Am.Ct.H.R (Ser.C) No.4 (1988)

⁴¹ Consolidated communication 147/95 and 149/96 – Sir Dawda K. Jawara/The Gambia

40. Very clearly, the situation as presented by the Respondent State does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the remedies under domestic law and have thus been prevented from exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.

41. For these reasons, the African Commission declares this communication admissible.

Ruling by the African Commission on request by the Respondent State to revisit the decision on admissibility

42. The present communication was declared admissible at the 33rd Ordinary Session of the African Commission's held in May 2003. In response to the African Commission's request for written submissions on the merits, the Respondent State in a Note Verbale expressed its dismay at the African Commission's decision to declare the matter admissible. They stated that they found the African Commission's decision on admissibility unacceptable and therefore requested that the African Commission revisits its decision on admissibility.

43. Before dealing with the merits of the communication, the African Commission would like to pronounce itself on the request by the Respondent State to revisit its decision on admissibility.

44. Firstly, it should be noted that the Respondent State did not bring any new element, either on the facts of the case as considered by the African Commission or on the legal grounds upon which he is making such a request.

45. Secondly, Rule 118(2) of the African Commission's Rules of Procedure stipulate that:
If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration....

The Rules of Procedure do not make provision for the African Commission to revisit its decision once a communication has been declared admissible. Furthermore, it has been the practice of the African Commission not to reconsider a decision declaring a communication admissible.

For these reasons the African Commission upholds its decision on admissibility in this matter.

Merits

46. The African Commission delivered its decision on admissibility of this communication at its 33rd Ordinary Session and informed the parties of its decision on 10th June 2003. The Secretariat of the African Commission further requested the parties to forward their submissions on the merits of the communication within 3 months. Whereas the Complainants forwarded their written submissions on the merits of the communication, none were received from the Respondent State. It is an established principle of the African Commission that where allegations of violations of provisions of the African Charter go uncontested by the Government concerned, the African Commission must decide on the facts as given. This principle also conforms to the practice of other international human rights adjudicatory bodies. In

the present communication therefore, the African Commission is left with no alternative but to proceed and deliver a decision on the merits based on the submissions of the Complainants.⁴² Although the African Commission has in this decision referred to the oral submissions made by the Respondent State during the 33rd Ordinary Session, especially as they relate to some issues that touch upon the merits of the communication, the Respondent State's failure to present comprehensive submissions on the merits has been done at its own peril.

47. By Note Verbale dated 20th May 2002, the Respondent State informed the African Commission that the 11 persons had indeed been detained for *"conspiring to overthrow the legal government of the country in violation of relevant OAU resolutions, colluding with hostile foreign powers with a view to compromising the sovereignty of the country, undermining Eritrean National Security and endangering Eritrean society and the general welfare of its people"*. The Respondent State further stated that such detention was in conformity with the criminal code of the country. In their oral submissions made during the 33rd Ordinary Session in May 2003, the Respondent State further admitted that they had not at the time brought the 11 detainees before any court of law.
 48. The Complainants aver that the 11 persons who were former Eritrean Government officials, had been openly critical of the Eritrean government policies and as a direct result of their open letter criticising the government of Eritrea for acting in an illegal and unconstitutional manner, they were arrested and detained for committing "crimes against the nation's security and sovereignty."
 49. The Complainants state that the 11 detainees have since September 2001 been held incommunicado and have never been brought before any courts of law in violation of Article 17(4) of the Constitution of the State of Eritrea and Article 6 of the African Charter. Article 17 (4) of the Constitution provides that every person who is held in detention must be brought before a court of law within 48 hours of his arrest and no person shall be held in custody beyond such a period without the authority of the court.
 50. The Complainants submit that the abovementioned acts by the Respondent State violate Articles 2, 6 and 7(1) of the African Charter.
 51. Article 2 of the African Charter provides
"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, or any other opinion, national or social origin, fortune, birth or other status."
- Article 6 of the African Charter provides
"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"
- Article 7(1) of the African Charter provides
Every individual shall have the right to have his cause heard. This comprises

⁴² Communication 74/92 – Commission Nationale des Droits de l'Homme et des Libertés/Chad and 232/99 – John D. Ouko/Kenya

- a) *The right to an appeal to competent national organs against acts of 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;*
- 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;*

52. Although Article 6 of the African Charter guarantees the right to liberty and security of the person, this is not an absolute right because the African Charter allows the deprivation of this right through lawful means. The African Charter specifically prohibits arbitrary arrests and detention.
53. Evidence before the African Commission indicates that the 11 persons have been held incommunicado and without charge since they were arrested in September 2001. This fact has not been contested by the Respondent State. They are being held in custody and have been cut off from communication with the outside world, with no access to their lawyers or families. Their whereabouts are unknown putting their fate under the exclusive control of the Respondent State.
54. The African Commission on two occasions wrote letters of Appeal to the President of the State of Eritrea informing him about the communication before the African Commission and requested him to intervene in the matter to ensure that the 11 persons are removed from secret detention and brought before the courts of law in Eritrea. In a Note Verbale dated 20th May 2002, the Ministry of Foreign Affairs of the State of Eritrea informed the African Commission that the 11 persons were being held in appropriate government facilities, that they had not been ill-treated and had access to medical services. The Ministry assured the African Commission that the government was making every effort to bring them before an appropriate court of law as early as possible. The African Commission notes that to date it has not received any information or substantiation from the Respondent State demonstrating that the 11 persons were being held in appropriate detention facilities and that they had been produced before courts of law.
55. Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Of itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment. The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and States must disclose the fact that someone is being detained as well as the place of detention. Furthermore, every detained person must have prompt access to a lawyer and to their families and their rights with regards to physical and mental health must be protected as well as entitlement to proper conditions of detention⁴³.
56. The African Commission holds the view that the lawfulness and necessity of holding someone in custody must be determined by a court or other appropriate judicial authority. The decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide

⁴³ Consolidated communication 143/95, 150/96 – Constitutional Rights Project and Civil Liberties Organisation/Nigeria

appropriate justification. Therefore, persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the State should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its ***Resolution on the Right to Recourse and Fair Trial***⁴⁴ and elaborated upon in its ***Guidelines on the Right to Fair Trial and Legal Assistance in Africa***⁴⁵

57. In the present communication, the Respondent State did not provide the African Commission with any details regarding the specific laws under which the 11 persons were detained but instead generally states that their detention is in “*consonance with the existing criminal code ...and other relevant national and international instruments*”. The 11 persons were detained on account of their political beliefs and are being held in secret detention without any access to the courts, lawyers or family. Regrettably, these persons’ rights are continually being violated even today, as the Respondent State is still holding them in secret detention in blatant violation of their rights to liberty and recourse to fair trial⁴⁶.
58. The Complainants further allege that the 11 persons were arrested and detained because they expressed opinions that were critical of the Respondent State. The Complainants submit that this amounts to a violation of Article 9 (2) of the African Charter, which provides
- “Every individual shall have the right to express and disseminate his opinions within the law”*
59. The right to freedom of expression has been recognised by the African Commission as a fundamental individual human right which is also a cornerstone of democracy and a means of ensuring the respect for all human rights and freedoms.⁴⁷ Nonetheless, this right carries with it certain duties and responsibilities and it is for this reason that certain restrictions on freedom of expression are allowed. However, Article 9(2) as well as Principle II(2) of the ***Declaration of Principles on Freedom of Expression in Africa*** categorically state that such restrictions have to be *provided for by law*.⁴⁸
60. It is a well settled principle of the African Commission that any laws restricting freedom of expression must conform to international human rights norms and standards relating to freedom of expression⁴⁹ and should not jeopardise the right itself. In fact, the African Charter in contrast to other international human rights does not permit derogation from this or any other right on the basis of emergencies or special circumstances.

⁴⁴ Adopted by the African Commission at its 11th Ordinary Session held from 2nd to 9th March 1992 in Tunis, Tunisia.

⁴⁵ Adopted by the African Commission at its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger.

⁴⁶ Consolidated communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria; UNHRC Communication 440/1990

⁴⁷ Preamble to the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission at its 32nd Ordinary Session held from 17th to 23rd October 2003 in Banjul, The Gambia

⁴⁸ **Principle II(2)** of the Declaration of Principles on Freedom of Expression in Africa provides “*any restrictions on freedom of expression shall be provided for by law, serve a legitimate interest and be necessary and in a democratic society*”

⁴⁹ Consolidated communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria

61. Consequently, if any person expresses or disseminates opinions that are contrary to laws that meet the aforementioned criteria, there should be due process and all affected persons should be allowed to seek redress in a court of law.⁵⁰
62. The facts as presented leave no doubt in the mind of the African Commission that the Respondent State did indeed restrict the 11 persons' right to free expression. No charges have been brought against the 11 persons and neither have they been brought before the courts. Such restrictions not only violate the provisions of the African Charter but are also not in conformity with international human rights standards and norms.

For the above reasons, the African Commission,

Finds the State of Eritrea in violation of Articles 2, 6, 7(1) and 9(2) of the African Charter on Human and Peoples' Rights;

Urges the State of Eritrea to order the immediate release of the 11 detainees, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie; and

Recommends that the State of Eritrea compensates the abovementioned persons

***Done at the 34th Ordinary Session of the African Commission
held from 6th to 20th November 2003, in Banjul, The Gambia***

⁵⁰ Communication 232/99 – John Ouko/Kenya

*COMMUNICATIONS
DECLARED
INADMISSIBLE*

248/2002 Interights and World Organisation Against Torture/Nigeria

Rapporteur:

31st Session: Commissioner Dankwa
32nd Session:
33rd Session: Commissioner Dankwa
34th Session: Commissioner Dankwa
35th Session: Commissioner Dankwa

Summary of Facts

1. The complaint is filed by Interights and the World Organisation Against Torture/Organisation Mondiale Contre la Torture on behalf of individuals who requested anonymity as permitted under Article 56(1) of the African Charter.
2. In their complaint, the complainants allege that between May 1999 and March 2002, the Federal Republic of Nigeria has engaged in extra-judicial executions, state-sponsored violence and impunity.
3. The complainants allege that during the said period, the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the extra-judicial execution of cumulatively over ten thousand persons at different locations in Nigeria.
4. They allege that the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the verifiable and forcible internal displacement of over one million persons in Nigeria.
5. They allege that the Federal Republic of Nigeria has systematically and deliberately in all the cases of extra-judicial execution and forcible displacement, denied the victims access to remedies in violation of its obligations under the African Charter. It has, by reason of all these violations over a period of more than two and a half years, committed systematic, serious and massive violations of human and peoples' rights recognised by the African Charter on Human and Peoples' Rights which is domestic law in Nigeria.
6. The authors of the complaint allege that they have independently verified the allegations described in the complaint. They assert that the epidemiology of the violations described in the complaint precluded the requirement to exhaust domestic remedies in Nigeria. They cited the decision of the Commission on admissibility in the Communication 25/89 *Free Legal Group et al v. Zaïre* wherein the Commission held that the requirement of exhaustion of local remedies need not be applied literally "in cases where it is impractical or undesirable for the individual complainant to seize domestic courts in the cases of each individual complainant. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the great numbers of people involved, such remedies as might theoretically exist in the domestic courts are, as a practical matter, unavailable or, in the words of the Charter, unduly prolonged."

Complaint

7. The Complainant alleges violation of Articles 1, 2, 3, 4, 5, 7(1), 12 (1), 13(1), 13(2), 14, 15, 16, 17(1), 17(2), 18, 25 and 26 of the African Charter on Human and Peoples' Rights.
8. In their prayers for redress, the complainants request the Commission to:
 - undertake an independent investigation and verification of the violations being complained of;
 - request, pending its decision on this communication, its Special Rapporteurs on Human Rights of Women, on Summary, Arbitrary and Extra-Judicial Executions, and on Prisons to undertake a joint investigation of violence, extra-judicial executions and related violations in Nigeria and to request the government to accede to the conduct of such an investigation;
 - request the government to verify the number and manner of death of all victims of extra-judicial executions during the period covered by the communication;
 - request the government to provide adequate and appropriate remedies to the victims of violations alleged in this communication, including, in particular, the prosecution of all persons implicated in the violations;
 - request the government to adopt and implement such measures as may be indicated by the Commission to prevent recurrence of the violations complained of in this communication; and
 - request the government to report periodically to the Commission on steps taken by it to comply with the finding and remedies indicated by the Commission.

Procedure

9. The Complaint, dated April 2002, was sent on 4th April 2002, and received at the Secretariat on 5th April 2002.
10. At its 31st Ordinary Session held from 2nd – 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.
11. On 28th May 2002, the Secretariat wrote to the complainants and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.
12. At its 32nd, 33rd and 34th Ordinary Sessions, the communication was deferred to enable the parties make submissions on admissibility.
13. At its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered this communication and declared it inadmissible.

LAW
Admissibility

14. Article 56 (5) of the African Charter requires that *"a communication be introduced subsequent to exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure for such recourse is unduly prolonged"*.
15. The Complainants' claim that theirs is a special case in which they assert that, by the jurisprudence of the African Commission, the epidemiology of the violations described precluded the requirement to exhaust domestic remedies. Despite this, however, the African Commission had decided, at its 32nd, 33rd and 34th Ordinary Sessions, that both parties should forward their written submissions on admissibility.
16. Despite several reminders, the Complainants, in particular, have not furnished their written submissions on admissibility. Consequently, the African Commission holds that the Complainants have not shown if they have exhausted local remedies as required by the African Charter.

For these reasons, and in accordance with Article 56(5) of the African Charter, the African Commission,

Declares this communication inadmissible due to non-exhaustion of local remedies.

*Done at the 35th Ordinary Session held in Banjul, The Gambia
from 2nd May to 4th June 2004*

256/2002 – Samuel Kofi Woods, II and Kabineh M. Ja’neh/Liberia

Rapporteur:

32nd Session:

33rd Session: Commissioner Dankwa

34th Session: Commissioner Dankwa

Summary of Facts

1. The complaint is filed by Mr. Samuel Kofi Woods, II and Mr. Kabineh M Ja’neh on behalf of Hassan Bility, Ansumana Kamara and Mohamed Kamara, all Liberian journalists for the independent Analyst Newspaper in Monrovia.
2. The Complainants allege that in the afternoon of 24 June 2002, plain-cloth state security officers from the National Police Force, National Security Agency, National Bureau of Investigation, Fire Service, Immigration, Ministry of Defence, Anti-Terrorist Unit, Special Security Service, and Ministry of National Security arrested Hassan Bility, Ansumana Kamara and Mohammed Kamara, all journalists working for the independent Analyst Newspaper in Monrovia.
3. The complaint also alleges that the said arrest and detention of the journalists was not disputed as the Minister of Information, Mr. Reginald Goodridge has confirmed the same. To date, there was no charge proffered against them and they continue to languish in detention, which is in contravention of the African Charter, the Constitution of Liberia and the Universal Declaration of Human Rights (UDHR).
4. It is alleged that in consideration of the available constitutional local remedies vis-à-vis the arbitrary arrest and detention of these journalists, and further to the petition filed by an assortment of human rights organisations in Liberia filed a petition at the First Judicial Circuit Court, Criminal Assizes “B” of Montserrado County, the latter issued a Special Writ of Habeas Corpus, which, however, was allegedly not complied with.
5. The Complainants further allege that the subsequent announcement by the Liberian Government of its intention to arraign the detained journalist before a military tribunal would restrain, deprive and deny them of their human rights to liberty, freedom and due process of laws as enshrined in the Liberian Constitution, the African Charter, and the UDHR.
6. Together with their complaint the Complainants submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission.

Complaint

7. The Complainants allege violations of Articles 6, 7(b), and 7(d) of the African Charter on Human and Peoples’ Rights.
8. The Complainants pray that in addition to provisionally ordering the immediate release of the detainees in consonance with Rule 111 of the Rules of Procedure of

the African Commission, the Commission grant any and all other remedies/redress that it shall deem right and appropriate.

Procedure

9. The Complaint was dated 9th August 2002 and received at the Secretariat on 16th August 2002 by post.
10. At its 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.
11. On 23rd October 2002, the African Commission appealed to His Excellency Charles Taylor, President of the Republic of Liberia, respectfully urging him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the African Commission.
12. On 4th November 2002, the Secretariat wrote to the Complainants and Respondent State to inform them that the African Commission had been seized of the communication and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the Commission.
13. The Secretariat requested the parties on several to submit their arguments on admissibility.
14. At its 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered this communication and declared it inadmissible.

LAW

Admissibility

15. Article 56 (5) of the African Charter requires that "*a communication be introduced subsequent to exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure for such recourse is abnormally prolonged*".
16. The Complainants have, despite repeated requests, however, not furnished their submissions on admissibility, especially on the question of exhaustion of domestic remedies.

For this reasons, and in accordance with Article 56(5) of the African Charter, the African Commission,

Declares this communication inadmissible due to non-exhaustion of local remedies.

*Done at the 34th Ordinary Session held in Banjul, The Gambia,
from 6th to 20th November 2003*

258/2002 - Miss A /Cameroon

Rapporteur

32nd Ordinary Session: Commissioner EVO Dankwa /Angela Melo

33rd Ordinary Session: Commissioner EVO Dankwa/Angela Melo

34th Ordinary Session: Commissioner EVO Dankwa/Angela Melo

35th Ordinary Session Commissioner Angela Melo

Summary of Facts

1. On 21st August 2002, the Secretariat of the African Commission on Human and Peoples' Rights (the African Commission) received from Miss A, a Cameroonian citizen, a communication relative to the provisions of Article 55 of the African Charter on Human and Peoples' Rights (the African Charter). Miss A submitted the communication for and on behalf of her father and co.
2. The communication was submitted against the Republic of Cameroon (a State Party⁵¹ to the African Charter) and Miss A alleged in the communication that her father and two colleagues, former workers of the Cameroon P & T were arrested and detained in 1998 by the police, as conspirators of the Minister of P & T, who was also arrested and detained for alleged corruption.
3. The Complainant further alleged that since 1998, when her father and two of his colleagues have been in detention, they have never been formally charged, they have never appeared in court and never had access to a lawyer. The Complainant added that the State did not appear to have any intention to try them in the foreseeable future, whereas the delicate health of her father required constant medical attention.

Complaint

4. Miss A contends that the above-described facts constitute a violation by Cameroon of Articles 2, 3, 5, 6, 7, 10, 11, 12 and 26 of the African Charter, and requests the African Commission to -:
 - a) Ask Cameroon take appropriate measures in order to avoid irreparable damage to the health and well being of the said detainees;
 - b) Pronounce the Government of Cameroon in violation of the African Charter and other international human rights treaties;
 - c) Request Cameroon to bring the accused persons to trial immediately or order their release;
 - d) Request the erring State to compensate her father and his co-detainees for the period they have been in detention.

Procedure

5. By letter ACHPR/COMM/258/2002 of 23rd August 2002, the Secretariat of the African Commission acknowledged receipt of the communication and informed

⁵¹ Cameroon ratified the African Charter on 20/06/1989.

- the sender that it would be tabled for consideration *prima facie* at its 32nd Ordinary Session.
6. During its 32nd Session, held from the 17th to 23rd October 2002 in Banjul, The Gambia, the Commission considered the communication and decided to be seized of it.
 7. On 22nd October 2002, the Chairman of the Commission sent a letter of requesting the urgent intervention of the President of the Republic of Cameroon, drawing his attention to the situation of the two detainees and in particular on their state of health and urged the Head of State to ensure that appropriate medical care is provided for the detainees. The Chairman of the Commission also requested in his letter that the detainees be charged and given a fair trial or freed in case no charge is made against them.
 8. On 28th October 2002, the Secretariat of the Commission sent a Note Verbale to Cameroon informing it of the communication against it and the decision of seizure that the Commission had taken on it. Cameroon was further requested to provide the Commission with its arguments on the admissibility of the case, which the Commission intends to consider at its 33rd Session (5-19 May 2003, Niamey, Niger).
 9. On the same date, the Secretariat of the Commission sent a letter to the Complainant informing her of the decision of seizure that the Commission had taken on her case as well as of the letter for urgent intervention that the Chairman of the Commission had sent to the President of the Republic of Cameroon at her request. The Complainant was also requested to furnish the Commission with possible arguments on the admissibility of the case, which the Commission intended to consider at its 33rd Session.
 10. Having received no reply from the Respondent State, the Secretariat of the Commission sent it a reminder on 10th February 2003 drawing its attention to the fact that its written submissions on the case should reach the Commission as early as possible to allow the Commission take a decision on admissibility of the case. The Secretariat is yet to receive a reaction from the Respondent State.
 11. On 20th October 2002, the Complainant sent a letter to the Commission requesting it to defer consideration of the communication to allow her to acquire more information on the case from the victims' lawyers.
 12. On 21st October 2002, the Secretariat of the Commission acknowledged receipt of the Complainant's request for deferment, and informed her that in accordance with her request consideration of the communication would be deferred until the 35th Ordinary Session of the ACHPR.
 13. At its 34th Ordinary Session held in November 2003 in Banjul, The Gambia, the African Commission formally decided to defer its decision on the admissibility of the complaint, in accordance with the request of the Complainant.
 14. By Note Verbale ACHPR/COMM 2²58/2002 OF THE 15/11/2003, the Secretariat of the African Commission handed to the delegation of Cameroon participating at the 34th Session a copy of the said complaint. The Note Verbale

further requested Cameroon to convey its comments with regard to the admissibility of the matter within three months and in any case before end February 2004, to enable the Commission to make a well informed ruling on the communication at its 35th Ordinary Session.

15. On the 17/02/2004, the Ministry of Foreign Relations of Cameroon sent a letter to the African Commission in which the Respondent State intimated that Mr. Ndeh Ningo had been acquitted and freed in November 2003, “for lack of criminal charges” whilst Mr. Takang Philip had been freed in March 2003 “for non-proven facts”.
16. Extracts of the judgement letter indicated the acquittal and liberation of the two individuals as well as the respective arrest warrants which had been attached to the documents mentioned earlier.
17. The Respondent State therefore requested the Commission to declare the communication inadmissible “in view of the presentation of the above mentioned documents, which sufficiently prove that the two cases had been submitted to the legal Authorities of Cameroon and had been dealt with”.
18. On the 01/03/2004 the Secretariat of the African Commission, through its Note Verbale ACHPR/COMM 258/02 acknowledged receipt of the Note Verbale from the Respondent State.
19. By letter ACHPR/COMM 258/02/RK of the 1st /03/2003, the Secretariat of the African Commission had conveyed the Note Verbale to the Complainant requesting her reaction on the contents of the letter.
20. On the 14/04/2004, the Complainant wrote to the Secretariat of the African Commission to confirm the liberation of Mr. Ndeh Ningo who had been “judged not guilty and freed on the 23/11/2003 after having spent 4 years in detention”.
21. The Complainant indicated in her letter that Mr. Ndeh Ningo would advise the Commission on whether or not he would pursue the matter at the level of the Commission. The Complainant further mentioned the possibility of holding negotiations with the Respondent State to obtain compensation for Mr. Ndeh Ningo. For this reason the Complainant requested the African Commission to kindly defer its decision on the admissibility of the communication until its 36th Ordinary Session and not to declare it inadmissible as per the request of the Respondent State.
22. During its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the Commission considered the communication and declared it inadmissible.

LAW

Admissibility

23. Article 56 of the African Charter on Human and Peoples’ Rights provides *inter alia* that communications shall be considered by the Commission after exhausting local remedies, unless this procedure is unduly prolonged.

24. In the case under consideration, the African Commission notes that the alleged victims were tried and freed in March and November 2003 respectively. This fact was admitted both by the Complainant and Respondent State.
25. The African Commission took note of the fact that the case was brought to the African Commission at the time that the matter was still before the courts. Furthermore, the fact that the case was tried properly before a court of law shows the availability of local remedies.
26. The African Commission further took note of the fact that the Complainant intends to meet with the Respondent State and start negotiations with a view to claim compensation for and on behalf of the alleged victims.

For this reason, and in accordance with Article 56(5) of the African Charter, the African Commission,

Declares this communication inadmissible for non-exhaustion of local remedies.

*Done at the 35th Ordinary Session held in Banjul, The Gambia
from 21st May to 4th June 2004*

*COMMUNICATION
WITHDRAWN BY THE
COMPLAINANT*

283/2003 – B/Kenya

Rapporteur:

34th Ordinary Session – Commissioner Nyanduga

35th Ordinary Session – Commissioner Nyanduga

Summary of Facts

1. The communication is submitted by a Complainant who requests anonymity and presents the facts of the case as follows -:
2. The Complainant alleges that on 30th September 2003, the Anti-Corruption Committee presented a report on corruption in the judiciary to the Chief Justice of Kenya in the presence of the press. The Report also known as the *Ringera* Report reveals shocking and endemic corruption in the judiciary and further lists the names of the Judges alleged to have been involved in corrupt and unethical practices in the course of performing their duties.
3. On 4th October 2003 during a press conference, the Chief Justice without naming the judges is alleged to have given the said judges a two-week ultimatum to resign or face trial. Two days later, the Constitutional Affairs Assistant Minister is reported to have reiterated the deadline issued by the Chief Justice and warned that judges who ignore the deadline would face tribunals and prosecution for crimes committed.
4. The Complainant states that the Kenya Magistrates and Judges Association was quoted in the press as saying “we urge the judicial administration to inform those affected so that they can decide on their next course of action not forgetting the need for confidentiality”. However, the Complainant claims that over the following several days none of the judges named in the report were informed of their presence on the list nor of the allegations leveled against them.
5. The Complainant avers that on 14th October 2003 it was reported through a six o'clock news broadcast that the President had appointed two tribunals to investigate the twenty-three judges whose names were announced during the broadcast as well as their suspension. The Complainant asserts that this is the first time that the judges learnt of their presence on the list and of their immediate suspension. The announcement however did not contain details of the allegations made against each judge. It is however reported in the *Daily Nation Newspaper* on 18th October 2003 that the police would question some of the judges before they appear before the tribunals and it is only during those interrogations they will be informed of the accusations against them and their statements taken.
6. The Complainant alleges that as of 17th October 2003, the judges had still not received details of the allegations made against them despite continued press coverage of the matter. Although maintaining their innocence, some of the named judges tendered their resignations or sought retirement.
7. The Complainant further submits that the Chair of the Law Society of Kenya on

18th October 2003 announced through the press that the Society would in two weeks' time release its report containing a list of judges other than those named in the Ringer Report.

8. The Complainant on the whole submits that failure to advise the judges mentioned in the *Ringer* Report of the allegations against them and to give them an opportunity to accept or dispute the allegations coupled with varied threats and warnings amounts to harassment and hounding of judges thereby undermining the principles of security of tenure and the independence of the judiciary.
9. Furthermore, the Complainant claims that the manner in which the whole matter was dealt with violates Articles 7 and 26 of the African Charter as well as other international human rights instruments namely the UN Basic Principles on the Independence of the Judiciary, the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights

Complaint

10. The Complainant alleges a violation of **Articles 7 and 26** of the African Charter on Human and Peoples' Rights.

Procedure

11. The communication was faxed and received at the Secretariat of the African Commission on 21st October 2003. The Complainant also requested the African Commission to take Provisional Measures under Rule 111 of the Rules of the African Commission to ensure that the process of removal of judges does not interfere with independence of the judiciary and the right to a fair hearing.
12. The Secretariat of the African Commission on 24th October 2003 forwarded a copy of the communication as well as a draft Appeal Letter to the Chair of the African Commission and requested him to take necessary action.
13. By email dated 28th October 2003, the Chair of the African Commission wrote advising the Secretariat that since the matter would be handled as a communication at the African Commission's forthcoming 34th Session, an Appeal Letter should not be sent to the government of Kenya until after the African Commission had examined the matter and determined what course of action to take.
14. On 31st October 2003, the Secretariat of the African Commission wrote to the Complainant acknowledging receipt of the communication.
15. At its 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission examined the communication and decided to be seized of the matter.

16. On 4th December 2003, the parties to the communication were informed accordingly and requested to forward their written submissions on admissibility of the communication within 3 months.
17. On 15th March 2004, the parties to the communication were reminded to forward their written submissions on admissibility to the Secretariat.
18. By email dated 16th March 2004, the Secretariat received a letter from the Complainant withdrawing the matter as she believed that the matter was now being addressed by the Respondent State.
19. On 25th March 2004, the Secretariat received the Respondent State's submissions on admissibility and acknowledged receipt of the same on 26th March 2004.
20. By letter dated 26th March 2004, the Secretariat acknowledged receipt of the Complainant's letter withdrawing the communication and also forwarded a copy of the Respondent State's submissions on admissibility.
21. At its 35th Ordinary Session held in Banjul, The Gambia, the African Commission considered this communication and decided to close the file.

Respondent State's submissions on admissibility

22. The Respondent State provides a background against which it undertook the judicial reforms which have in part given rise to this communication. They argue that a well functioning judicial system is crucial to improving governance, combating corruption and consolidating the democratic order, thereby fostering economically sustainable development. Therefore, a judicial system with integrity should be free from political and external interference. Furthermore, judicial independence must be balanced by accountability in order to facilitate transparency within the system and control of corruption.
23. It is submitted by the Respondent State that the tendency towards corruption and abuse of power among certain members of the judiciary in Kenya has been lamented over time. As such, one of the key objectives of the Kenyan government has been to undertake judicial reform in order to develop an impartial, independent, accountable and effective judiciary that is able to improve governance and advance development in the country.
24. The Respondent State contends that the communication does not meet the requirements in Article 56(2), (4) and (5) of the African Charter.
25. It is submitted that the communication is substantially based on newspaper reports and is therefore not founded on factual realities of the case contrary to Article 56(4) of the African Charter.
26. The Respondent State further submits that the Complainant did not even attempt to exhaust local remedies in their case as required by Article 56(5) of the African Charter. In this regard, the Respondent State argues that the national legal framework in Kenya is adequate to address the concerns raised by the Complainant and should have therefore been utilised. For instance, the concerns

raised by the Complainant could have been addressed through, the constitutional provisions or national statutes like the Public Officer Ethics Act 2003, The Anti Corruption and Economic Crimes Act 2003. Furthermore, local judicial action and remedy is available to the judges, should any of the procedures adopted be deemed illegal or in any case *ultra vires*.

27. The Respondent State reports that the judges are not on trial as understood but that special investigative tribunals were set up to determine issues touching upon the behaviour and ability of the judges implicated to perform the functions of their office. 23 judges from both the Court of Appeal and High Court of Kenya were involved and were investigated within 14 days of the presentation of the *Ringera* Report. The Tribunals started sitting on 9th and 16th February 2004.
28. Confidentiality was assured for the affected judges in the initial stages and at all crucial times. Only broad categories of alleged offences were highlighted in the media. The Respondent State argues that it was therefore possible for a judge to privately and conscientiously place him/herself into any of the categories and make a personal decision to resign or appear before the tribunals. Consequently, majority of the judges mentioned opted for early retirement with full benefits as a result.
29. In any case, the Respondent State argues, that the Judges had the option within the laws to challenge the process before the High Court should they be aggrieved by it but none of the said judges opted for the judicial remedy.
30. The Respondent State maintains that the domestic legislation of Kenya is in consonance with both the letter and spirit of international law including the UN Basic Principles on the Independence of the Judiciary and asks the African Commission to declare the communication inadmissible.

Reasons given by the Complainant for withdrawing the communication

31. The Complainant wrote to inform the African Commission that they received information that the Registrar and Chief Justice did not authorise the leaking of the names of the implicated judges to the press and that this particular matter was now being investigated by the judiciary. Furthermore, the issue of a fair trial in light of the publicity created prior to the suspension of the judges had been raised before the Tribunals and that the matter was being handled and could end up with the Constitutional courts of Kenya.
32. It is for this reason that the Complainant wishes to withdraw the communication.

The African Commission takes note of the withdrawal of the communication by the Complainant and for this reason decides to close the file.

*Done at the 35th Ordinary Session held in Banjul, The Gambia,
from 21st May to 4th June 2004*

AFRICAN UNION
الاتحاد الأفريقي



UNION AFRICAINE
UNIÃO AFRICANA

Addis Ababa, ETHIOPIA P. O. Box 3243 Telephone 517 700 Fax :
517844

SEVENTEENTH ANNUAL ACTIVITY REPORT OF THE
AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
2003 - 2004

Annex II

*Executive Summary of the Report of the Fact-finding Mission to
Zimbabwe⁵²
24th to 28th June 2002*

⁵² A complete report of the Fact-Finding Mission to Zimbabwe can be obtained from the Secretariat of the African Commission on Human and Peoples' Rights.

INTRODUCTION

Following widespread reports of human rights violations in Zimbabwe, the African Commission on Human and Peoples' Rights (African Commission) at its 29th Ordinary Session held in Tripoli from **23rd April to 7th May 2001** decided to undertake a fact-finding mission to the Republic of Zimbabwe from **24th to 28th June 2002**.

The stated purpose of the Mission was to gather information on the state of human rights in Zimbabwe. In order to do so, the Mission sought to meet with representatives of the Government of the Republic of Zimbabwe, law-enforcement agencies, the judiciary, political parties and with organised civil society organisations especially those engaged in human rights advocacy. The method of the fact-finding team was to listen and observe the situation in the country from various angles, listen to statements and testimony of the many actors in the country and conduct dialogue with government and other public agencies.

FINDINGS

1. The Mission observed that Zimbabwean society is highly polarised. It is a divided society with deeply entrenched positions. The land question is not in itself the cause of division. It appears that at heart is a society in search of the means for change and divided about how best to achieve change after two decades of dominance by a political party that carried the hopes and aspirations of the people of Zimbabwe through the liberation struggle into independence.
2. There is no doubt that from the perspective of the fact-finding team, the land question is critical and that Zimbabweans, sooner or later, needed to address it. The team has consistently maintained that from a human rights perspective, land reform has to be the prerogative of the government of Zimbabwe. The Mission noted that Article 14 of the African Charter states "*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 in accordance with the provisions of appropriate laws*". It appears to the Mission that the Government of Zimbabwe has managed to bring this policy matter under the legal and constitutional system of the country. It now means that land reform and land distribution can now take place in a lawful and orderly fashion.
3. There was enough evidence placed before the Mission to suggest that, at the very least during the period under review, human rights violations occurred in Zimbabwe. The Mission was presented with testimony from witnesses who were victims of political violence and others victims of torture while in police custody. There was evidence that the system of arbitrary arrests took place. Especially alarming was the arrest of the President of the Law Society of Zimbabwe and journalists including Peta Thorncroft, Geoffrey Nyarota, among many others, the arrests and torture of opposition members of parliament and human rights lawyers like Gabriel Shumba.
4. There were allegations that the human rights violations that occurred were in many instances at the hands of ZANU PF party activists. The Mission is however not able to find definitively that this was part of an orchestrated policy of the government of the Republic of Zimbabwe. There were enough assurances from the Head of State, Cabinet Ministers and the leadership of the ruling party that there has never been any plan or policy of violence, disruption or any form of human rights violations, orchestrated by the State. There was also an acknowledgement that excesses did occur.
5. The Mission is prepared and able to rule, that the Government cannot wash its hands from responsibility for all these happenings. It is evident that a highly charged atmosphere has been prevailing, many land activists undertook their illegal actions in the expectation that government was understanding and that police would not act against them – many of them, the War Veterans, purported to act as party veterans and activists. Some of the political leaders denounced the opposition activists and expressed understanding for some of the actions of ZANU (PF) loyalists. Government did not act soon enough and firmly enough against those guilty of gross criminal acts. By its statements and political rhetoric, and by its failure at critical

moments to uphold the rule of law, the government failed to chart a path that signalled a commitment to the rule of law.

6. There has been a flurry of new legislation and the revival of the old laws used under the Smith Rhodesian regime to control, manipulate public opinion and that limited civil liberties. Among these, the Mission's attention was drawn to the Public Order and Security Act, 2002 and the Access to Information and Protection of Privacy Act, 2002. These have been used to require registration of journalists and for prosecution of journalists for publishing "false information". All these, of course, would have a "chilling effect" on freedom of expression and introduce a cloud of fear in media circles. The Private Voluntary Organisations Act has been revived to legislate for the registration of NGOs and for the disclosure of their activities and funding sources.
7. There is no institution in Zimbabwe, except the Office of the Attorney General, entrusted with the responsibility of oversight over unlawful actions of the police, or to receive complaints against the police. The Office of the Ombudsman is an independent institution whose mandate was recently extended to include human rights protection and promotion. It was evident to the Mission that the office was inadequately provided for such a task and that the prevailing mindset especially of the Ombudsman herself was not one which engendered the confidence of the public. The Office was only about the time we visited, publishing an annual report five years after it was due. The Ombudsman claimed that her office had not received any reports of human rights violations. That did not surprise the Mission seeing that in her press statement following our visit, and without undertaking any investigations into allegations levelled against them, the Ombudsman was defensive of allegations against the youth militia. If the Office of the Ombudsman is to serve effectively as an office that carries the trust of the public, it will have to be independent and the Ombudsman will have to earn the trust of the public. Its mandate will have to be extended, its independence guaranteed and accountability structures clarified.
8. The Mission was privileged to meet with the Chief Justice and the President of the High Court. The Mission Team also met with the Attorney General and Senior Officers in his office. The Mission was struck by the observation that the judiciary had been tainted and even under the new dispensation bears the distrust that comes from the prevailing political conditions. The Mission was pleased to note that the Chief Justice was conscious of the responsibility to rebuild public trust. In that regard, he advised that a code of conduct for the judiciary was under consideration. The Office of the Attorney General has an important role to play in the defence and protection of human rights. In order to discharge that task effectively, the Office of the Attorney General must be able to enforce its orders and that the orders of the courts must be obeyed by the police and ultimately that the professional judgement of the Attorney General must be respected.
9. The Mission noted with appreciation the dynamic and diverse civil society formations in Zimbabwe. Civil society is very engaged in the developmental issues in society and enjoys a critical relationship with government. The Mission sincerely believes that civil society is essential for the upholding of a responsible society and for holding government accountable. A healthy though critical relationship between government and civil society is essential for good governance and democracy.

RECOMMENDATIONS

In the light of the above findings, the African Commission offers the following recommendations -:

On National Dialogue and Reconciliation

Further to the observations about the breakdown in trust between government and some civil society organisations especially those engaged in human rights advocacy, and noting the fact that Zimbabwe is a divided society, and noting further, however, that there is insignificant fundamental policy difference in relation to issues like land and national identity, Zimbabwe needs assistance to withdraw from the

precipice. The country is in need of mediators and reconcilers who are dedicated to promoting dialogue and better understanding. Religious organisations are best placed to serve this function and the media needs to be freed from the shackles of control to voice opinions and reflect societal beliefs freely.

Creating an Environment Conducive to Democracy and Human Rights

The African Commission believes that as a mark of goodwill, government should abide by the judgements of the Supreme Court and repeal sections of the Access to Information Act calculated to freeze the free expression of public opinion. The Public Order Act must also be reviewed. Legislation that inhibits public participation by NGOs in public education, human rights counselling must be reviewed. The Private Voluntary Organisations Act should be repealed.

Independent National Institutions

Government is urged to establish independent and credible national institutions that monitor and prevent human rights violations, corruptions and maladministration. The Office of the Ombudsman should be reviewed and legislation which accords it the powers envisaged by the Paris Principles adopted. An independent office to receive and investigate complaints against the police should be considered unless the Ombudsman is given additional powers to investigate complaints against the police. Also important is an Independent Electoral Commission. Suspicions are rife that the Electoral Supervisory Commission has been severely compromised. Legislation granting it greater autonomy would add to its prestige and generate public confidence.

The Independence of the Judiciary

The judiciary has been under pressure in recent times. It appears that their conditions of service do not protect them from political pressure; appointments to the bench could be done in such a way that they could be insulated from the stigma of political patronage. Security at Magistrates' and High Court should ensure the protection of presiding officers. The independence of the judiciary should be assured in practice and judicial orders must be obeyed. Government and the media have a responsibility to ensure the high regard and esteem due to members of the judiciary by refraining from political attacks or the use of inciting language against judges and magistrates. A Code of Conduct for Judges could be adopted and administered by the judges themselves. The African Commission commends to the Government of the Republic of Zimbabwe for serious consideration and application of the *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* adopted by the African Commission at its 33rd Ordinary Session in Niamey, Niger in May 2003.

A Professional Police Service

Every effort must be made to avoid any further politicisation of the police service. The police service must attract all Zimbabweans from whatever political persuasion or none to give service to the country with pride. The police should never be at the service of any political party but must at all times seek to abide by the values of the Constitution and enforce the law without any fear or favour. Recruitment to the service, conditions of service and in-service training must ensure the highest standards of professionalism in the service. Equally, there should be an independent mechanism for receiving complaints about police conduct. Activities of units within the ZRP like the law and order unit which seems to operate under political instructions and without accountability to the ZRP command structures should be disbanded. There were also reports that elements of the CIO were engaged in activities contrary to international practice of intelligence organisations. These should be brought under control. The activities of the youth militia trained in the youth camps have been brought to our attention. Reports suggest that these youth serve as party militia engaged in political violence. The African Commission proposes that these youth camps be closed down and training centres be established under the ordinary education and employment system of the country. The African Commission commends for study and implementation the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (otherwise known as The Robben Island Guidelines)

adopted by the African Commission at its 32nd Ordinary Session held in Banjul, The Gambia in October 2002.

The Media

A robust and critical media is essential for democracy. The government has expressed outrage at some unethical practices by journalists, and the Access to Information Act was passed in order to deal with some of these practices. The Media and Ethics Commission that has been established could do a great deal to advance journalistic practices, and assist with the professionalisation of media practitioners. The Media and Ethics Commission suffers from the mistrust on the part of those with whom it is intended to work. The Zimbabwe Union of Journalists could have a consultative status in the Media and Ethics Commission. Efforts should be made to create a climate conducive to freedom of expression in Zimbabwe. The POSA and Access to Information Act should be amended to meet international standards for freedom of expression. Any legislation that requires registration of journalists, or any mechanism that regulates access to broadcast media by an authority that is not independent and accountable to the public, creates a system of control and political patronage. The African Commission commends the consideration and application of the *Declaration on the Principles on Freedom of Expression in Africa* adopted by the 32nd Ordinary Session of the African Commission in Banjul, October 2002.

Reporting Obligations to the African Commission

The African Commission notes that the Republic of Zimbabwe now has three overdue reports in order to fulfil its obligations in terms of Article 62 of the African Charter. Article 1 of the African Charter states that State Parties to the Charter shall “recognise the rights, duties and freedoms enshrined in the Charter and *shall undertake to adopt legislative or other measures to give effect to them.*” Article 62 of the African Charter provides that each State Party shall undertake to submit every two years “a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.” The African Commission therefore reminds the Government of the Republic of Zimbabwe of this obligation and urges the government to take urgent steps to meet its reporting obligations. More pertinently, the African Commission hereby invites the Government of the Republic of Zimbabwe to report on the extent to which these recommendations have been considered and implemented.

**COMMENTS BY THE GOVERNMENT OF ZIMBABWE ON THE REPORT OF
THE FACT FINDING MISSION**

Introduction

- 1.0 The Government of Zimbabwe is a member of the African Union and is a State Party to the African Charter *on* Human and People's Rights in terms of which the African Commission *on* Human and Peoples Rights (the Commission) is constituted. The Government of Zimbabwe is committed to the implementation of its obligations under the African Charter *on* Human and Peoples Rights. It fully recognizes, respects and supports the mandate of the Commission to promote and protect the enjoyment of human rights by the people of Africa. The Government of Zimbabwe therefore commends the African Commission for sending its Fact Finding Mission to Zimbabwe as this showed concern over the situation in our country and commitment to discharge its mandate.
- 2.0 Background to the mission's visit**
- 2.1 Since the year 2000, up to the present, allegations of violations of human rights by the Government of Zimbabwe are being peddled in various ways, including print and electronic media and at various international, regional and domestic fora. The level and magnitude of the Reports of the alleged violations however intensified during the period between February 2000 and June 2002. During this period the referendum *on* the draft Constitution took place, followed by the Parliamentary elections of June 2000 and the Presidential elections of March 2002. More importantly, the land reform programme was in progress and had reached its peak around the same time.
- 2.2 The request to send a Fact Finding Mission was premised *on* allegations of violations of human rights received by the Commission. The violations were said to be widespread, and committed at a time when, according to the Report of the Fact Finding Mission, “passions were inflamed”¹. In light of these Reports, the Commission approached the Government through the Ministries of Foreign Affairs and Justice and was granted approval to send a fact-finding mission to Zimbabwe.

- 2.3 It must be noted that prior to the request to send a fact finding mission, no communication had been formally made by the Commission to the Government of Zimbabwe regarding the alleged human rights situation, and no specific information regarding the nature of the violations were made before the Mission's arrival in the country. In this situation, the Government of Zimbabwe was confronted with two problems, namely that there had been nondisclosure on the part of the Commission as regards the source of the allegations and secondly there were no specific details regarding the nature of the violations allegedly perpetrated directly, or indirectly, by the Government of Zimbabwe. Notwithstanding the lack of such information, the Government of Zimbabwe, in a spirit of openness and oneness with the Commission, conceded to the Commission's request, as this would enable the Commission to assess the situation on the ground for itself.
- 2.4 The Government of Zimbabwe believes that the Non governmental organisation community operating in Zimbabwe, in collaboration with their counterparts outside the borders of the country, made the allegations. This presumption was confirmed by the identities of the persons and organizations the Fact Finding Mission specifically requested to meet during the 4 days the Mission met stakeholders, and also those whom the mission made its own arrangements to meet outside of the official programme.
- 2.5 It should be stated that the Government of Zimbabwe did express disquiet to the Mission over the limitation of their visit to Harare only as this was not representative enough of the situation and the population of Zimbabwe. Further, the Mission only had 4 days to search for the truth in Zimbabwe. Given the nature, seriousness and adverse implications of the allegations, four days for the Fact Finding Mission to conduct the necessary investigations were not adequate.

¹ Page 3 para graph 1 of the Fact Finding Mission's Report.

3.0 Time frame of mission's visit

- 3.1** The fact finding mission came to investigate allegations that had been highly publicized internationally. Considering the international image of Zimbabwe, one would have hoped that more time would have been dedicated to unravelling the human rights situation in the country. However, the mission only spent four working days conducting its investigations which were only confined to Harare. It should be stated that the Government of Zimbabwe did express disquiet to the Mission over the limitation of their visit to Harare only as this was not representative enough of the situation and the population of Zimbabwe. Further, the Mission only had 4 days to search for the truth in Zimbabwe. Given the nature, seriousness and adverse implications of the allegations, four days for the Fact Finding Mission to conduct the necessary investigations were not adequate.
- 3.2** The mission's report states that the time spent in the country was limited by lack of resources. As acknowledged in the mission's report, from the date of arrival in the country, up to the date of departure, the Government of Zimbabwe extended its hospitality and placed resources at the disposal of the fact finding mission. The Government of Zimbabwe was prepared to make additional resources available had the request been made. It must be pointed out that such assistance would have been provided, not with the intention to influence the process but to ensure that the mission suffered no constraints and met a wide cross section of the entire Zimbabwean population, and more particularly visit those areas in which violations had been alleged. Thus to the Government of Zimbabwe, more particularly given the seriousness and adverse implications of the allegations, four days for the fact finding mission were highly inadequate, and the issue of lack of resources is not a justifiable excuse. It should be stated that the Government of Zimbabwe did express disquiet to the Mission over the limitation of their visit to Harare only as this was not representative enough of the situation and the population of Zimbabwe. Further, the Mission only had 4 days to search for the truth in Zimbabwe. Given the nature, seriousness and adverse implications of the allegations, four days for the Fact Finding Mission to conduct the necessary investigations were not adequate.

4.0 The Mission's Programme

- 4.1 The Government of Zimbabwe had anticipated a nationwide investigative mission, in which a wide cross section of Zimbabwe's population, both rural and urban, would be met as the allegations were said to be widespread. In light of this anticipation, the Government of Zimbabwe had prepared a draft itinerary that included visits to rural areas, to farming areas as well as meeting the people of Harare. As indicated in the Fact Finding Mission's Report the Government of Zimbabwe, following requests from the public for audience with the fact finding mission, and in consultation with the Secretariat of the Commission, drew up the Mission's final itinerary. At the end of the day, however, the final programme belonged to the Commission, and the Government's role was merely being facilitatory. In fact, the Commission at times met stakeholders not included in the itinerary. As desired by the Mission, the visit was eventually confined to Harare.
- 4.2 The Fact Finding Mission met His Excellency the President of the Republic of Zimbabwe, (together with the Minister of Foreign Affairs), the Vice President of Zimbabwe, the Chief Justice of Zimbabwe (together with the Judge President), the Speaker of Parliament, the Commissioner of Police, the Commissioner of Prisons, the Ombudsman, the Attorney-General (for less than 15 minutes and the visit appeared to have been a courtesy call as the Mission kept on making reference to their next appointment), the Minister of State Information And Publicity, the Deputy Minister of Justice, Legal and Parliamentary Affairs, the Minister of Home Affairs together with the Minister of State Security. Even though there were allegations against the youth militia, the Fact Finding Mission declined our request that they meet the Minister responsible for the national youth training programme. The only Minister on the programme who was unable to meet the Fact Finding Mission due to prior commitment is the Minister of Land, Agriculture and Rural Resettlement. The Mission met a total of 16 non-governmental organisations and 8 human rights activists/defenders. It, in short, met 23 civic organizations compared to 15 government institutions. The Fact Finding Mission also met some of the non governmental organizations and human rights defenders outside the programme. However, the generality of the Zimbabwe population, the key persons whose rights were allegedly violated, were not seen and spoken to. The Mission, therefore, did not meet the wide spectrum of stakeholders to justify their visit and Report.
- 4.3 The Mission, due to limitations expressed in its Report, gave audience to representatives of persons against whom the violations were allegedly committed and these were mainly representatives of Non governmental organisations that made the initial Reports to the Commission. The Mission should have conducted a verification exercise and hence met the allegedly affected persons. Getting first hand information from them about what happened was critical. Meeting the representatives of the same institutions who made the report casts doubt on the integrity of the mission.

- 4.4 The Fact Finding Mission states in its Report that they saw persons who had been abused and these people were brought to them by members of the non governmental organisation community. However, according to their list of persons and organizations they interviewed annexed to the report they only saw one alleged victim of torture brought by Amani Trusl. It is actually on record that the mission only saw
- 4.5 The fact finding mission claims that it received documentary evidence of the alleged violations. However, the Mission did not have an opportunity to verify the authenticity of the video tapes that they received and the credibility of the witnesses who brought the video tapes and the other documentary evidence. It is an undisputed fact that videos can be stage managed and manipulated and the Mission should, therefore, have been concerned with seeing and hearing the persons' accounts of their ordeal so as to buttress the video tapes. This was not done.

5.0 Procedural irregularities

- 5.1 Zimbabwe is concerned with the procedure which the Commission adopted in conducting the fact finding mission and in the adoption of the report.
- 5.2 The Mission did not physically verify what they were told. Some of the statements which non governmental organisations made did not only lack substance but they were never brought to the attention of the Government of Zimbabwe for comment. There was no proper verification of the accuracy, or otherwise, of the evidence upon which the Fact Finding Mission based its report because the bulk of the people or organizations that the Mission met are the very persons or organizations that made the allegations in the first place.
- 5.3 In addition to oral statements that were made to the Commission in the absence of the Government of Zimbabwe, the report alleges that the Mission was furnished with documentary evidence of the violations. The report does not state what is precisely on the said documents. The report itself is a summary of what the Mission was told. The Government of Zimbabwe regards such information, being the basis of the Commission's Report, to be pertinent and, therefore, ought to have been made part of the Report. This position is founded on the internationally accepted rules of fact finding missions which prescribe that the State should have all information submitted for its comments. The Government of Zimbabwe states that to date the vital source of information and the documentary evidence received by the Fact Finding Mission² have not been presented to the Government of Zimbabwe to enable it to comment on the veracity of the evidence. .

- 5.4 According to Rule 79 of the Rules of Procedure of the African Commission on Human and Peoples' Rights as provided in the African Charter on Human and Peoples' Rights, the report should only have been released to the public after the Assembly of Heads of State and Government had considered it. Until such time, the report remains a private document. However, the report on Zimbabwe was released to members of the non governmental organisations community in 2003. These organisations held discussions over the report in South Africa in or about October 2003, and there were press reports in the independent media in Zimbabwe over the same which the Government of Zimbabwe brought to the attention of the Commission. No remedial action was taken. Instead, the report was again released through the electronic media before the June 2004 Summit of Heads of States. It is immaterial how the report got out but it is the responsibility of the Commission to ensure that there are no leaks in its rank and file, and that the highest level of security
- 5.5 Further, we note that the Commission adopted the Fact Finding Mission at its 34th Ordinary Session and sought Zimbabwe's response after the adoption. The Fact Finding Mission saw the Head of State and Government representatives first before seeing other stakeholders. The Mission was able to seek comments from the stakeholders on the representations made by the Government. In light of this, the Mission should, therefore, have sought the Government's response before even adopting the Fact Finding Mission's Report. We are of the view that the rules of natural justice require that the Commission should have sought the comments of the Government of Zimbabwe before its adoption of the report. The adoption of the report before seeking the comments of the government of Zimbabwe means that the Commission was convinced on the contents thereof. Seeking the comments of the government of Zimbabwe after the adoption was therefore a mere formality and these comments are irrelevant to the Commission.

² Page 3 paragraph I of Report. Note should be taken that the documentary evidence given to the Mission by the government of Zimbabwe is ignored through out the Report.

6.0 Land Question in Zimbabwe

- 6.1 The land issue is central to the problems bedevilling the country. The story of Zimbabwe cannot be told, or be complete without the story of the land, and neither can the land issue be separated from the alleged human rights violations. For this reason it is important that the land issue be put into its proper context. In this regard we refer you to the words of wisdom in the letter from the President of South Africa in ANC Today Volume 3 No. 18 of 15 May 2003 where he says:

Contrary to what some in our country now claim, the economic crisis currently affecting Zimbabwe did not originate from the desperate actions of a reckless political leadership or from corruption. It arose from a genuine concern to meet the needs of the black poor without taking into account the harsh economic reality that in the end we must pay for what we consume.

The longer the problem of Zimbabwe remains unresolved the more entrenched poverty will become. The longer this persists, the greater will be the degree of instability as the poor try to respond to the pains of hunger. The more protracted this instability, the greater will be the degree of polarization and generalized social and political conflict.

- 6.2 Writing to the Prime Minister of Australia, Rt. Honourable Mr. J. Howard, President Obasanjo of Nigeria - a member of the *troika* had this to say on the matter of Land:

"In many of our previous meetings it has been admitted that the issue of land is at the core of the current crisis in Zimbabwe and that an appropriate solution to this problem would go a long way in bringing to early conclusion other associated issues."

It is pertinent to note that the Commonwealth appointed a *troika* of three Heads of State to look into the situation of Zimbabwe and make appropriate recommendations to the Commonwealth on whether, or not, sanctions should be lifted on Zimbabwe. The *troika* group comprised:

- . President Thabo Mbeki of South Africa,
- . President Olusegun Obasanjo of Nigeria, and
- . Prime Minister, the Rt. Honourable Mr. John Howard of Australia.

The first two members of the *troika* identified the issue of land as having been the substantive cause of Zimbabwe's problems. The Fact-Finding Mission, therefore, missed the point when it found, as it did, that land was not the effective cause of Zimbabwe's problems.

6.3

The land and the land reform programme in Zimbabwe is a socioeconomic and political imperative. It is an undisputed fact that the land issue was actually one of the primary reasons for the protracted war of liberation and that up to 1999, the unequal distribution of land had remained a serious concern, whose implications had a potential to destabilize the post colonial Zimbabwe. Zimbabwe's economy is agriculturally based and, out of a total land area of 39 million hectares, 33.3 million is suitable for agriculture. Half of this land was, up to 1999 occupied by 6 000 white commercial farmers while 840 000 communal farmers (blacks) occupied the other half. The uneven distribution of land between the large scale commercial sector and the communal areas also extended to the suitability of land for agricultural purposes. The commercial farms were largely located in the high rainfall areas, found in regions I, II and III while the communal lands are concentrated in regions IV and V which are characterized by very poor soils and low rainfall patterns. Out of the land in the fertile regions, I, II and III, some belonged to absentee landlords and was either not being put to use at all or was being managed from abroad, some was under-utilised, and other prime agricultural land had been converted to safari hunting while the majority of the black people either had no land or were overcrowded on over-utilised and often barren rural land.

6.4 As is the case in all matters which are covered in this Report, it is unfortunate that the Fact Finding Mission did not find time to see for themselves the conditions under which the rural black persons live, nor did the Mission see the cramped, pathetic and squalid conditions of the black farm workers compared to the grandiose lifestyle in which their white masters lived and, in some cases, still live some 23 years after independence. Up until the implementation of the land reform programme, none of the non governmental organizations and human rights defenders saw the need to put the issue of the living conditions of farm workers on the agenda of the African Commission on Human and Peoples' Rights and this is a question the Commission still did not consider in its Report. Even the trade unionists did not regard the farm worker befitting their representation until the emergence of the agrarian reform.³

6.5 As all parties in Zimbabwe now concede (the opposition doing so reluctantly), land reform was necessary in order to address the imbalances in land, which were created by the colonial Governments, thereby achieving equitable land distribution and decongesting over populated rural areas. Land reform was also necessary to meet the land needs of indigenous citizens and successful smallholder farmers who wanted to enter into commercial agriculture for the economic development of the country. In fact, Article 22 of the Charter recognizes the right of all peoples to economic, social and cultural development. It is in the spirit of that article and other economic considerations that Zimbabwe embarked upon the land reform programme.

- 6.6 It is not correct that the issue of land redistribution is a problem today due primarily to the absence of good governance. The observations by the executive director of SAHRITS are, to all intents and purposes, factually incorrect.⁴ It should be pointed out that, during the first ten years of independence, the Government of Zimbabwe was not able to acquire land enmasse to settle the people as the constitutional and legislative framework inhibited the quick acquisition of land for resettlement. The first inhibition was the provision in the Lancaster House Constitution of 1979. The Commission should be reminded that the Lancaster House negotiation nearly collapsed because of the land issue, with the liberation groups insisting on immediate resettlement of its people and the whites opting for protection of land rights. The Lancaster House negotiations were concluded with an agreement that the privileged land rights of the white population would be protected for 10 years and, during this period, Britain and the USA would provide funds for the acquisition of land by the incoming Government from the white farmers on a willing buyer willing seller basis. The programmes that were put in place during the period that extends from 1990 to 1999 were equally not able to place adequate land at the disposal of Government. This was due particularly to lack of resources, as well as lack of suitable available land
- 6.7 Accordingly, following unfulfilled promises by Britain and her allies to fund the acquisition of land for resettlement purposes, Zimbabwe embarked on the land reform programme in 2000. The cause for such a programme was not a desire on the part of ZANU (PF) to hold onto power.⁵ The cause was, and remains, the correction of colonial imbalances in the ownership of land, and the advancement of economic rights to the people of Zimbabwe as a whole. This was done following demonstrations by both the land hungry rural peasants and war veterans who spontaneously occupied commercial farms throughout the country as far back as 1999. Such actions caused hue and cry both within and beyond our borders. These developments necessitated the amendment of our Constitution to provide for the compulsory acquisition of land, without compensation except for improvements. It is unfortunate that these provisions were found by some to be offensive.⁶ Of concern is the fact that the Mission also considered the amendment to be offensive.⁷ This constitutional provision was enacted in the Land Acquisition Amendment Act. We hasten to state that the constitutional amendment, and the accompanying legislation was not put in place to pave way for Government's acquisition of the white farmer's land, but to provide the legal environment within which Government equitably carried out land reform while at the same time obligating Britain to honour her previous undertakings. The amendment was also in conformity with Article 14 of the Charter regarding the allowable encroachments on the right to property. The acquisition was in the interest of the public and due and fair compensation was, and is, still being paid for improvements made on the land.

³ Page 3 of Report paragraphs 4 to end.

- 6.8 Government acknowledges the role played by some few members of the white commercial farming community who supported the land reform programme and, in the process, showed willingness as well as commitment to working with Government for the betterment of the black Zimbabweans. However, the overall pursuit of this land reform programme was resisted by many quarters in and outside Zimbabwe, more particularly by the opposition MDC party, the majority of the members of the white commercial farmers, Non governmental organisations, the British Government, and their allies. They carried out a well-orchestrated campaign to disrupt the programme. They did everything in their power to demonise the Government of Zimbabwe. Some of the British nobility in Britain and whites who migrated to such countries as Australia, New Zealand and South Africa were owners of some of the land acquired under the land reform programme. Some farmers pretended to collaborate with Government by offering for resettlement land that had already been acquired, others gave land that has always belonged to the State and which they illegally annexed to their farmland, while another category gave land that was not suitable for resettlement purposes. There were scuffles and acts of violence at the farms, there were evictions of settlers and counter evictions of the commercial farmers, disruption of production, destruction of property, there was loss of lives and injury to persons. This went on, notwithstanding Government's calls for peaceful coexistence. The enactment in 2001 of the Rural Land Occupiers (Protection from Eviction) Act, and the deployment of police to maintain peace, law and order at the farms were measures which Government took to keep the situation under control.
- 6.9 The land issue has put Zimbabwe on the international scene since the year 2000 and has had other adverse consequences against the Government of Zimbabwe, which include its suspension from the Commonwealth, from which it eventually pulled out, of smart sanctions and the imposition of travel bans against its leadership. The enactment of the Zimbabwe Democracy and Economic Recovery Bill by the United States Government is a direct response to the land reform programme. All these are pressures intended to bear on Zimbabwe, to bring about political and socio-economic instability and to force Zimbabwe to reverse the land reform programme. However, the approach has since changed and momentum has increased with the introduction of alleged human rights violations in order to bring about a regime change. Indeed, Mr. Blair of Britain has, as recently as this year, told the whole world that his Government was working with the MDC to effect regime change in Zimbabwe. When this statement is viewed in its proper context, it is not hard to see that:

- Britain and her allies in the Western World withdrew the financial support which they were, in the past, giving to Government
- encouraged non-patriotic Zimbabweans to form themselves into Non Governmental Organisations particularly those dealing with human rights issues
- channeled all the funds to the mentioned organisations and

7.0 Zimbabwe's General comments on the Report

- 7.1 We reiterate that four days of searching for the truth was totally inadequate and the Mission confined itself to Harare which was not representation of the views of the entire Zimbabwean population and therefore, not at all reflective of the prevailing situation in the country.
- 7.2 We reiterate further that the Mission's statement that they did not have sufficient resources to cover a wider spectrum of the people Zimbabwe than they did is not a justifiable excuse as Zimbabwe would have provided additional resources for the Commission's work.
- 7.3 The Fact Finding Mission's Report is in many respects lacking in specific detail and it is, therefore, not possible for the Government of Zimbabwe to comment on some of the issues that were raised. The Government of Zimbabwe concedes that there were problems in Zimbabwe, especially during the period 1999, to 2002. The Government of Zimbabwe regrets the loss of lives, the injury to persons and destruction of property that took place during this period. While some of the activities were spontaneous, some were manipulated and others were pre-arranged in order to give weight to the allegations of abuse. For instance in Chinhoyi, farm workers were manipulated by their employer to act as war veterans and made to loot their employers' property while aerial photographs were taken as they made away with the property. The events were reported by the British Broadcasting Corporation well before it was even known in Harare that such acts had taken place. The fact that when the alleged war veterans were "looting" the farms the British. Broadcasting Corporation was on the scene taking aerial photographs in a helicopter or small plane should not be regarded as a mere coincidence. When the farm workers were arrested, the white farmers whose property had been 'stolen', and who had made the reports paid bail for the employees. Their conduct in paying bail for "war veterans" who looted their property was contradictory, and raised eyebrows, and supports indications that the whole thing had been stage managed in order to discredit the land reform exercise and the Government of Zimbabwe.

7.4 The Government of Zimbabwe acknowledges the rights of the people to elect a government of their choice. The fact that ZANU (PF) has been the ruling party since the time that Zimbabwe attained her independence does not necessarily mean that with the emergence of the MDC there should have been a change of government. Change is achieved through an expression of will by the majority of the electorate. There was no such expression in favour of the MDC party by the Zimbabwean majority. Rather, the majority of the electorate showed that they wanted no change by voting for, and retaining a ZANU (PF) government. 8 Opposition political parties are formed with the object of forming a new government. However, such a government cannot be imposed on the people. It is the wish of every opposition leader to bring forth a new government, and always undoubtedly put blame on the winner of any election for his or her own misfortune. This has become the trend in Africa where elections won by the ruling party are invariably challenged by the opposition yet when the opposition wins the elections any allegations of manipulation of the elections fall away. However, it is not correct that opposition parties in Zimbabwe have been suffering harassment at the hands of the government since independence. The only party that can claim to have been exposed to, and taken part in, violence is the MDC.

7.5 The Government of Zimbabwe concedes that there was an economic decline and that inflation had reached an all time high during the relevant period. It has been suggested that the cause for the decline is the land reform programme.¹⁰ The allegation is that Government gave land to persons who are not proper farmers hence the wastage of land.¹¹ The correct position is that skilled persons originating from the rural and urban sector, former farm workers who have been conducting the actual farming activities, as well as persons who can command resources for agriculture were allocated land. In the first year of the land reform, people were making preparations to work the land. They, therefore, did not fully utilize the land. Government played a significant role in the recapitalization of the agricultural sector and this improved the situation. Contrary to the expectations of those opposed to it, the land reform programme has not failed. It, if anything, is gathering momentum for the benefit of the country's hitherto impoverished people.

7.6 It is, not correct that the land reform programme was the sole cause of the country's economic decline. Events on the ground indicate that there were more factors, including the financial institutions which engaged in activities like money laundering, externalization of foreign currency, and fuelling the parallel market thereby crippling the economy. The institutions in question were ostensibly working with Government when in actual fact they had formed a broad - based alliance with the MDC in an effort to topple the Government. The economic sanctions imposed by countries such as Britain and United States of America contributed in a large measure to the decline of the economy. The Zimbabwe Democracy and Economic Recovery Bill called for sanctions by international financing institutions and as a result Zimbabwe has not received any support for balance of payment from the Bretton Woods institutions. The bad publicity orchestrated by the Western media has resulted in the flight of foreign investors and a decline in tourism as Zimbabwe has been portrayed as a country which is at war with herself where no security is provided for human life and property.

7.7 Considering the challenges which the country went through, the resistance and the sabotage which the people of Zimbabwe experienced during the land reform programme, as well as the two years of successive droughts that the region suffered during the same period, it was only natural that there would be a decline in agricultural production. However, the position has since changed and this year the country has sufficient produce to, hopefully, take us to the next harvest.

8 Fact Finding Mission Report page 10 para. 2

9 Supra page 15 para 5 and 6

10 Fact Finding Mission Report page 5 para. 4

11 (*****input from Lands And Agriculture on among other information, success of the programme on production, statistics on the fact that the white farmers had moved from grain production to met the food requirements of Zimbabwe and moved to tobacco, wildlife management, safari operations, horticulture and forestry from which they earned foreign currency and externalized. Considering the development in those sectors in the past 3-4 years and the foreign exchange realized in those activities it is surprising that Zimbabwe could have run out of foreign exchange. Their maize was for their cattle feed and the communal farmers were producing 60% of the food requirements and only 40% from the commercial and small scale farmers. * * * * *)

7.8 The Government of Zimbabwe acknowledges and recognizes the role which civil society plays in the advancement of human rights. She, therefore, accepts non governmental organisations' presence in the country, and welcomes constructive criticism coming from them. The Government of Zimbabwe sees non governmental organisations as partners in development and has, therefore, always maintained an open door policy for them. The Government of Zimbabwe is equally aware of the status of non governmental organisations within the African Commission on Human and People's Rights. They constitute the Commission's technical partners in the advancement and monitoring of the enjoyment of rights. However, Zimbabwe has learnt that not all non governmental organisations consider themselves as partners in a positive development of the country, and in her case, in some instances, the allegations being made against the Government are not correct. Most of the non governmental organisations got themselves embroiled in the national politics against the Government. They resorted to whatever means they could employ to bring about the downfall of the Government. They fuelled and collaborated with the opposition parties to effect what they termed regime change in Zimbabwe. It is those non governmental organisations which, realized the folly of their actions, and either closed operations in Zimbabwe claiming that the government was hostile to them or intensified their efforts to unseat the Government.

7.9 The Private Voluntary Organisations Act has always been in our statute books. The problems which Zimbabwe faced regarding the operations of non governmental organisations were that they were not all being registered under this Act. Some were registering as Trusts, while others were registering with the Ministry of Foreign Affairs. In such a chaotic environment it was easy for some to abandon the activities they had laid down in their constitutions and proceed to embroil themselves in the politics of Zimbabwe. What the Government of Zimbabwe has, therefore, done is to amend the Private voluntary Organisations Act, so that all such organisations are registered under one body. The amendment which was drafted with the involvement of non governmental organisations themselves and other stakeholders is meant to create an enabling environment for the operations, monitoring and regulation of the work of all non governmental organisations. It will enable them to stick to their core business for which they sought registration in the first place.

7.10 The general trend of non governmental organisations is to pick upon an isolated event and portray it as the common position in the country and to dwell on issues that have long since been rectified in order to perpetuate their unfounded allegations and, in the process, justify their existence. This position is observed through out the Report. Another practice of the non governmental organisations is to simply quote events out of context. For instance:

- The Mission found that there had been a flurry of new legislation and the revival of old legislation to control and manipulate public opinion and, in the process, limit civil liberties.¹² The term flurry connotes flooding with legislation yet the only pre-Zimbabwe legislation that was "revived" is the Public Order and Security Act. It was not revival as such. That is so as the mentioned Act is materially different from the Law and Order Maintenance Act in that all the provisions of the latter that had been ruled to be unconstitutional were not reproduced. Zimbabwe actually drew inspiration on her enactment of the Public Order and Security Act from the British Public Order and Security legislation. The Access to Information and Protection of Privacy Act (AIPPA) is the only new enactment, which was passed to regulate the profession of journalists, and its provisions are within the parameters of the Constitution. The Access to Information and Protection of Privacy Act (AIPPA) was moulded along the lines of Canada's laws on the same subject. The Private Voluntary Organisation Act has always been in force since the 1960s.
- The General Laws Amendment Act was found to be unconstitutional due to the procedures adopted in passing the Bill into an Act of Parliament.¹³ The Court did not make a pronouncement on the substantive provisions of the Bill, as more fully appears in the attached case of *Biti v Minister of Justice, Legal and Parliamentary Affairs*. It should be emphasized that the court did not declare any of the provisions of the Bill including the prohibition of non governmental organisations from carrying out voter education to be unconstitutional. The Court's ruling was based on the procedures which the House adopted when passing the Bill in Parliament. The provision in the Presidential Powers (Temporary Measures) Act was lawful. The Presidential Powers Act enables the President, in situations of emergency, to enact regulations when there is no law governing the situation. It was necessary and urgent that non governmental organisations be prohibited from conducting voter education as they had been found to be conducting disinformation education and confusing the rural voters.

- Representatives of chiefs have always been members of parliament since time immemorial yet the impression created is that this was resorted to in order to increase the number of members who represent the ruling party in Parliament. This provision dates back to the pre independence era in which chiefs were appointed to the Senate, an upper chamber of Parliament and since we now have a single chamber house, chiefs are nominated by their constituencies to represent them in Parliament. 14
- Both ZANU (PF) and the MDC challenged the results of the 2000 parliamentary elections. Some of the applications have long since been heard, in some instances the election results were confirmed, while in others they were nullified. In some cases there have been appeals to the Supreme Court. We forward herewith to the Commission a list showing what took place in respect of each Petition which the opposition MDC had filed with the court.
- Learnmore Jongwe, a Member of Parliament from the opposition MDC party, died while in remand prison for the brutal murder of his wife. The legislature was not arrested for political reasons. He did not die at the hands of the State. He committed suicide as was revealed by both the State appointed, and independent, pathologist(s).
- Job Sikhala is the only Member of Parliament of the opposition party who is alleged to have been arrested and tortured by the police. His arrest followed the violent demonstrations and stay away which his party organized. He torched a bus. The Report alleges rampant arrest of other opposition supporters as well as journalists without stating who they were, how many arrests were made, and for what reasons the people were arrested. This creates the impression that as long as one professes to be a member of the opposition party, he should not be arrested for any offences committed. Many members of the opposition party made effort to transgress the law and get arrested to give the picture that Government was not tolerant of any opposition.

- It is conceded that some of the incidences of violence that occurred were politically motivated. In this regard, both ZANU (PF) and the MDC were responsible for these activities and it is improper to try and apportion the extent of each party's liability because violence is violence. IS Some such violence occurred as resistance to the land reform programme. The violence did not target institutions of learning as alleged.¹⁶ The commercial farmers were not as innocent as the Report portrays them to have been considering that some of their lot did commit serious offences like murder as well as some of the looting attributed to war veterans.
- In terms of the General Amnesty of October 2000, persons arrested for political violence were released. The general amnesty was a political measure, aimed at calming down the volatile situation that preceded it. The period was characterized by unprecedented violence and the amnesty was considered as one of the best ways to ensure national stability and security. It was not a backhand method which was calculated to save supporters of the ruling party from imprisonment. ¹⁷ Members of both political parties benefited under the amnesty and it is not proper to claim that this was for the benefit of ZANU (PF) members. Perpetrators of offences are arrested, and dealt with according to law, irrespective of their political affiliation.
- At the time of the Fact Finding Mission, the leader of the opposition MDC party and two other senior party officials were standing trial not because they are MDC activists but because of the treasonous offences they had allegedly committed. Two of them, have since been acquitted, but the President of the party still has a case to answer and his matter is awaiting judgment.

15 Report page 15 para 4, statement of W. Ncube
 16 Page 13 para 5
 17 Page 11 para. 1

8.0 The Report's Inaccuracies And Inconsistencies

8.1 The Report of the Fact Finding Mission is fraught with inconsistencies, inaccuracies and, at times, deliberate distortions of fact, which were made in order to further tarnish the image of the Government. For instance:

- The Registrar General has been the elections registrar since 1985¹⁸ yet the Report implies that he was made the elections registrar for the 2000 elections. His office does not unilaterally alter or delete a person's name from the voters roll. In fact, before any election takes place, the office of the Registrar - General of elections opens the voters' roll for inspection and any errors that would prejudice a person's right to vote are corrected.
- The limit on the number of observers from non governmental organisations to a maximum of three was enacted in a statutory instrument and was not a mere administrative decision as is inferred in the Report.¹⁹ In the election petition by the MDC leader Morgan Tsvangirai, the Statutory Instrument in question was ruled to be constitutional.
- During both the parliamentary and presidential elections, police officers did not supervise or monitor the electoral process²⁰. They provided the required security during the elections.
- During the parliamentary and presidential elections, it is not true that monitors and observers were not allowed to accompany the ballot boxes.²¹ The position was, and still is, that the monitors and observers could not fit into the vehicle that was transporting the boxes. The boxes were ferried in open trucks and the monitors and observers were allowed to follow the boxes as they were being transported.
- The security of the ballot box was never lax and the police officers provided round the clock tight security. In fact, as proof of this point no ballot box was ever found to have been tampered with.

..

18 Page II of the fact finding Report
19 ibid
20 ibid, also comment on page 17 last
21 paragraph ibid

- There was no legislation providing that the ballot boxes should not be sealed and, in fact, throughout the elections, as is always the practice, ballot boxes were and are sealed at the end of each polling day, and party officials' signatures as well as the signature of the constituency registrar were and are affixed onto the seal itself.²² Before the commencement of each polling day, the seals were checked and found not to have been tampered with. Further, through the verification exercise, the number of ballot papers in the boxes tallied with the number of ballot scripts that had been used for each polling station.
- The amendment of the Citizenship Act²³ was intended to prevent dual citizenship, which is prohibited by the Constitution of Zimbabwe. Zimbabwe, like any other sovereign State has the right to decide whether to allow dual citizenship or not and, in our case, we allowed persons of SADC parentage special procedures for the renunciation of their foreign citizenship. The procedures are less cumbersome to enable them to renounce with ease the citizenship of their country of origin.
- The MDC was founded from the ranks of the Zimbabwe Congress of Trade Unions. In fact at the formation of the party, the party president, and his deputy were within the leadership of the labour movement²⁴ and they used the position they had gained as trade unionists to garner support for the MDC.
- Incidences of sexual violence and rape²⁵ allegedly perpetrated by war veterans and graduates of the national youth training service programme were never reported to the authorities. The practice in Zimbabwe, as in all other criminal jurisdictions, is that the victim or other concerned person can report the matter so that it can be dealt with according to law. The Mission itself did not receive, or hear any testimony from persons who claimed to have been raped.

22 ibid

23 ibid and page 12 of the fact finding Report paragraph 1 further comment on paragraph 2 page 12 required.

24 Page 12 paragraph 5 & 6

25 Page 13 last paragraph page 14 paragraph 4, page 25 paragraph 2. NB role in elections requires comment

- Reference is made to the so called hate speeches²⁶ made against the opposition MDC. It is not clear which of the President of the Republic of Zimbabwe's speeches falls within the internationally accepted definition of hate speech. During the fact finding mission's visit to Zimbabwe, the government of Zimbabwe showed the Mission video tapes of the MDC president Mr. Tsvangirai agitating for the violent removal of the President of the Republic of Zimbabwe from office if he did not heed Tsvangirai's call to vacate office. This constitutes hate speech within the internationally accepted definition, yet there is no reference to it whatsoever in the Mission's report. Among other video clips shown to the Mission was also one of Mr. Tsvangirai campaigning for sanctions to be imposed on Zimbabwe to force the President out of office, Mr. Mhashu's promise during an interview on the BBC Hard Talk programme which he made to his white community forks in Britain promising to return land to them in the event that an MDC government came to power, Morgan Tsvangirai's plea to South African to impose sanctions on Zimbabwe, cut the supply of electric power and/or fuel from Zimbabwe. There is no reference whatsoever to this material in the Mission's Report thereby giving the impression that anything that came from the Government was unacceptable as long as it destroyed the credibility of the non governmental organisations and opposition political parties' position. One of the clips showed Mr. Tsvangirai with a group of white farmers who were writing cheques and placing huge sums of money into some container whereupon one of the white farmers stated that he supported MDC as, according to him, it was that party which would return his land which Government had acquired to him. Given that farmer's statement, it remains evident that the Mission missed the point when it stated, as it did, that:

- land was not at the centre of Zimbabwe's problems, and
- the MDC, which Government has all along viewed as a front for the whites' neo-colonialist policies, was or is a genuine government- in-waiting.

The President of the Republic of Zimbabwe, in his capacity as the party leader of ZANU (PF) responded to the statements made by his political opponent which are on the videos referred to above. The opposition leader's statements were highly inflammatory and President Mugabe did not provoke the statement.

²⁶ Page 15 paragraph 2. Note the absence of reference to any documentation and video tapes relating to inflammatory speeches by the MDC leadership

The President's statement, it must be emphasized, was a response to all the derogatory remarks the opposition leader made, and it is however not treated as such in the Report. The selective treatment is again prevalent not just within our non governmental organisations community only, but also in the Report of the Mission itself and this is a cause of concern considering that the Commission should have been unbiased and impartial.

9.0 Comments on the Findings on the allegations of human rights violations

- 9.1 As stated above, and as acknowledged by the Fact Finding Mission, during the five days that the Commissioners were in Zimbabwe, the team was confined to Harare and contrary to their statement, the Mission did not meet a wide cross section of the Zimbabwean community, or even anyone critical for the visit to be a success.²⁷ Further, the mission, as stated above, largely met the same organisations or representatives of those who had made the initial complaints and hence their findings are a rhetoric of what they were told.
- 9.2 The team probed on the situation in Zimbabwe during the period 1999 to June 2002. It should be noted that at the time the Mission came to Zimbabwe, the people of Zimbabwe were living peacefully. During that time, there were no reports of political clashes, or politically motivated crimes which the Mission witnessed, or even heard of, a fact which is not acknowledged anywhere in the Report. In fact, law and order was well in place and in those instances where wrongs had been committed against the people, necessary measures had been taken to ensure a remedy for the wrongs.
- 9.3 It has never been categorically denied that there was violence in Zimbabwe, but at the time the mission visited Zimbabwe, the Government was thoroughly in charge of her people's affairs. There was, in fact, peace, law, order and tranquility in the country at the time of the Mission's visit to Zimbabwe. Government makes the following comments to the Mission's findings:

~ **Polarization of the Society**

In Zimbabwe there are two main political parties namely the MDC and ZANU (PF) and it is admitted that the country is polarized. The said polarization is, however, not as intense as is portrayed in the Report and neither is everyday life in Zimbabwe run along political lines. People are free to express their political opinions. During the run up to the Presidential elections in 2002, His Excellency the President and cabinet ministers made public appeals to the people of Zimbabwe to be tolerant and to accept political differences.

~ **Militarized society**

The Mission's Report states that the Zimbabwean society was being militarized and that a law and order special unit had been established in the police force and this has induced fear in the non governmental organisations community.

Both the militarization and the establishment of a special unit within the police as alleged by the non governmental organisations is denied. Zimbabwe has a professional police force which effects arrests without fear or favour, and this includes members of, or sympathetic to, the ruling party as well as war veterans. There never was a specialized unit -set up to deal with political matters.

~ **Torture at the hands of state agents**

The CIO, the police, the militia and the army were reported to be torturing and attacking people suspected of being opponents of the Government with impunity. Such conduct was alleged to have been prevalent in the country. The Government of Zimbabwe denies implementing a policy of torture and victimization of supporters of the opposition by State agents. The Government does not deny receiving reports of assault and injury to the people. Where such were received, investigations were carried out and those responsible were not only apprehended but were also brought to book. No one in Zimbabwe is above the law. The police and the army were deployed in situations of national emergency, especially when the MDC called for demonstrations and stay away that became violent. The police and the army were called in to prevent injury to persons and loss of lives, as well as looting and destruction of property that became rampant during such activities and was associated with all the demonstrations and stay away called by the MDC and ZCTU.

~ **Lack of agreement on the land reform within civil society**

The Report states that although the land question is critical, there was no agreement, even within the civil society on the land issue. The importance of the land question as stated above cannot be over emphasized. However, the Government is incompetent to comment on the lack of agreement amongst civil society membership save to say that to any Zimbabwean who is aware of the history of the country, land is such a central issue that there cannot be any proper enjoyment of human rights as long as the land matters remain unresolved.

~ **Politicisation of land**

The Mission observed, and quite correctly so, that the issue of land has been politicized and that there has been violence in the wake of the land reform programme. Considering that this was the primary cause of the war of liberation, land has always indeed been a political issue. The acts of violence that were perpetrated during the period of the land reform programme are regretted. Such acts were never Government's policy and Government took the necessary measures to bring the situation under control as well as to bring the culprits to book.

~ **The Press**

The Report states that there is violation of freedom of expression, independence of the press, and freedom of political association. The Public Order and Security Act (POSA) and the Access to Information and Protection of Privacy Act have been cited as instruments used to further such violation of rights. The Access to Information Act was enacted to *inter alia* regulate the hitherto unregulated profession of journalists some of whom resorted to publishing articles that were, and are, intended to misinform the public in an effort to tarnish the image of Government and destabilise the country with the ultimate objective to unseat the Government.

~ **Prevalence of torture and political violence**

The Mission found that torture and political violence were prevalent, found that ZANU (PF) party activists committed violence and that the Government was/is liable for such violence, as it did not act soon enough and firmly enough against those who committed the offences. The Government of Zimbabwe does not deny the existence of violence and unsanctioned torture during the period between 2000 and 2002.

The Government reiterates that it took all necessary measures and at the right time to arrest the situation and dealt with members of the ruling party as well as the opposition without any discrimination. The fact that the Mission carried out its fact finding exercise in a peaceful Zimbabwe is testimony of the success of the Government's measures considering that the country had just concluded the Presidential elections which were said to have been violent.

~ **Breakdown of the rule of law**

Zimbabwe denies that there ever was breakdown in the rule of law. There never was a time that the system failed to address the situation in the country.

~ **Monitoring of police actions**

The Mission accepts in paragraph 7 of its Report that there are two institutions entrusted with the responsibility of ensuring that the Police carry out its responsibilities effectively and efficiently, that is the Office of the Attorney General and the Office of the Ombudsman. The Mission, however, states in the same paragraph that there is only the Attorney General's Office. The capacity of the Office of the Ombudsman does not make it a lesser institution but only compromises its effectiveness to some degree.

~ **Conditions in prison**

The Report states that prison conditions in Zimbabwe are horrible. Zimbabwe's prisons do not claim to be akin to those of a five star hotel. However, although there is overcrowding, the standards are not below the internationally prescribed minimum. Further there is a distinction between the prisons and places of detention in terms of the Prisons Act and the holding cells referred to by Ms Thorncroft. The impression given by her statement regarding opposition members opting to pay the admission of guilt fines instead of being imprisoned is incorrect because the option of paying a fine has always been available at police stations country wide for anyone who commits minor transgressions of the law. Yet the statement gives the impression that the opposition members are in a class of their own. This is not the position.

10.1 By being a signatory to the African Charter on Human and Peoples Rights, the Government of Zimbabwe undertook to be bound by the decisions and recommendations of the African Commission. As indicated above, the problems that the Government of Zimbabwe experienced and the accusations that the Government suffered are all intricately related to the land issue. Since the land reform exercise is almost over, and Government is now carrying out mop up operations, there has been restoration of peace and order. There are no incidences of violence. People have reverted to, and are concentrating on, improving their lifestyles in a peaceful and orderly environment that is conducive to development. The Government takes her responsibilities towards her people seriously and comments on the recommendations made by the Commission as follows:

~ **Creating an environment conducive to democracy and human rights**

Although there are some decisions that the government took issue with, generally and as a matter of principle, the government of Zimbabwe abides by the decisions of her courts, the Supreme Court, in particular. She has, following the ruling of her constitutional court, repealed provisions of AIPP A that were found to be unconstitutional. Non governmental organisations under the auspices of the Electoral Supervisory Commission are able to conduct voter.

~ **National dialogue and reconciliation**

10.0 **Comments on the Commission's Recommendations** The Government of Zimbabwe is aware of the need for mediation on the case of Zimbabwe. However, the only lasting solution to our problems and challenges can only come from Zimbabweans themselves. So far, the greatest help anyone can give to Zimbabwe is to encourage ZANU (PF) and the MDC to get together and talk about the challenges facing Zimbabwe. In the past the efforts of regional and church leaders have been welcome and they are still welcome to do so.

> **Independent national institutions**

The Government of Zimbabwe has already made headway in the establishment of the Anti Corruption Commission. The enabling legislation is before Parliament. Further, Government is conducting research towards the establishment of a Human Rights Commission. This will entail streamlining the functions of the office of the Ombudsman, which currently has that mandate. To complement the human rights monitoring functions of the Ombudsman's office, there is an Inter-Ministerial Committee on Human Rights and International Humanitarian Law and a Human Rights Secretariat housed within the Ministry of Justice. As far as the Electoral Supervisory Commission is concerned, it already enjoys autonomy in the supervision and/ monitoring of elections and it has its own separate budget. The electoral reforms which are currently under way are aimed at establishing an independent election commission.

> **The independence of the judiciary**

The independence of the judiciary in Zimbabwe is protected both constitutionally and in practice. The President in consultation with the Judicial Services Commission makes the appointments to the High Court and Supreme Court bench while magistrates are civil servants. Currently a Bill which is aimed at placing magistrates under the Judicial Service Commission is being considered.

> **A professional police force**

Zimbabwe has a professional police force that enforces the law without fear or favour. The police force already enforces high standards in all respects. It has never been Government policy to politicize the police. In fact both the police and the army owe their allegiance to the Government of the day, not to the ruling party, ZANU (PF) and are precluded from becoming members of any political party as this would compromise the discharge of their duties. The statements made by the leaders of the uniformed forces were misconstrued to mean that they were professing allegiance to ZANU (PF) and not the Government. There is no unit in the police force that operates under strict political instructions. As for an independent mechanism to receive complaints against the police force, the Government placed this responsibility on the office of the Ombudsman.

~ **The media**

The media has never been restrained from voicing their opinion freely and as can be witnessed in Zimbabwe, only the Associated Newspapers Group has been prohibited from publishing until such time that they are registered according to the law of Zimbabwe.

~ **Repeal of POSA and AIPP A**

The Mission recommended a repeal of both PO SA and AIPP A, notwithstanding the objective and the merits of the legislation. The Government of Zimbabwe has already caused the amendment of AIPP A regarding press freedom to ensure its compliance with the Constitution. Some of the provisions of POSA have already been ruled by the Supreme Court to be constitutional.

It appears that the Commission has not read the two Acts in order for them to appreciate their respective contents and the fact of whether, or not they are offensive. As indicated earlier, POSA is similar to the British and Australian legislation on public order and security. AIPP A is similar to the Canadian legislation. The Commission should have identified provisions in the two Acts that it considers to be offensive and supplied the reasons why the provisions are offensive. AIPP A is a very noble Act in that it has given the people of Zimbabwe access to information held by governmental institutions. The opposition party MDC has, for instance, relied on the Act in their request to the Reserve Bank for information on the use of foreign exchange by the Government.

What the Commission is recommending is that the Government of Zimbabwe denies its people the right to access public information held by government departments. The Government finds this to be contradictory to the mandate of the Commission to ensure the enjoyment of rights of the people of Zimbabwe, their right to participate in the governance of their country and the right to information.

The recommendation by the Commission to repeal the two Acts is a parroting of the statements by the opposition and partisan non governmental organisations. This leaves the unpalatable impression that the Commission did not give itself adequate time to consider the legislation and merely relied on the statements of the opposition and partisan non governmental organisations. This clearly reflects the bias of the Commission in favour of the opposition party and partisan non governmental organisations.

~

Reporting obligations under the African Charter

The Government of Zimbabwe acknowledges that it has delayed in submitting the State Party Reports in accordance with the African Charter. Submission of the Reports for consideration by the Commission is a human rights monitoring mechanism, which enables the Commission to assess compliance with the State Party's obligations in terms of the charter. As acknowledged by the Commission, the Government of Zimbabwe since 1986 timeously submitted its Reports in terms of Article 62 of the Charter. Due to the problems that Zimbabwe experienced after 1998, the Government of Zimbabwe had to divert all resources to critical areas hence it fell into arrears in its Reporting obligations. The Government of Zimbabwe is in the process of preparing a combined Report for the period 1999 to 2003. The position is being remedied and the Reports will be submitted to the Commission in due course.

Although this is not justification for the delays in submitting the outstanding reports, the Commission is very much aware that there are other State Parties who have not submitted any report since they ratified the Charter in the early 1980s. Statement that has been deleted from paragraph 7.1 bullet No. 10 relating to hate speeches

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

F. Addis Ababa, ETHIOPIA
Fax : 517844

P. O. Box 3243

Telephone 517 700

EXECUTIVE COUNCIL

Sixth Ordinary Session

24 – 28 January 2005

L. Abuja, Nigeria

EX.CL/167 (VI)

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“EIGHTEENTH ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS”

**I. REPORT ON THE IMPLEMENTATION OF THE DECISION
ASSEMBLY/AU/DEC. 49 (III) OF THE 8TH JULY 2004**

1. In compliance with paragraph 4 of the decision Assembly/AU/Dec. 49 (III), of the 8th July 2004, the African Commission on Human and Peoples' Rights undertook the activities summarized below in relation to the Report of the Fact-Finding Mission to Zimbabwe..
2. The Fact finding Mission to the Republic of Zimbabwe was carried out from the **24th to 28th June 2002**. The African Commission, at its 34th Ordinary Session held from the **6th to 20th November 2003 in Banjul, The Gambia**, adopted the Report of the Fact Finding Mission.
3. Under cover of Note Verbale dated **15th December 2003**, the Secretariat of the African Commission transmitted, by DHL, (Lt. No. 3521227861 of the **15th December 2003**), the adopted report, to the Government of the Republic of Zimbabwe.
In this Note Verbale the Secretariat also invited the Government to submit any observations or comments that it may have on the Fact-finding Mission Report within 2 months of receipt thereof.
4. On the **30th March 2004**, the Secretariat of the African Commission received by fax, a Note Verbale from the Government dated **26/3/04** acknowledging receipt of the report and requesting an extension of another two months for the submission of its comments.
5. By Note Verbale dated **6th April 2004**, the Secretariat of the African Commission informed the Government by fax that it was in the process of preparing the 17th Annual Activity Report of the African Commission for submission to the 3rd Ordinary Session of the Assembly of Heads of State and Government of the African Union in **July 2004** and given the short period of time left for the transmission of the said report to Addis Ababa, it would not be able to accede to the latter's request for an extension of two (2) months for the submission of the expected comments. The Secretariat however invited the Government of Zimbabwe to present its observations by **30th April 2004** at the latest..
6. On the 9th **June 2004**, the Secretariat of the African Commission received, by fax, another Note Verbale from the Government dated **7th June 2004** requesting another extension of the deadline (unspecified), for the submission of its comments.

7. By Note Verbale dated **16th June 2004**, which was sent by fax, the Secretariat of the African Commission informed the Government that the Report of the Fact-finding Mission would form part of the 17th Annual Activity Report that would be presented by the African Commission to the Assembly of Heads of State and Government in **July 2004** and that all comments/observations would subsequently be published by the Secretariat of the African Commission with the aforementioned Annual Report.
8. The Assembly considered the 17th Annual Activity Report of the African Commission in **July 2004** and decided to suspend its publication pending the presentation of the comments from Member States on the Mission Reports which concerned them.
9. By Note Verbale dated **30th July 2004**, and faxed on the **3/8/04**, the Secretariat sent a reminder to Zimbabwe to convey its comments on the Mission Report before the **8th August 2004**.
10. By Note Verbale dated **30th August 2004**, faxed on the **31/8/04**, the Secretariat reminded Zimbabwe of its previous Note Verbale of **30th July 2004**, and requested it to submit its comments, preferably before **8th September 2004**.
11. On the **2nd November 2004**, the Secretariat sent another Note Verbale by fax to Zimbabwe, referring to its previous Notes Verbale of the **30th July and 30th August 2004**, and reminding this State once again, of the promise made by its Foreign Minister during the AU Summit of **July 2004** to send the comments within two weeks.
12. On the **16th November 2004**, the Secretariat received the comments from the State and on the same date acknowledged receipt thereof by fax.
13. From the foregoing it is clear that the African Commission complied with the directives of the decision Assembly/AU/Dec. 49 (III) which invites (in its paragraph 4) the Commission to do everything possible to obtain comments from Member States on the Mission Reports which concern them.
14. Zimbabwe's comments, are joint in annex to the Report sanctioning the mission carried out by the African Commission on Human and Peoples' Rights in this country from the **24th to 28th June 2002** and form an integral part of the said Commission's 17th Annual Activity Report.

M. Recommendation

15. The African Commission recommends that the Assembly:
- Takes note of the present Report on the execution of the decision Assembly/AU/Dec. 49 (III),
 - Adopts the 17th Annual Activity Report of the African Commission and authorizes its publication.

II. OTHER ACTIVITIES**A. *Missions to State Parties.***

16. Within the framework of its activities of promotion and protection of human and peoples' rights, the African Commission fielded missions to South Africa, Sudan, Seychelles, the Central African Republic, Burundi, the Islamic Republic of Mauritania and the Republic of Congo.

The other missions, which had been programmed, could not take place due to financial constraints. The African Commission wishes to thank the Member States for having agreed to receive its delegations and for the cooperation which they demonstrated during the said missions.

Only the Report of the mission to Sudan had been adopted and conveyed to the competent Authorities for appropriate follow-up. The African Commission would like to adopt all the other pending Reports in the very near future if funds are available.

B. *Emergency Situations*

17. When the African Commission is informed of an alleged human rights violation with the likelihood of the victim being subjected to irreparable prejudice, it invites the State in question to take the appropriate measures to avoid this prejudice.

It is in this context that the Chairperson of the African Commission addressed appeals to the Heads of State of Cameroon, The Gambia, Sudan, the DRC and Kenya.

C. *36th Ordinary Session*

18. The African Commission on Human and Peoples' Rights held its 36th Ordinary Session in Dakar, Senegal, from the **23rd November to 7th December 2004** under the Chairmanship of Commissioner Salamata Sawadogo, Chairperson of this Commission.

19. This Session had been preceded by an NGO Forum (**20 – 22 November 2004**) which had been devoted to the preparation of the NGOs' contributions to the meeting.
20. All the Members participated at this Session. They were:
 - Commissioner Yassir S. A. El Hassan, Vice-Chairperson;
 - Commissioner Mohammed A. Ould Babana;
 - Commissioner Kamel Rezag Bara;
 - Commissioner Andrew R. Chigovera;
 - Commissioner Vera M. Chirwa;
 - Commissioner Emmanuel V.O. Dankwa;
 - Commissioner Jainaba Johm;
 - Commissioner Angela Melo;
 - Commissioner Sanji Mmasenono Monageng; and
 - Commissioner Bahame Tom Mukirya Nyanduga.
21. After having welcomed the participants to the 36th Ordinary Session of the African Commission, Commissioner Salamata Sawadogo, thanked, on behalf of the Members of the African Commission and on her own behalf, His Excellency Maître Abdoulaye Wade, President of the Republic of Senegal and the people of Senegal, who had kindly accepted to host the 36th Session in Dakar. In her opening address the Chairperson underscored the important role played by Senegal both in the drafting and ratification process of the African Charter on Human and Peoples' Rights and in the activities of the African Commission. She expressed her pleasure at the increasing number of participants at the Sessions, which is an indication that human rights issues as well as the activities of the African Commission represent major challenges. Madam the Chairperson also reminded the State Parties of their obligation to implement the provisions of the African Charter, including the presentation of their Initial/Periodic Reports in conformity with Article 62 of the African Charter. Finally, the Chairperson urged State Parties, which have not already done so, to ratify, as urgently as possible, the Protocol on the Establishment of an African Court on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa.
22. On behalf of His Excellency Maître Abdoulaye Wade, the Prime Minister of Senegal, His Excellency Macky Sall, opened the 36th Ordinary Session. In his speech, His Excellency the Prime Minister deplored the serious human rights violations in certain countries in spite of the appeals launched by the international community. Mr. Macky Sall urged the State Parties to implement the human rights instruments that they have ratified. He lauded the entry into force of the Protocol establishing the African Court on Human and People's Rights, which,

he said, will inspire a new dynamism in the protection of human rights in Africa.

23. In his address delivered on behalf of the delegates of State Parties, His Excellency Mr. Hamadi Ould Meïmou, High Commissioner of Human Rights of the Islamic Republic of Mauritania, expressed his profound gratitude to the Government of Senegal for having hosted the 36th Ordinary Session of the African Commission. Mr. Ould Meïmou reiterated that poverty eradication and the enjoyment of economic, social and cultural rights should be given the same level of importance as civil and political rights. Mr. Ould Meïmou concluded by urging the African Commission to remain the custodian of the respect for human rights and to develop its dialogue with the State Parties and its other partners.
24. His Excellency, Ambassador Emile Ognimba, Director of Political Affairs of the Commission of the African Union, representative of His Excellency Mr. Alpha Omar Konaré, Chairperson of the Commission of the African Union, pointed out that the human rights situation has seriously deteriorated in certain parts of the Continent. In this context, Mr. Ognimba intimated that the Commission of the African Union was committed to providing its total support to the African Commission to enable it to adequately implement its mandate. With regard to the merger of the African Court of Human and Peoples' Rights and the African Court of Justice, His Excellency Mr. Ognimba pointed out that this decision had been made in order to rationalise utilisation of resources. In conclusion, he urged the African Commission to draw up a sensitization strategy to promote gender equality and the rapid ratification of the Protocol on the Rights of Women in Africa.
25. Mr TOGBUI AGBOLI K. F. AGOKOLI IV of the National Commission on Human and Peoples' Rights of Togo, representative of the Community of National Human Rights Institutions, recalling the persistence of human rights violations on the Continent in spite of all the efforts being made by the different actors, invited the African Commission and its partners to seek rapid solutions to the conflicts, which are undermining enjoyment of human rights on the Continent. Mr. TOGBUI AGBOLI further requested the African Commission to strengthen its relations with the Coordination of National Institutions. Finally, Mr. TOGBUI AGBOLI reiterated the willingness of the National Institutions to work in collaboration with the African Commission to ensure the improved promotion and protection of human rights in Africa.

26. Maître SIDIKI KABA, President of the International Human Rights Federation (FIDH), representing the NGO Community, lauded the fruitful dialogue established by the African Commission with the State Parties and Civil Society. Deploring however the deteriorating human rights situation in Africa, Me. Kaba urged all the Parties to embark on a general mobilisation in order to put an end to the numerous human rights violations all over the Continent. In conclusion, Me. Kaba requested the African Commission to redouble its efforts in the quest for solutions to the problems of refugees and internally displaced persons and in the process of setting up the African Court on Human and Peoples' Rights.
27. Their Excellencies Mr. Abdoulaye Wade and Mr. Paul Kagame Presidents of the Republic of Senegal and the Republic of Rwanda respectively, graced the public session of 25th November 2004 with their august presence. They reiterated their commitment to the human rights cause and addressed messages of congratulations, encouragement and support to the Members of the African Commission.
Presidents Wade and Kagame made a commitment to sensitise their colleagues on the need to allocate adequate resources to the African Commission.
28. The Session registered the attendance of five hundred and sixty seven (567) participants from twenty nine (29) State Parties, seven (7) National Human Rights Institutions, four (4) International Organisations, one hundred and thirty seven (137) African and International Non-Governmental Organisations.
29. State Party delegates and representatives of National Human Rights Institutions made declarations on the human rights situation in their countries. Representatives of NGOs also made declarations on the human rights situation in various African countries namely, Côte d'Ivoire, Sudan, Burundi, the Democratic Republic of Congo.
30. In conformity with Article 62 of the African Charter, the Republic of Rwanda presented its 2nd Periodic Report. The African Commission on Human and Peoples' Rights considered this Report and adopted the concluding observations relating thereto and these were conveyed to Rwanda for appropriate follow-up.
31. The Members of the African Commission presented their reports on the activities carried out during the intersession period. The Special Rapporteurs on Prisons and Conditions of Detention, on the Rights of Women in Africa, on Human Rights Defenders in Africa and on Refugees, Asylum seekers and Internally Displaced Persons in Africa

presented their Activity Reports. The Focal Points on the right to Freedom of Expression in Africa as well as on the Prevention of Torture, Cruel, Inhuman or Degrading Treatment in Africa, presented their intersession reports. The Chairperson of the Working Group on Indigenous Populations/Communities also presented the Activity Report of the Group. These reports can be obtained from the Secretariat and from the Commission's website: www.achpr.org.

32. The African Commission granted Affiliate Status to the following National Human Rights Institutions:

- The National Human Rights Commission (Kenya);
- The Observatoire National des Droits de l'Homme (Democratic Republic of Congo).

This brings the total number of Institutions enjoying Affiliate Status to seventeen (17).

The African Commission launched an appeal to Member States, which have not yet done so, to urgently set up National Human Rights Institutions in conformity with the Paris Principles.

33. The African Commission also granted Observer Status to the following Non Governmental Organisations:

- The Association des Femmes Juristes (Burkina Faso);
- The African Union Club (Côte d'Ivoire);
- The Observatoire Burundais des Prisons (Burundi);
- Action Aid (The Gambia);
- African Regional Council for Mental Health (Zambia).

This brings the total number of Organisations enjoying Observer Status to three hundred and nineteen (319).

34. The African Commission examined the topic relative to the ratification of the Protocol on the Establishment of an African Court on Human and Peoples' Rights and the one relative to the Rights of Women in Africa.

The African Commission entrusted its Bureau with the responsibility of meeting the current Chairman of the African Union as well as the Chairperson of the AU Commission in order to draw their august attention to the need to review the decision on the merger of the African Court on Human and Peoples' Rights with the African Court of Justice in view of all the legal and practical implications of this merger in relation to the establishment and efficiency of the African Court on Human and Peoples' Rights.

35. Furthermore, the African Commission examined its relations of cooperation with certain organs and structures of the African Union, in accordance with the decision Assembly/AU/Dec. 11(II) of the Assembly. It needs to pursue its reflections on this subject.

36. The African Commission attaches great importance to the organisation of thematic seminars and conferences. In its Strategic Plan (2003-2006) the Commission had programmed the holding of 19 seminars. The African Commission reiterated its decision to organise the seminars as planned.

37. From the 13th to 17th September 2004, the African Commission organised, in collaboration with its partners, a seminar on economic, social and cultural rights in Pretoria, South Africa. The declaration adopted at the end of this seminar is attached to the Resolution on ECOSOC which is part of Annex 2.

38. It decided to organise two (2) seminars in 2005 on the following topics:

- Refugees and Internally Displaced Persons in Africa:

The African Commission chose this topic due to:

- (i) the fact that Africa is the Continent which hosts the largest number of refugees;
- (ii) the fatigue manifested by donors with regard to provision of assistance to refugees;
- (iii) the urgent need for our Member States to mobilise the resources required for assisting refugees and internally displaced persons;
- (iv) the alarming situation of the rights of refugees.

- Contemporary forms of Slavery.

Although slavery has been abolished by all the Member States of the African Union, it has been noted that there still remain some of its most abject forms, such as the trafficking of women and girls, the enslavement of certain social categories etc...

Collective brainstorming is required to define strategies to effectively combat this phenomenon for its total eradication.

39. The African Commission lauded the offer made by certain partners to contribute to the organisation of these seminars and invited the State Parties and other partners to make their contribution. The list of seminars

was distributed and can be consulted on the ACHPR website: www.achpr.org.

40. The African Commission considered forty-five (45) Communications. It took a decision on seizure on eight (8) Communications. It took a decision on admissibility on six (6) and three (3) on the merits. Furthermore, it considered twenty-nine (29) other Communications and decided to defer its decisions on these Communications to the 37th Ordinary Session pending additional information. The copies of the five (5) final decisions are joint to this Report as **Annex 1**.

41. The African Commission adopted the procedures on the notification of its decisions and mission reports as well as the adoption process of these mission reports.

In this regard, the Commission decided to notify its decisions to all the Parties to the Communications as soon as they are made, reminding them at the same time, to respect the requirements of the Article 59 of the Charter which prohibits the publication of these decisions so long as the Assembly of Heads of State and Government has not given the approval for publication.

The Commission decided to adopt the mission Reports before conveying them for comments to the State Parties visited.

The Commission decided to grant the State Parties a deadline of three (3) months for the presentation of their comments. This deadline can be renewed for a further three (3) months if required.

42. The African Commission adopted Resolutions on:

- (a) The mandate and the appointment of the Special Rapporteur on Freedom of Expression in Africa;
- (b) The mandate of the Special Rapporteur on Refugees, Asylum Seekers and the Internally Displaced Persons in Africa;
- (c) Economic, Social and Cultural Rights in Africa.

These Resolutions are attached to this Report as **Annex 2**

43. The African Commission appointed Commissioner A. R. Chigovera, as Special Rapporteur on the Freedom of Expression in Africa for a period of six (6) months corresponding to the portion of his mandate which is still to run.

44. The Agenda of the Sessions of the African Commission is always extremely full – despite the exhausting rhythm of work and the

holding of night sessions, the Commission cannot cover all the items on the Agenda. It is for this reason that consideration of several Mission Reports has had to be deferred several times. To date, seventeen (17) Mission Reports are pending for consideration. Whereas, if these Mission Reports are not adopted and conveyed to the State Parties concerned within a reasonable period, they lose their usefulness.

Given the large number of pending mission reports and the urgent need to adopt and convey them to the State Parties visited, the African Commission decided to hold an Extraordinary Session from 15th to 19th March 2005 in Addis Ababa, Ethiopia. It will also consider certain Communications during this session which are due.

45. The 37th Ordinary Session of the African Commission on Human and Peoples' Rights will be held from the 27th April to 11th May 2005, in Banjul, The Gambia.
46. The 36th Ordinary Session was closed on the 7th December 2004 by Mr. Serigne Diop, Minister of State, Guardian of the Seals and Minister of Justice of the Republic of Senegal.
47. After the closing ceremony, the Chairperson of the African Commission held a Press Conference, which was attended by State Delegates and other participants as well as representatives of the local and international media.

D. Mobilisation of Resources

48. The African Commission has the vast mandate of guaranteeing the promotion and protection of human and peoples' rights throughout the Continent. In order to properly execute this mandate, it requires adequate human, material and financial resources.
49. Under the provisions of Article 41 of the African Charter on Human and Peoples' Rights, it is the A.U. Commission which should provide the African Commission with the resources that it requires for its activities.
50. Due to the paucity of the resources placed at its disposal by the Mother Organisation, the African Commission was compelled to turn to its partners who provided the necessary supplementary assistance.

51. In the effort to better organise its work, to establish priorities in its activities and to make rational use of its resources, the African Commission adopts Action and Strategic Plans. It is currently implementing the Strategic Plan covering the period 2003 – 2006.
Some partners have taken over the responsibility of certain sectors whilst others await funding. The A.U. Commission is involved in the mobilisation of extra-budgetary resources for the African Commission.
52. The African Commission wishes to seize this opportunity to launch an appeal to the Member States to provide funding for the current Strategic Plan. South Africa has already offered assistance; we thank her fervently for it.
53. Those Member States which have the means should join the non-African partners in contributing towards the operations of the African Commission, which, logically speaking, should count more on the resources generated in Africa than on those coming from outside the Continent.

ANNEX 1

DECISIONS ON THE MERITS

- **243/2001** Women's Legal Aid Center (on behalf of Sophia Moto)/Tanzania
- **249/200** African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea)/Republic of Guinea
- **255/2002** Garreth Anver Prince /South Africa

COMMUNICATIONS DECLARED INADMISSIBLE

- **260/02** Bakweri Land Claims Committee / Cameroon
- **263/02** Kenyan Section of the International Commission of Jurists, Law Society of Kenya, Kituo Cha Sheria/Kenya

243/2001 – Women's Legal Aid Center (on behalf of Sophia Moto)/Tanzania

Rapporteur:

31st Session: Commissioner El Hassan
32nd Session: Commissioner El Hassan
33rd Session: Commissioner El Hassan
34th Session: Commissioner El Hassan
35th Session: Commissioner El Hassan
36th Session: Commissioner El Hassan

Summary of Facts

1. The complaint is filed by Women's Legal Centre, Tanzania on behalf of Sophia Moto, an unemployed Tanzanian woman of 40 years old.
2. The Complainant alleges that she petitioned to the Magistrate of Dar es Salaam in 1995 and appealed to the High Court of Tanzania in 1997 for the dissolution of her marriage to one Anthony Lazima, division of matrimonial assets, and damages from an illicit cohabitation of the latter with one Bertha Athanas. She claims that the High Court, which is part of the Tanzanian Judiciary, dismissed

her appeal on the ground of her non-appearance on the date set for the hearing.

3. The Complainant states that she had applied to the same High Court for a review of the said decision, but the High Court overruled the application. And under the laws of Tanzania, such an exercise of applying for review before the same High Court bars one from appealing against the decision of the same to the Court of Appeals of Tanzania, the Complainant alleges that she could not thus seize the highest court in the country.
4. She, therefore, alleges that the High Court, in so dismissing her appeal without having issued summons or notice to her notifying her of the date for the hearing of the appeal, violated her rights to fair trial and hearing. The same decision also resulted in the wrongful denial of her right to the matrimonial property.
5. The Complainant claims that she has exhausted all the national remedies available to pursue her rights and that the present claim has not been or is not being considered by any other human rights treaty monitoring body.

Complaint

6. The Complainant alleges violation of Articles 7 and 14 of the African Charter on Human and Peoples' Rights.
7. The Complainant prays for a declaration that the Respondent State provides her with appropriate remedies in accordance with the Laws of Tanzania, and for any other relief the Commission deems just and fit.

Procedure

8. The Complaint was dated 10th October 2001 and received at the Secretariat on 7th December 2001.
9. On 24th January 2002, the Secretariat wrote to the Complainant acknowledging receipt of the complaint, informing her of the entering of the same in the Commission's register, its number in the latter, and its having been scheduled for consideration by the Commission at its 31st Ordinary Session taking place from 2nd – 16th May 2002.
10. At its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.

11. On 28th May 2002, the Secretariat wrote to the Complainant and the Respondent State of this decision and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.
12. On 9th September 2002, the complainant requested further time for submission of further information on the issue.
13. At its 32nd Ordinary Session held from 17th – 23rd October 2002 in Banjul, The Gambia, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 33rd Ordinary Session.
14. On 7th November 2002, the Secretariat wrote to the complainants and Respondent State to inform them of this decision and further remind them to forward their submissions on admissibility of the same before the 33rd Ordinary Session of the Commission.
15. On 3rd April 2003, the Secretariat of the African Commission wrote to the parties informing them that it still awaited their submissions on the admissibility of the complaint and further reminded them to forward the same before the 33rd Ordinary Session of the Commission.
16. At its 33rd Ordinary Session held in Niamey, Niger from 15th – 29th May 2003, the African Commission considered the communication and declared it admissible.
17. On 12th June 2003, the Secretariat wrote to the complainant and Respondent State informing them of this decision and further reminding them to forward their written submissions on merits of the same before the 34th Ordinary Session of the Commission.
18. A similar reminder was resent to the Respondent State on 3rd July 2003 and to both parties on 6th August 2003.
19. On 3rd October 2003, the Secretariat received the Respondent State's written submissions to the communication, which was forwarded to the complainant on 6th October 2003, which was received, per DHL's online Global Tracking facility, on 13th October 2003.
20. At its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003, the African Commission examined the complaint and decided to defer its consideration on merits to the 35th Ordinary Session.

21. On 8th and 9th December 2003, the Secretariat wrote to the complainant and the Respondent State respectively informing them of this decision and further requesting the latter to forward to the African Commission a copy of the country's Civil Procedure code and the former its response to the written submissions of the Respondent State before the 35th Ordinary Session.
22. On 13th January 2004, the complainant sent its written submissions accordingly, which were forwarded to the Respondent State on 11th February 2004.
23. On 17th February 2004, the Respondent State forwarded a copy of the country's civil procedure code through the African Union's office in Addis Ababa.
24. At its 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004, the African Commission examined the complaint and decided to defer its decision on the merits to the 36th Ordinary Session.
25. On 17th June 2004, the Secretariat informed both parties of this decision.
26. At its 36th Ordinary Session held from 23 November to 7 December 2004, in Dakar, Senegal, the African Commission considered the communication and took a decision on the merits.

LAW**Admissibility:**

27. Article 56 of the African Charter governs admissibility of communications brought before the African Commission. In this regard, the African Commission notes that the Respondent State's only challenge on the admissibility of this communication concerned itself with Article 56 (5) under which it claimed that the dismissal of the application for review was done by a Court of competent jurisdiction and in accordance with its laws. For the purposes of the said sub-Article, however, this claim does not refute the complainant's claim that she could not seize the highest Court in Tanzania for the reason that she opted to apply for a review of the decision of the High Court that dismissed her application.
28. For this reason, the African Commission decided to declare this communication admissible at its 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003.

Merits:

29. As can be seen in paragraph 2 above, the complaint arose out of the Tanzanian High Court's decision to dismiss the complainant's civil case appeal for the dissolution of marriage on the ground that she failed to appear on the date set for the hearing irrespective of the fact that she was not served with summons or notice notifying her of the date for the same. In seizing the African Commission, she alleged that the Court's decision, an institution of the Respondent State, denied her right to fair trial, and (as the original case before the lower magistrate court related to dissolution of property as well) her right to the matrimonial property.
30. The complainant further alleges, in her memorial to the African Commission of 9th September 2004, that it was her counsel and not her who was reportedly present and aware of the date on which her case was slated before the High Court which dismissed it altogether for non-appearance. She further alleged that there was no evidence presented showing that her counsel (on whose expertise she, as a lay person, relied on) communicated the information about the date for the hearing of her appeal. By dismissing her appeal, the High Court improperly punished her while the proper person to be punished for "negligence or recklessness," if any, was her counsel.
31. In requesting that the African Commission dismiss the complaint in its entirety, the Respondent State submitted, on 21st August 2003, its response to the same. In its response, the Respondent State disputed the allegation that it violated Article 7 of the African Charter in that the complainant was indeed granted an opportunity to be heard but chose not to exercise it by failing to appear on the hearing date. The Respondent State annexed a copy of the proceedings of the High Court in question and further argued that although the judiciary is an institution of the Respondent State, the latter could not be at fault for the court's dismissing the appeal as the complainant's advocate was present on the first date for the hearing and was aware of the date when the hearing was adjourned to, and that despite this knowledge, both the complainant and her counsel failed to appear on the scheduled date.
32. The Respondent State further argued that there was no violation of Article 14 of the African Charter as the decision to dismiss by the High Court in question was in accordance with Order IX Rule 8 of the country's Civil Procedure Code of 1966. The complainant failed to adduce evidence to prove her right to property, which right was recognised by the Government. It argued that the matter had been

completely dealt with by the Respondent State's Courts of Law and hence the complaint before the Commission was an abuse of process of law. The Respondent State concluded that the appeal was dismissed by the High Court because of the gross misconduct of the complainant's advocate and hence she should proceed against her counsel for professional misconduct.

33. By a rejoinder of 23rd October 2003, the complainant maintained that there was no evidence whatsoever to show that she was duly served or notified of the date set for the hearing by the High Court that dismissed the appeal, and hence the dismissal was contrary to the cardinal principle of natural justice, the right to be heard. She insisted that she did not have knowledge of the hearing date as the records show that she was absent when the matter was adjourned.
34. She further averred that her main prayers as laid before the magistrate's court, dissolution of marriage and division of matrimonial property, remained undecided to date as the High Court's dismissal order erroneously based itself on the law of limitations Act of 1971. She claimed that even if she were absent on the date the matter was called for hearing, which fact she denied, the High Court was wrong to dismiss her appeal as it was not mandatory under the law (*Order XXXIX Rule 11 (1) of the Civil Procedure Code of 1966*) that non appearance of the appellant shall result in dismissal of the appeal.
35. The Complainant followed this by a further submission dated 13th January 2004 addressing the contents of the copy of the proceedings before the High Court that dismissed her appeal for non-appearance. In that, she alleged that the matter concerned matrimonial issue, which required determination for purposes of giving rights to each party, exacting special care due to its nature relating to divorce, custody of children, and division of property. The Counsel for the appellant that appeared before the High Court was a human being and anything might have happened to her and as such her non-appearance on the hearing date ought to have been given excuse. Besides, the complainant further alleged, the non-appearance was a first default and the trial judge should have adjourned the matter and order for the parties to be notified to appear on another date. She maintained that the dismissals failed to consider the interest of both parties as far as married life was concerned, which, together with the rights of each party, had to be determined.
36. A look at both parties' submissions and documentary evidence adduced before the African Commission showed that an important fact, that neither the complainant nor her counsel appeared before the

High Court on the date her appeal was slated to be heard, was correct. As summarised above, however, the complainant held that the dismissal that ensued was not justified as she had not been notified of the date for the hearing, and that, among others, the dismissal was contrary to natural justice denying her right to equitable share of the matrimonial property. She maintained that it was her counsel's fault that resulted in her present situation and that should anyone be punished, it should have been her counsel not her. She further advocated that the decision by the High Court did not determine her marital status or the partition of matrimonial property, including child custodial issues. It merely disposed of the matter on the superficial reason that procedure had not been complied with.

37. The Respondent State, on the other hand, insisted that it shall not be held responsible for the complainant's failure to follow procedure in enforcing her rights. It even suggested that the complainant rather proceed against her own counsel for failure to appear which resulted in the dismissal of the case by the High Court.
38. The African Commission notes that civil procedure concerns itself with enabling parties enforce their substantive rights before the courts as guaranteed by substantive laws. It is not disputed that the present complainant failed to do so by failing to appear on the date for hearing of the matter. What is disputed is the fairness of the dismissal of the matter in its entirety, which the Respondent State claimed was proper.
39. The Respondent State claimed that the High Court's decision based itself on *Order IX Rule 8 of the country's Civil Procedure Code of 1966*, which read:

“Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.”

40. The subsequent Rule 9 (1) under the same Order IX, however, introduced an important exception to Rule 8 above in providing the plaintiff an opportunity to have the dismissal set aside. It states that the plaintiff:

“...may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal..., and shall appoint a day for proceeding the suit.”

41. The African Commission does not wish to pre-empt the understanding and interpretation of these rules by Tanzanian courts. Yet, the combined reading of these two Rules clearly shows that the dismissal of the suit by the High Court is not unassailable and that as long as the plaintiff can show sufficient cause for her non-appearance, the court should allow the complainant to proceed with the suit. The High Court may exercise discretion, on a case by case basis, in deciding whether the cause shown before it to have the dismissal set aside is sufficient or not.

42. The Courts are provided with further discretionary power under Order XXXIX Rule 11 (2) of the same Procedure Code when they decide upon the appeals before them. This Rule reads:

“If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed.”

43. The emphasis here is on “may make an order that the appeal be dismissed.” This is a clear discretion left to the court to decide as it deemed fit. Again, the African Commission does not wish to delve into the interpretation of this or any other laws of Tanzania. Yet, the effect of their application, should it run contrary to the natural justice principle underlying Article 7 (1) (a) of the African Charter, can be a proper subject before the African Commission.

44. The facts as presented by the parties and not contested indicate that there were no proceedings held justifying the closure of the complainant’s case without further hearings. In such circumstances, the African Commission can not but agree with the complainant’s claim that the option the court followed in dismissing her appeal without giving her an opportunity to be heard and without considering the consequences that may have on her claims to property and child custody (which could have been taken care of by a favourable exercise of discretion by the courts) does not conform with the requirements of the African Charter and the principle of natural justice. The court’s decision to simply dismiss the complainant’s petition ushered in

uncertainty as to the status of the marriage itself, the partition of patrimonial property, and custodial issues.

45. The African Commission holds that substantive rights enshrined in the African Charter rely on procedural rules for their effective enjoyment. The application of these procedural rules giving effect to the enjoyment these rights should be checked since, like in the present case, their application may negate the very substantive rights, resulting in their curtailment or deprivation. Member States have committed themselves to give effect to rights contained in the African Charter. The African Commission holds that the application of these procedures domestically put in place with a view to implement the African Charter should not result in frustrating the very obligations the Member States undertook in committing themselves under the African Charter.
46. The African Commission further notes that although the provisions of the Tanzanian Civil Procedure form part of the procedural laws giving effect to the substantive laws elsewhere in their laws, their application in cases such as the present could result in the curtailment of citizens to enjoy their basic rights. It is not being disputed that the substantive laws of Tanzania guarantee the right to property, family life and child custodian rights. Yet, the establishment of such rights must be followed by the diligence on the part of the State to ensure that everyone enjoys them, which means the just application of procedures meant to give effect to the rights. It is noted that it is not the place of the African Commission, nor does it fall under its mandate, to prescribe legislation for Member States with a view to give effect to the rights and duties enshrined in the African Charter domestically. However, it is the duty of the African Commission to check the application of domestic procedures enacted by Member States implementing the African Charter. Accordingly, Tanzanian authorities may enact the procedures governing the exercise of rights and duties, while the African Commission retains its supervisory role over the application of those procedures enabling the implementation of the African Charter, making sure that the application of procedures does not indeed deny the enjoyment of the rights themselves.
47. It is noted that the complainant was given only one chance to appeal. She was faced with making a procedural choice to enforce her rights. Eventually, her case was dismissed on mere grounds of procedural rules, the application of which was at times discretionary (as shown in paragraphs 38-42 above). Even the review procedure allowing the same High Court judge to preside over appeals and their review thereof, the application of which led to the dismissal of the

complainant's claim, does not tone with the general requirements of fair trial.

For these reasons, the African Commission

Finds the Republic of Tanzania in violation of Articles 7 (1) (a);

Further, the African Commission urges the Government of the Republic of Tanzania to ensure that its Courts apply its rules of procedure without fear or favour;

Urges the Government of the Republic of Tanzania to allow the complainant to be heard on her appeal.

***Adopted at the 36th Ordinary Session of the African Commission
on Human and Peoples' Rights***

Held from 23rd November to 7th December 2004 in Dakar, Senegal

249/2002 - African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea)/Republic of Guinea

Rapporteur:

31st Session: Commissioner Badawi
32nd Session: Commissioner Badawi
33rd Session: Commissioner Badawi
34th Session: Commissioner El-Hassan
35th Session: Commissioner El-Hassan
36th Session: Commissioner El-Hassan

Summary of facts

1. It is alleged by the Complainant that on 9th September 2000, Guinean President Lansana Conté proclaimed over the national Radio that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps. His speech incited soldiers and civilians alike to engage in mass discrimination against Sierra Leonean refugees in violation of Article 2 of the African Charter.
2. The Complainant alleged that the discrimination occasioned by President Conté speech manifested itself primarily in at least five ways:
3. First, widespread looting and extortion occurred in the wake of President Conté's speech. Guinean soldiers evicted Sierra Leoneans from their homes and refugee camps. The soldiers further looted the homes, confiscated food, personal property and money from refugees at checkpoints. They also extorted large sums of money from detained refugees. These items were never returned to the refugees.
4. Second, the speech motivated soldiers and civilians to rise up against Sierra Leonean refugees inside and outside of the refugee camps. The resulting physical violence ranged from beatings, rapes, to shootings. Countless refugees died in these attacks, and many have scars as permanent reminders of their time in Guinea.
5. Third, after President Conté's speech, Guinean soldiers targeted Sierra Leonean refugees for arrest and detention without any just cause. Soldiers at checkpoints would inspect refugees for supposed rebel scars, calloused hands from carrying a gun, speaking Krio (the local language in Sierra Leone), or carrying a refugee card. However, the refugees had scars from tribal markings rather than the rebels and calloused hands from farming not carrying a gun. These false identifications were used to then detain refugees for hours and days

for no other reason than being “a rebel” based upon being Sierra Leonean.

6. Fourth, the speech instigated widespread rape of Sierra Leonean women in Guinea. Furthermore, Guinean soldiers subjected men and women to humiliating strip searches. These searches were conducted sometimes several times a day and in front of large groups of people and on-looking soldiers.
7. Finally, Sierra Leonean refugees were forced to decide whether they were to be harassed, tortured and die in Guinea, or return to Sierra Leone in the midst of civil war where they would face an equally harsh fate. Thousands chose to flee back to their native Sierra Leone in response to the Guinean mistreatment. Furthermore, Guinean soldiers collected refugees, bussed them to Conakry seaport, and physically put them on the ferry forcing their return to Sierra Leone. The Guinean government was therefore not providing refuge and protection required by law, reported the Complainant.

Complaint:

8. The Complainant alleges that Articles **2, 4, 5, 12(5)** and **14** of the African Charter on Human and Peoples’ Rights have been violated.

Procedure:

9. The communication dated 17th April 2002, was submitted by the Institute for Human Rights and Development in Africa on behalf of the Sierra Leonean refugees.
10. On 18th April 2002, a letter was sent to acknowledge receipt and inform the Complainant that the communication would be scheduled for consideration at its 31st session.
11. At the 31st Ordinary Session held from 2 – 16 May 2002 in Pretoria, South Africa, the Commission decided to be seized of the case and requested the parties to submit their observations on the admissibility of the case.
12. On 29th May 2002, the Secretariat of the African Commission informed the parties of the decision of the African Commission.
13. On 24th June 2002, the Complainant forwarded to the Secretariat of the African Commission its written submission on the admissibility of the case, a copy was sent to the Respondent State by post on 16 August 2002.

14. By letters dated 28 November 2002, 17 January 2003 and 20 March 2003, the Secretariat wrote to the government requesting it to react to this complaint. Up to the holding of the 33rd Ordinary session in Niamey, Niger, from 15 – 29 May 2003, the Secretariat had not received any feedback from the Respondent State.
15. At the 33rd Ordinary Session the African Commission declared this communication admissible, and the parties were requested to forward their written submission on the merits.
16. On 18th June 2003, the Secretariat informed the parties of the above decision and requested them to transmit their brief on the merits to the Secretariat within a period of 3 months, the Note Verbal to the Respondent State was hand delivered.
17. On 29th August 2003, the Complainant forwarded its written submission on the merits of the case. On 22 September 2003, the Secretariat of the African Commission forwarded the written submission from the Complainant to the Respondent State
18. On 9th October 2003, the Secretariat of the African Commission received a Note Verbale from the Respondent State stating that they had not received the written submission from the Complainant.
19. By note Verbale dated 14th October 2003, the Secretariat of the African Commission forwarded once again the written submission from the Complainant to the Respondent State by DHL.
20. During its 34th Ordinary Session held in Banjul, The Gambia from the 6th to 20th November 2003, the African Commission heard the oral presentations on admissibility of the parties concerned and decided to postpone consideration on the merits of the case to its 35th Ordinary Session. By note verbale dated 4 December 2003, and by letter bearing the same date both parties were accordingly informed of the commission's decision.
21. The Commission instructed the Secretariat to have the comments of the Complainant translated into French and have the translation sent to the Respondent State to enable it submit its written comments on the merits of the communication.
22. These submissions on the merits of the case submitted by the Complainant were translated into French and sent to the Respondent State by Note Verbale on the 11th December 2003. The Respondent

State was also informed that the communication would be considered on the merits at the Commission's 35th ordinary session.

23. By Note verbale dated 26 December 2003, the Secretariat received an acknowledgement from the Respondent State to its note verbale of 11 December 2003 noting that the Respondent State will forward its submission on admissibility within three months.
24. By note verbale dated 9 March 2004 the Secretariat reminded the Respondent State to forward its submission on admissibility noting further that the communication will be considered at the 35th ordinary session to be held in Dakar, Senegal from 3 – 17 May, 2004.
25. The Respondent State sent its reaction as to the merits of the communication to the Secretariat of the Commission on the 5th April 2004.
26. At the 35th Ordinary session, the Respondent State was not represented due to the change of the venue. At the 35th Ordinary Session, the Commission heard oral submissions from complainants and testimonies from witnesses on the merits of the communication.
27. By note verbale dated 18 June 2004 the Secretariat of the African Commission informed the State of its decision taken at the 35th ordinary session and by letter of the same date informed the complainant accordingly.
28. At its 36th Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission considered this communication and decided to deliver its decision on the merits.

LAW

Admissibility

29. The admissibility of communications brought pursuant to Article 55 of the African Charter is governed by the condition stipulated in Article 56 of the Charter. This Article lays down seven (7) conditions for admissibility.
30. The African Commission requires that all these conditions be fulfilled for a communication to be declared admissible. Regarding the present communication, the two parties do not dispute that Article 56 (1, 2, 3, 4, 6 and 7) have been fulfilled, and the only article that is in dispute is Article 56(5) of the African Charter.

31. Article 56(5) requires the exhaustion of local remedies as a condition of the presentation of a complaint before the Commission is premised on the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.
32. Concerning the matter of exhausting local remedies, a principle endorsed by the African Charter as well as customary international law, the Complainant argues that any attempt by Sierra Leonean refugees to seek local remedies would be futile for (3) three reasons:
33. First, the persistent threat of further persecution from state officials has fostered an ongoing situation in which refugees are in constant danger of reprisals and punishment. When the authorities tasked with providing protection are the same individuals persecuting victims an atmosphere in which domestic remedies are available is compromised. Furthermore, according to the precedent set by the African Commission in *Communication 147/95 and 149/96 Sir Dawda K. Jawara / the Gambia*, the need to exhaust domestic remedies is not necessarily required if the Complainant is in a life-threatening situation that makes domestic remedies unavailable.
34. Second, the impractical number of potential plaintiffs makes it difficult for domestic courts to provide an effective avenue of recourse. In September of 2000, Guinea hosted nearly 300,000 refugees from Sierra Leone. Given the mass scale of crimes committed against Sierra Leonean refugees – 5,000 detentions, mob violence by Guinean security forces, widespread looting – the domestic courts would be severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea. Consequently, the requirement to exhaust domestic remedies is impractical.
35. Finally, exhausting local remedies would require Sierra Leonean victims to return to Guinea, the country in which they suffered persecution, a situation that is both impractical and unadvisable. According to precedent set by the Commission in *Communication 71/92 Rencontre Africaine pour la Défense des Droits de l'Homme / Zambie*, victims of persecution are not necessarily required to return to the place where they suffered persecution to exhaust local remedies.
36. In this present case, Sierra Leonean refugees forced to flee Guinea after suffering harassment, eviction, looting, extortion, arbitrary arrests, unjustified detentions, beatings and rapes. Would it be

required to return to the same country in which they suffered persecution? Consequently, the requirement to exhaust local remedies is inapplicable.

For these reasons, the communication is declared admissible.

Merits

37. In interpreting and applying the African Charter, the African Commission relies on its jurisprudence and, as provided by Articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards.
38. The African Commission is therefore amenable to legal arguments that are supported by appropriate and relevant international and regional human rights principles, norms and standards.
39. The Petitioners have enclosed several affidavits from Sierra Leonean refugees who suffered widespread human rights abuses including harassment, evictions, looting, extortion, arbitrary arrests, beatings, rapes and killings while seeking refuge in the Republic of Guinea.
40. These accounts are based on interviews obtained from collaboration between the Institute for Human Rights and Development in African and Campaign for Good Governance, a Sierra Leonean NGO. Lawyers from both organisations interviewed and recorded statements from refugees who had returned to Sierra Leone from Guinea. For the most part, the depiction of events is substantiated by reports from Human Rights Watch and Amnesty International who have documented the situation of Sierra Leonean refugees in Guinea during the period in question.
41. The Republic of Guinea has ratified several regional and international human rights instruments which include the African Charter, the OAU Convention on the Specific Aspects of Refugee Problems in Africa, the International Covenant on Civil and Political Rights, the UN Convention Against Torture, and the 1951 UN Convention on the Status of Refugees, together with its 1967 Optional Protocol.
42. While the efforts of the Guinean authorities to host refugees are commendable, the allegations that the government instigated and directly discriminated against Sierra Leonean refugees present a picture of serious human rights abuses which contravene the African

Charter and the other international human rights instruments to which Guinea is a party.

43. The statements made under oath by several refugees indicate that their refugee camps were direct targets and taken together with accounts of numerous other abuses, constitute tangible evidence that the Sierra-Leonean refugees in this situation had been targeted on the basis of their nationality and had been forced to return to Sierra Leone where their lives and liberty were under threat from the on-going war.
44. **In view of the circumstances, the Complainant alleges that the situation which prevailed in Guinea in September 2000 manifestly violates Article 12 (5) of the African Charter which sets forth that:**

“The mass expulsion of strangers is prohibited. Mass expulsion is that which targets national, racial, ethnic or religious groups as a whole”.
45. **Among the Articles and other legal instruments to which the Respondent State is a party and by which it is bound to protect all persons against discrimination can be noted: Article 4 of the OAU Convention on the Specific Aspects of Refugees, Article 26 of the International Covenant on Civil and Political Rights and Article 3 of the 1951 United Nations Convention on the Status of Refugees.**
46. **The Complainants allege that in his speech of the 9th September 2000, delivered on radio in Susu language, President Conte incited soldiers and civilians to engage in large scale discriminatory acts against Sierra-Leonean refugees, the consequences of which had been that these persons were the direct victims of harassment, deportations, looting, stealing, beatings, rapes, arbitrary arrests and assassinations. It is further alleged that the President made no effort to distinguish between refugees and rebels and that the Government is therefore directly responsible for the violation of this fundamental precept of international law: Non-discrimination.**
47. **The Complainants also allege that the Respondent State violated the principle of non-refoulement under which no person should be returned by force to his home country where his liberty and life would be under threat.**
48. **The Complainants contend that President Conte’s speech not only made thousands of Sierra-Leonean refugees flee Guinea and**

return to the dangers posed by the civil war, but it also clearly authorized the return by force of Sierra-Leonean refugees. Thus, the voluntary return of refugees to Sierra Leone under these circumstances cannot be considered as voluntary but rather as a dangerous option available for the refugees.

49. The Respondent State alleges that on the 1st September 2000, the Republic of Guinea was victim of armed aggression perpetrated by elements from Liberia and Sierra Leone. These surprise attacks which were carried out simultaneously at its South and South-Eastern borders resulted in the fleeing en masse, of the populations from these zones.
50. Matching reports which came from all fronts to the Respondent State denounced persons who had lived for a long time in Guinea as refugees, and who had turned out to be, where they did not figure among those who had attacked Guinea, at least as accomplices of the attackers.
51. The President of the Republic, by virtue of the powers granted him under the Constitution, jumped to it by taking the measures necessary for safeguarding the nation's territorial integrity. In the process he recommended that all refugees be quartered and that Guineans scatter in all districts in order to unmask the attackers who had infiltrated the populations.
52. The Respondent State emphasises that such measures are in conformity with the provisions of Article 9 of the 1951 UN Convention on the Status of Refugees on refugees and Article 41 of the Laws of Guinea which provides that: "the President of the Republic is the guarantor/custodian of the independence of the nation and of territorial integrity. He is responsible for national defence....."
53. The Respondent State intimates that for the majority of the refugees the statement by the Head of State had been beneficial since the refugees had been registered, given supplies and placed in secured areas.
54. The State underscored the fact that at the time of the events there were not only Sierra Leonean refugees in Guinea but also Liberians and Guinea Bissau nationals. Guinea therefore had no interest in targeting Sierra Leonean refugees since it was public knowledge that all the attacks against the country had been directed from Liberia.

55. The Respondent State points out that there is no violation of the right to non-discrimination, since the speech referred to never mentioned specifically Sierra Leonean refugees. The Respondent State recalled that during the 34th Ordinary Session the Complainant had been requested to produce a transcript of the entire statement, which had not been done, whereas it is the responsibility of the Complainant to provide evidence.
56. The Complainants allege that almost immediately after the broadcast of President Conte's speech, the Guinean Authorities and civilians started to harass the Sierra Leonean refugees and to carry out large scale looting, expulsions and robbery of assets.
57. The Complainants contend that the rapes and physical searches carried out by the Guinean Authorities to establish a kind of discrimination against Sierra Leonean refugees constitute some form of inhuman treatment, thereby violating the dignity of the refugees.
58. The Complainants allege that the President's speech had given rise to widespread sexual violence largely against the Sierra Leonean women in Guinea with the Guinean soldiers using rape as a weapon to discriminate against the refugees and to punish them for being so-called rebels. The communication contains detailed reports of the raping of women of various ages in the prisons, in houses, control posts and refugee camps.
59. The Complainants contend that the violence described in the statements made under oath was undeniably coercive, especially since the soldiers and the civilians used arms to intimidate and threaten the women before and during the forced sexual relations.
60. The Complainant reports large scale acts of violence carried out by the soldiers, police and Guinean civilian protection groups against the thousands of Sierra Leonean refugees in the camps and in the Capital, Conakry. Different cases are mentioned, namely S.B. who is said to have been seriously injured, his hip dislocated and his knees broken with a gun in the Gueckedou Camp. S.Y. talks about soldiers who had shot her in the leg; she reports having been witness to a scene where soldiers were cutting off the ears of Sierra Leoneans with bayonets. L.C. recounts that Guinean soldiers had been shooting at random at the Sierra Leone Embassy on a group of Sierra Leoneans who had been waiting to be repatriated and that a large number of these

refugees had been killed; he mentioned having also been witness at a scene where soldiers in trucks were shooting at Sierra Leoneans who were boarding the ferry to be repatriated: several of them fell into the water and were drowned.

61. The Respondent State, in a critical appraisal of these testimonies as reported, not only made comments but also raised some questions. With regard to isolated cases like those of S.B., M.F., and S.Y., the issues alluded to remain to be proved, declared the Respondent State, since they constitute a simple gathering of evidence. Concerning S.Y.'s testimony, who contends that she saw Guinean soldiers cutting off the ears of Sierra Leoneans with bayonets, it has to be pointed out that if such practices have been noted in certain countries, they do not figure among the habits of the Guinean Army.
62. The Complainants allege that the Guinean soldiers also subjected the Sierra Leonean men and women to humiliating physical searches. These searches were frequently carried out, sometimes in the presence of a group of soldiers and curious onlookers, which constituted a serious insult to their dignity.
63. The Respondent State disputes the testimony of L.C. who recounts that in front of the Sierra Leone Embassy building Guinean soldiers were shooting at random at a group of Sierra Leoneans who were waiting to be repatriated.
64. The Respondent State recalls that the Republic of Guinea and the Republic of Sierra Leone have always enjoyed relations of fraternity and good neighbourliness. This is evidenced by the fact that the Government of Sierra Leone has never complained to the Government of Guinea about any such situation. To say that Sierra Leonean refugees have been shot at by Guinean soldiers is more fiction than reality.
65. Considering all the accusations thus described by the Complainant, the Respondent State wonders if it is only Sierra Leonean refugees who live on Guinean soil. The Respondent State alleges that some hundreds of thousands of Liberian refugees also live in Guinea and enjoy the same privileges and protection as do the Sierra Leoneans. It requested the Complainant to provide evidence with regard to the number of persons killed or injured and to indicate where or to which hospital they had been taken during the so called shooting incident by the Guinean soldiers of Sierra Leonean refugees.

66. **The Respondent State recognises that if these testimonies as reported by the Complainant are proved they can only give rise to emotion and reprobation. But it insists that evidence must be produced and it is the responsibility of the Complainant to produce all the required evidence on the cases reported. The Respondent State points out that if these accounts have a basis the necessary investigations will be carried out and those responsible will be punished for their crimes.**
67. **The African Commission is aware that African countries generally and the Republic of Guinea in particular, face a lot of challenges when it comes to hosting refugees from neighbouring war torn countries. In such circumstances some of these countries often resort to extreme measures to protect their citizens. However, such measures should not be taken to the detriment of the enjoyment of human rights.**
68. **When countries ratify or sign international instruments, they do so willingly and in total cognisance of their obligation to apply the provisions of these instruments. Consequently, the Republic of Guinea has assumed the obligation of protecting human rights, notably the rights of all those refugees who seek protection in Guinea.**
69. **In *Communication 71/92 Rencontre africaine pour la Défense des Droits de l'Homme/Zambia*, the African Commission pointed out that “those who drafted the Charter considered large scale expulsion as a special threat to human rights”. In consequence, the action of a State targeting specific national, racial, ethnic or religious groups is generally qualified as discriminatory in this sense as it has no legal basis.**
70. **The African Commission notes that Guinea is host to the second largest refugee population in Africa with just under half a million refugees from neighbouring Sierra Leone and Liberia. It is in recognition of this role that Guinea was selected to host the 30th Anniversary celebrations of the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa, which was held in Conakry, Guinea in March 2000.**
71. **The African Commission appreciates the legitimate concern of the Guinean Government in view of the threats to its national security posed by the attacks from Sierra Leone and Liberia with a flow of rebels and arms across the borders.**

72. As such, the Government of Guinea is entitled to prosecute persons that they believe pose a security threat to the State. However, the massive violations of the human rights of refugees as are outlined in this communication constitute a flagrant violation of the provisions of the African Charter.
73. Although the African Commission was not provided with a transcript of the speech of the President, submissions before the Commission led it to believe that the evidence and testimonies of eye witnesses reveal that these events took place immediately after the speech of the President of the Republic of Guinea on 9 September 2000.
74. The African Commission finds that the situation prevailing in Guinea during the period under consideration led to certain human rights violations.

For the above reasons, the African Commission,

Finds the Republic of Guinea in violation of Articles 2, 4, 5, 12 (5) and 14 of the African Charter and Article 4 of the OAU Convention Governing the Specific Aspects of Refugees in Africa of 1969.

Recommends that a Joint Commission of the Sierra Leonean and the Guinea Governments be established to assess the losses by various victims with a view to compensate the victims.

Adopted at the 36th Ordinary Session of the African Commission held from 23 November to 7 December 2004 in Dakar, Senegal

255/2002 – Garreth Anver Prince /South Africa

Rapporteur:

32nd Session: Commissioner Chigovera

33rd Session: Commissioner Chigovera

34th Session: Commissioner Chigovera

35th Session: Commissioner Chigovera

36th Session: Commissioner Chigovera

Summary of Facts

- a. The complaint is filed by Mr. Garreth Anver Prince, a South African citizen of 32 years old, against the Republic of South Africa.
- b. The Complainant alleges that despite his completion of the academic requirements for admission as an attorney in terms of the Attorney's Act 53 of 1979, and despite his willingness to register for a contract of community service for a period of one year, which is a requirement under the said ACT, the Law Society of the Cape of Good Hope (the Law Society) declined to register his contract of community service.
- c. The Complainant alleges that the Law Society's refusal to register him was based on his disclosure, made in his application with the Law Society, that he had two previous convictions for possession of cannabis under section 4(b) of the Drugs and Drug Trafficking ACT and his expressed intention to continue using cannabis. The Complainant stated that the use of cannabis was inspired and required by his Rastafari religion. The Law Society held that such a person was not a fit and proper person to be admitted as an attorney.
- d. The Complainant alleges that reasoning and meditation are essential elements of the religion. The use of cannabis is central to these essential practices of the religion that serve as a form of communion. He alleges that the use of cannabis was believed to open one's mind and helped Rastafari gain access to the inspiration provided by Jah Rastafari, the Living God. He further alleges that the use of Cannabis in Rastafari religion was the most sacred act surrounded by very strict discipline and elaborate protocol. The use of the herb, as it is commonly known, is to create unity and assist in establishing the eternal relationship with the Creator.

Complaint

- e. The Complainant alleges violations of Articles 5, 8, 15 and 17(2) of the African Charter on Human and Peoples' Rights.
- f. The Complainant prays that he be entitled to an exemption for the sacramental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.

Procedure

- g. The undated complaint was received at the secretariat on 12th August 2002.
- h. On 16th August 2002, the Secretariat wrote to the Complainant acknowledging receipt of the complaint, and informing him that his complaint has been registered and scheduled for consideration at the Commission's 32nd Ordinary Session.
- i. At its 32nd Ordinary Session held from 17th – 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.
- j. On 4th November 2002, the Secretariat wrote to the complainant and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the Commission.
- k. On 19th December 2002, the Secretariat received the Complainant's written submissions on admissibility of the communication, which was forwarded to the Respondent State on 17th February 2003. In the same letter, the Secretariat reminded the Respondent State to forward its written submissions on the admissibility of the communication before the 33rd Ordinary Session.
- l. By a Note Verbale of 31st March 2003, which was not received in a legible print out form, the Respondent State confirmed receipt of the Commission's correspondences and requested the Commission to extend the deadline for the submission of its response on the admissibility of the complaint for another three months.
- m. On 8th April 2003, the Secretariat wrote to the Respondent State confirming receipt of their correspondence and requesting them to resend the said request to it as the same did not reach the Secretariat in a legible print out form.

- n. By a fax of 5th May 2003, the Respondent State confirmed its request for more time to enable it prepare and forward its written submissions on admissibility of the communication to the Commission.
- o. At its 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003, the African Commission examined the communication and postponed its decision on admissibility to its 34th Ordinary Session granting the Respondent State more time as per its request.
- p. On 12th June 2003, the Secretariat wrote to the complainant and the Respondent State informing them of this decision and further reminding the latter to forward its written submissions on admissibility of the same before the 34th Ordinary Session of the Commission.
- q. On 12th September 2003, the Secretariat of the African Commission received the written submissions on admissibility of the Respondent State. This was forwarded to the complainant on 23rd September 2003.
- r. At its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003, the African Commission examined the complaint and declared it admissible.
- s. On 10th December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the African Commission their respective written submissions on the merits of the communication before the 35th Ordinary Session.
- t. On 12th March 2004, the Respondent State forwarded its written submissions on the merits of the communication and expressed its wish to lead oral arguments on the matter during the 35th Ordinary Session of the African Commission, receipt which the Secretariat acknowledged on 17th March 2004. A similar request to address the African Commission orally was sent to the African Commission by the complainant on 11th and 23rd March 2004.
- u. On 17th March 2004, the Secretariat of the African Commission forwarded a copy of the Respondent State's written submissions on the merits to the complainant.

- v. By a Note Verbale of 21st May 2004, the Respondent State informed the Secretariat that the parties in the matter have consulted on the date for the hearing of the communication by the African Commission and kindly requested the latter to consider the same on the 29th May 2004, which date would be most suitable for them to appear.
- w. The parties have concluded their exchange of submissions on the merits. They are now both requesting the African Commission to allow them to lead oral arguments to complement their submissions on the same. The African commission granted them audience as requested to enable them complement their written submissions and to enable the African Commission to engage the parties during their presentations.
- x. At its 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004, the African Commission examined the complaint and decided to defer its decision on the merits to the 36th Ordinary Session.
- y. On 17th June 2004, the Secretariat informed both parties of this decision.
- z. At its 36th Ordinary Session that took place from 23rd November to 7th December 2004, the African Commission considered the communication and took a decision on merits thereto.

LAW**Admissibility:**

- aa. Since both parties have not contested the issue of admissibility of this communication, and since the complaint complies with the requirements under Article 56 of the African Charter, the African Commission decided, unanimously, to declare it admissible at its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003.

Decision on Merits:

- bb. As per the original complaint, the Complainant is a 32 years old man who wishes to become an attorney in the courts of South Africa. Having satisfied all the academic requirements of the South African Attorney's Act (the Act), he applies to register a contract of community service with the Law Society of the Cape of Good Hope (the Law Society). Under the same Act, registering articles of clerkship or performing community Service, as Mr. Prince wished to do, is another requirement that an applicant should fulfil before he/she could be admitted as an attorney to practice before the High Court. Per the

provisions of the Act, the applicant, such as Mr. Prince should serve for a period of one year. Before serving so, however, the Act requires that the applicant should provide proof to the satisfaction of the Law Society that he/she is “fit and proper person.” In his application to the Society, and as part of the legal requirement, Mr. Prince disclosed not only that he had two previous convictions for possession of cannabis under the Drugs and Drug Trafficking Act (the Drugs Act) but that he intended to continue using cannabis as inspired and required by his Rastafarian religion.

cc. The Law Society declined to register Mr. Prince’s contract of community service taking the view that a person who, while having two previous convictions for possession of cannabis, declares his intention to continue using the substance, is not a “fit and proper person” to be admitted as an attorney. Mr. Prince alleged that the Law Society’s refusal to register meant that as long as he adhered to the requirements of his Rastafari faith, he would never be admitted as an attorney. Accordingly, Mr. Prince brought this complaint alleging violation of Articles 5, 8, 15, and 17(2) of the African Charter. In his prayers to the African Commission, the complainant requested the African Commission to find the Respondent in violation of the said Articles, and that he be entitled to an exemption for the sacramental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.

dd. In elucidating his claims, the complainant cites two South African statutes as having an impact on the practice of the Rastafarian religion: the Drugs Act and the Medicines and Related Substances Act (the Medicines Act). The former lists cannabis as an undesirable dependence-producing substance and prohibits its use and possession, in line with the stated purpose of the Act: to prohibit the use and possession of dependence-producing substances and dealing in such substances. It, however, exempts the use or possession of this substance in certain circumstances such as for medicinal purposes, subject to the provisions of the Medicines Act, which in turn regulates the registration of medicines and substances. The latter Act, however, prohibits the use or possession of cannabis except for research and analytical purposes. The complainant alleges that the purposes of the prohibitions contained in these two Acts coincided and hence both Statutes proscribed the sacramental use of cannabis and therefore impacted upon the religious practices of Rastafari. The proscriptions are unlimited in terms that they also encompassed the use or possession of cannabis by Rastafari for bona fide religious purposes failing to distinguish between Rastafari and drug abusers thereby grouping genuine religious observation with criminality. He alleges

that the Respondent State thus violated his right to dignity [Article 5], his right to freedom of religion [Article 8], his right to occupational choice [Article 15], and his right to a cultural life [Article 17(2)].

- ee. The complainant, in requesting for an exemption for sacramental use of cannabis, further explains that he does not ask for the overall decriminalisation of cannabis, rather for a reasonable accommodation to manifest his beliefs in accordance with his Rastafari religion. Such reasonable accommodation ensures a religiously pluralistic society that is an important principle of any democratic society. He adds that Rastafari is a minority and vulnerable group, a political minority not able to use political power to secure favourable legislations for themselves.
- ff. In its initial response of 5th September 2003, the Respondent State argues that attorneys are obliged to uphold the law and wilful defiance of the law suggests that such a person is not fit and proper to be admitted as an attorney. This is so even if the person applying for admission believes that a law or a provision thereof contravenes his or her fundamental rights. Until such time that a law or a provision thereof has been declared unconstitutional or has been changed by legislative or other means, everyone has duty to obey the law or provision in question.
- gg. The Respondent State further argues that any religious practices must be conducted within the framework of the law and must, if necessary, be adapted to comply with the law as failure to do so will result in anarchy. Rastafari is a genuine religion protected by the South African Constitution. The recognition of and the right to practice a religion and engage in associated activities may not be exercised in a manner which is inconsistent with the Bill of Rights and the Rule of Law under which no one would be punished except for a distinct breach of law to which everyone is subject. Religious practices and the freedom to practice a religion must be conducted strictly in accordance with the law, which must be obeyed.
- hh. Contrary to the complainant's allegation, the Respondent State avers that the fact that reasonable limitations are placed on the practice of a religion in the interests of society does not negate the essential right to freedom of religion. The Constitution permits limitation of rights without which the rights of others may be infringed with unintended consequences. The prohibition on the use of cannabis is a reasonable and permissible limitation on the freedom of religion. The legal restrictions placed on the use of cannabis do not

erode the necessity to ensure religious pluralism, are rational and legitimate and do not invade the right any further than it needs.

- ii. The Respondent State further avers that lawyers have a duty, at all times, to uphold the Constitutions and the rule of law, which includes adhering to the law, adapting ones religious practices to confirm with the law and generally setting an example to others. The complainant's professional difficulties are due to his refusal to accept and adhere to the relevant laws and that the worship of the Creator is possible without cannabis. The impugned provisions of the law do not compel Rastafari to desist from taking part in an aspect of the cultural life of their community.
- jj. In conclusion, the Respondent State admits that the impugned provisions do prohibit the use or possession of cannabis for bona fide religious purposes but they are not overbroad and that the Constitutional Court has upheld the restrictions placed on the use of cannabis.
- kk. In its further written submissions on the merits, the Respondent State raised the following points:
 - That the matter has been carefully considered by the South African Courts which found that while the legislations in question did limit Mr. Prince's constitutional rights, specifically the right to freedom of religion, such limitations were justifiable under the South African Constitution which allows limitations only in terms of law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Limitations may also take place taking into account all relevant factors, including:
 - The nature of the right;
 - The importance of the purpose of the limitation;
 - The nature and extent of the limitation;
 - The relation between the limitation and its purpose; and
 - The less restrictive means to achieve the purpose.
 - That in considering the matter, the South African Constitutional Court made a careful analysis of the Bill of Rights and struck a careful balance between competing interests in society, while remaining acutely aware of the historical context and unique feature of the South African society of which it is the highest judicial body.

- That the African Commission should apply extreme care in considering this matter as a determination that will in effect contradict the decision of an esteemed judicial body will inevitably carry seeds of possible conflict between domestic and international legal systems, and will upset the careful balances struck within the young and developing human rights system of member states of the AU.
- That the South African Courts, in denying Mr. Prince's application, and in striking a balance between his rights and the interests of the wider society, did not only do so with South African domestic law in mind, but in the process also took into account the widest possible scope of international law, both customary international law and treaty law, including the African Charter. By using the same international law sources as the South African Courts, the African Commission should come to the same conclusions as that of the South African domestic courts.
- That, in order to allow the domestic legal system of South Africa co-exist with the African Charter without undue tension, the African Commission should apply the following two methods of interpretation:
 - ***The Principle of Subsidiarity*** which delimits or distributes powers, functions and responsibilities between the state on the one hand, and individuals and groups within the jurisdiction of the state, on the other. Equally, this can be applied to distribute powers between national authorities of State Parties to the African Charter and the African Charter itself. The national authorities should have the initial responsibility to guarantee rights and freedoms within the domestic legal orders of the respective states, and in discharging this duty, should be able to decide on appropriate means of implementation. The African Commission should therefore construct its role as subsidiary, as a narrower and supervisory competence in subsequently reviewing a state's choice of action against the standards set by the provisions of the African Charter. In terms of this construction, the African Commission should not substitute for domestic institutions in the interpretation and application of national law.
 - ***The margin of appreciation doctrine***, which is the logical result of the application of the principle of subsidiary. It's a discretion that a state's authority is allowed in the implementation and application of domestic human rights norms and standards. This discretion that the state is allowed, rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that

need to be struck between the competing and sometimes conflicting forces that shape a society. Accordingly, the African Commission, in considering the matter, has to take into account the legal and factual situation in South Africa. It should not view this communication *in abstracto*, but in the light of the specific circumstances pertaining in the Respondent State. The South African Constitutional Court did take into account such specific circumstances: the *ratio* for the decision to limit the right to freedom of religion in terms of the Constitution was that the use of cannabis by Rastafari could not be sanctioned without impairing the State's ability to enforce its drug legislation in the interest of the public at large.

38. The Respondent State finally avers that the African Charter does not prescribe how States Parties should achieve the protection of the rights enshrined within the domestic jurisdiction, but leaves the way in which such protection is to be achieved to the discretion of States Parties.

39. The African Commission has examined the complaint and the various documents thereto and decides as follows:

Violation of the right to freedom of religion: Article 8 of the African Charter

40. The complainant alleges violation of this Article due to the Respondent State's alleged proscription of the sacramental use of cannabis and for failure to provide a religious exemption for Rastafari. The crux of his argument is that manifestation of Rastafari religious belief, which involves the sacramental use of cannabis, places the Rastafari in conflict with the law and puts them at risk of arrest, prosecution and conviction for the offence of possession or use of cannabis. While admitting the prohibition serves a rational and legitimate purpose, he nonetheless holds that this prohibition is disproportionate as it included within its scope the sacramental use of cannabis by Rastafari.

41. Although the freedom to manifest one's religion or belief cannot be realized if there are legal restrictions preventing a person from performing actions dictated by his or her convictions, it should be noted that such a freedom does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one's religion must yield to the interests of society in some circumstances. A parent's right to refuse medical treatment for a sick child, for instance, may be subordinate to the state's interest in protecting the health, safety, and welfare of its minor children.

42. In the present case, thus, the Commission upholds the Respondent State's restriction, which is general and happens to affect Rastafari incidentally (de

facto), along the lines of the UN Human Rights Committee, which, in the case *K. Singh Bhinder v. Canada*, (Communication No. 208/1986) upheld restrictions against the manner of manifestation of one's religious practice. That case concerned the dismissal of the complainant from his post as maintenance electrician of the government-owned Canadian National Railway Company. He had insisted on wearing a turban (as per the edicts of his Sikh religion) instead of safety headgear at his work, which led to the termination of his labour contract. The UN Human Rights Committee held:

If the requirement that a hard hat be worn is seen as a discrimination de facto against persons of the Sikh religion under Article 26 (of the ICCPR), then, applying the criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by wearing of hard hats is to be regarded as reasonable and directed towards objective purpose that are compatible with the ICCPR.

43. The African Commission considers that the restrictions in the two South African legislations on the use and possession of Cannabis are similarly reasonable as they serve a general purpose and that the Charter's protection of freedom of religion is not absolute. The only legitimate limitations to the rights and freedoms contained in the African Charter are found Article 27(2); i.e. that the rights in the African Charter "shall be exercised with due regard to the rights of others, collective security, morality, and common interest." The limitation is inspired by well-established principle that all human and peoples' rights are subject to the general rule that no one has the right to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' recognised elsewhere. And the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages, which are to be obtained. It is noted that the Respondent State's interest to do away with the use of cannabis and its abuse/trafficking stems from the fact that, and this is also admitted by the complainant, cannabis is an undesirable dependence-producing substance. For all intents and purposes, this constitutes a legitimate limitation on the exercise of the right to freedom of religion within the spirit of Article 27(2) cum Article 8.
44. Besides, the limitations so visited upon the complainant and his fellow Rastafari fall squarely under Article 2 of the African Charter which

requires States to ensure equal protection of the law. As the limitations are of general application, without singling out the complainant and his fellow Rastafari but applying to all across the board, they cannot be said discriminatory so as to curtail the complainant's free exercise of his religious rights.

Violation of the right to occupational choice: Article 15 of the African Charter

45. The complainant has alleged that because of his religious beliefs, the Law Society refused to register his contract of community service, thereby violating his right to occupational choice. He argued that the effect of the legal restrictions on cannabis in effect denied the Rastafari access to a profession.
46. One purpose of this Charter provision is to ensure that States respect and protect the right of everyone to have access to the labour market without discrimination. The protection should be construed to allow certain restrictions depending on the type of employment and the requirements thereof. Given the legitimate interest the State has in restricting the use and possession of cannabis as shown above, it is held that the Complainant's occupational challenge can be done away with should he chose to accommodate these restrictions. Although he has the right to choose his occupational call, the Commission should not give him or any one a leeway to bypass restrictions legitimately laid down for the interest of the whole society. There is no violation, thus, of his right to choose his occupation as he himself chose instead to disqualify himself from inclusion by choosing to confront the legitimate restrictions.

Violation of the right to dignity and cultural life: Articles 5 and 17(2) of the Charter

47. The complainant lists down the main characteristics for identifying the Rastafari way of life (culture): hairstyle, dress code, dietary code, usage of cannabis, the worship of Jah Rastafari, the Living God and others. He further states that the critical form of social interaction amongst the followers of this religion is the worship of the Creator, which is not possible without cannabis, and to which the Respondent State argues to the contrary.
48. The Commission notes that the participation in one's culture should not be at the expense of the overall good of the society. Minorities like the Rastafari may freely choose to exercise their culture, yet, that should not grant them unfettered power to violate the norms that keep the whole nation together. Otherwise, as the Respondent State alleged, the result would be anarchy, which may defeat everything altogether. Given the outweighing balance in favour of the whole society as opposed to a restricted practice of Rastafari culture, the Commission should hold that the Respondent State violated no cultural rights of the complainant.

49. With respect to the alleged violation of the right to human dignity, the Commission holds that the complainant's treatment by the Respondent State does not constitute unfair treatment so as to result in his loss of self-worth and integrity. As he or his fellow Rastafari are not the only one's being proscribed from the use or possession of cannabis, the complainant has no grounds to feel devalued, marginalized, and ignored. Thus, the Commission should find no violation of the right to dignity.

With Respect to the arguments of the Respondent State invoking the inter-related ***Principle of Subsidiarity*** and the ***margin of appreciation doctrine***:

50. The African Commission notes the meaning attached to these doctrines by the Respondent State as outlined in its submissions to the former. The principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for internal/domestic procedures found in the Respondent State that strive to give effect to the promotion and protection of human and peoples' rights enshrined under the African Charter.
51. Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the Respondent State in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.
52. Both doctrines establish the primary competence and duty of the Respondent State to promote and protect human and peoples' rights within its domestic order. That is why, for instance, the African Charter, among others, requires complainants to exhaust local remedies under its Article 56. It also gives Member States the required latitude under specific Articles in allowing them to introduce limitations. The African Commission is aware of the fact that it is a regional body and cannot, in all fairness, claim to be better situated than local courts in advancing human and peoples' rights in Member States.
53. That underscored, however, the African Commission does not agree with the Respondent State's implied restrictive construction of these two doctrines relating to the role of the African Commission, which, if not set straight, would be tantamount to ousting the African

Commission's mandate to monitor and oversee the implementation of the African Charter. Whatever discretion these two doctrines may allow Member States in promoting and protecting human and peoples' rights domestically, they do not deny the African Commission's mandate to guide, assist, supervise and insist upon Member States on better promotion and protection standards should it find domestic practices wanting. They do allow Member States to primarily take charge of the implementation of the African Charter in their respective countries. In doing so, they are informed by the trust the African Charter has on Member States to fully recognise and give effect to the rights enshrined therein. What the African Commission would not allow, however, is a restrictive reading of these doctrines, like that of the Respondent State, which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter.

For these reasons, the African Commission finds no violation of the complainant's rights as alleged.

Adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights, 23rd November 7th December 2004, Dakar, Senegal.

COMMUNICATIONS DECLARED INADMISSIBLE

- **260/02** Bakweri Land Claims Committee / Cameroon
- **263/02** Kenyan Section of the International Commission of Jurists, Law Society of Kenya, Kituo Cha Sheria/Kenya

260/02 – Bakweri Land Claims Committee / Cameroon**Rapporteur:**

32nd Session: Commissioner:
33rd Session: Commissioner: Dankwa
34th Session: Commissioner: Dankwa
35th Session: Commissioner: Dankwa
36th Session: Commissioner: Dankwa

Summary of Facts

1. The complaint is filed by the Bakweri Land Claims Committee (BLCC) on behalf of the Traditional Rulers, Notables and Elites of the indigenous minority peoples of Fako Division (the “Bakweri”) against the government of Cameroon.
2. The complaint follows the Presidential Decree No.94/125 of 14th July 1994 where the Government of Cameroon listed the Cameroon Development Corporation (CDC), which will allegedly result in the alienation, to private purchasers, of approximately 400 square miles (104,000 hectares) of lands in the Fako division traditionally owned, occupied or used by the Bakweri. The Complainant alleges that the transfer would extinguish the Bakweri title rights and interests in two-thirds of the minority group’s total land area.
3. The Complainant states that the land in question was seized from Bakweri landowners between 1887 and 1905 by German colonial occupiers, which was acknowledged by the British colonial authorities and the United Nations General Assembly (UN Document 189, paragraph 16) in November 1949, and that the land in question was bought back by the British Colonial Government following WWII, and declared ‘Native Lands’ and placed under the custody of the Governor of Nigeria to hold in trust for the Bakweri. In 1947, the lands were later leased to a newly created statutory corporation, the Cameroon Development Corporation (CDC) for a period of 60 years to administer and develop same until such time that the Bakweri people were competent to manage them without outside assistance.

4. The Complainant alleges that the Bakweri's antecedent rights and interests to this land survived the change of sovereignty from the British Crown to the State of Cameroon. The Complainant states that the Bakweri title to this land has never been extinguished, confirmed by Cameroon's 1974 Land Tenure Act 74-1 which states that land entered in the *Grundbuch* is subject to the right of private property, and that the lands held in trust were leased in 1947 for a period of 60 years to the CDC, until that time that the Bakweri people were competent to manage them without assistance, and that during this time the rents paid for the land were to be paid to the local councils in Fako division.
5. The Complainant alleges that the process of extinguishment set in motion by Decree No. 94/125, the privatization of CDC and with it the likelihood of transferring Bakweri private lands to third parties is in violation of the Bakweri people's right to private property and the freedom to dispose of their wealth and natural resources, which are guaranteed in the African Charter. The Complainant further alleges that this process is being carried out without any discussion of fair compensation for the Bakweri in a violation of the African Charter and Cameroon's own Constitution.
6. The Complainant alleges that the concentration of private Bakweri lands in non-native hands undermines the Bakweri people's right to development, by irrevocably altering existing land holding arrangements and pattern of natural resource exploitation and by forcing a future exodus of the Bakweri population to other parts of Cameroon who will need to relocate for more land for their agricultural and development needs, and thereby risk aggravating social tensions. The Complainant further alleges that the Government of Cameroon has adopted a discriminatory approach toward the Bakweri that has totally lacked in fundamental fairness and has failed to include proper representation of the Bakweri stakeholders in the negotiations with regard to the future of the CDC.

Complaint

7. The Complainant alleges violations of Articles 7(1)(a), 14, 21, 22 of the African Charter on Human and Peoples' Rights.
8. The Complainant prays for the Commission to recommend that:
 - **the government of Cameroon affirm the lands occupied by the CDC are private property;**

- the Bakweri be fully involved in any CDC privatization negotiations;
- ground rents owed to the Bakweri dating back to 1947 be paid to a Bakweri Land Trust Fund;
- the Bakweri, acting jointly and severally, be allocated a specific percentage of shares in each of the privatized companies;
- the BLCC be represented in the current and all future policy and management boards.

Procedure

9. The complaint was dated 4th October 2002 and received at the secretariat on 8th and 15th October 2002.
10. At its 32nd Ordinary Session held from 17th – 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.
11. On 4th November 2002, the Secretariat wrote to the complainant and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the Commission.
12. On 31st January 2003, the Respondent State forwarded its written submission on the admissibility of the communication, which was forwarded to the complainant.
13. On 3rd February 2003 (received on 6th February 2003), the complainant forwarded its written submission on the admissibility of the communication as requested by the African Commission. The Secretariat forwarded a copy of the same to the Respondent State on 17th February 2003.
14. On 4th March 2003, the complainant forwarded its response to the submissions by the Respondent State. The former also requested for leave to appear before the Commission at its 33rd Ordinary Session for the purpose of making an oral submission.
15. On 8th May 2003, the Secretariat received the written submission of the Respondent State on the admissibility of the complaint.
16. At its 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003, the African Commission considered the communication and deferred its decision on admissibility to the next ordinary session allowing the

complainant more time to forward written response to the Respondent State's reply on admissibility, which was handed to the complainant on 24th May 2003. Pending the final decision of the African Commission on the issue, the latter also requested its Chairman to forward an urgent appeal letter to His Excellency, President Paul Biya of the Republic of Cameroon respectfully urging Him to ensure that the Respondent State no further alienation of the land in question takes place.

17. Accordingly, the Chairman of the African Commission forwarded the said letter to His Excellency, President Paul Biya of the Republic of Cameroon on 20th May 2003.
18. The complainant forwarded its written response to the Respondent State's reply on 23rd August 2003.
19. At its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003, the African Commission heard oral submissions of the parties and decided to defer its consideration on admissibility to the 35th Ordinary Session. The parties were also requested to avail the Secretariat with copies of the Constitutions of the Republic of Cameroon and relevant legislations cited in their respective submissions.
20. On 10th December 2003, the Secretariat wrote to the parties informing them of this decision.
21. At its 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004, the African Commission deferred its decision on admissibility to the 36th Ordinary Session due to lack of time.
22. On 17th June 2004, the Secretariat wrote to the parties informing them of this decision.
23. During its 36th Ordinary Session that took place from 23rd November to 7th December 2004 in Dakar, Senegal, the African Commission considered the communication.

The Law Admissibility

24. In its initial complaint dated 4th October 2002, the Complainant notes that it is mindful of the requirement of exhausting local remedies under Article 56 (5) of the African Charter. This rule is waived, however, where it is obvious that the procedure for exhausting domestic remedies is "unduly prolonged" and further, the complainant holds, that the African Commission, in its

jurisprudence, has cautioned against the mechanical application of the domestic remedies rule particularly in “cases where it is impractical or undesirable for complainant to seize the domestic courts in case of each violation.” [*Free Legal Assistance Group et al. vs. Zaire, ACHPR Communication No. 25/89, 49/90, 56/91, and 100/93* Para 37]. The Complainant also cited the African Commission’s jurisprudence on the need to exhaust local remedies [*in the ACHPR Communication 155/96 Social and Economic Rights Action Center for Economic and Social Rights vs. Nigeria*]. The Complainant drew the Commission’s attention to the fact that the Government of Cameroon has had four decades during which it could have redressed these grievances within the framework of its domestic legal system. It further argues that the Government instead was engaged in delaying tactics to avoid taking a principled position on the Bakweri land problem. It has known, for very long time, about the violations of Bakweri land rights and thus had “ample opportunity” to reverse the situation consistent with its obligations under the Banjul Charter.

25. The Complainant further argues that during this entire period, it petitioned the successive Cameroonian governments for restitution. It met with the various officials of the Republic, including the Prime Minister and the Assistant Secretary General at the Presidency, but to no avail. The Complainant holds thus that any further negotiations to seek domestic relief will merely prolong the resolution of the Bakweri land problem.
26. The Complainant alleges that even if the exhaustion of domestic remedies rule is given its most restrictive meaning, requiring it to go through the courts of Cameroon would be futile. No judge in Cameroon will risk his/her career, not to mention his/her life, to handle this politically sensitive matter, as the matter implicates the crown jewel of a Privatisation Programme the Government is determined to see through, pits the Bakweri people against a Prime Minister and Head of Government as well as an Assistant Secretary General at the Presidency, both of whom are Bakweri but non elected officials holding their offices at the pleasure of the President, and places the Government in a face off with a politically-conscious minority tribe that has refused to stay quiet and watch its ancestral lands being sold to non-natives. The Complainant claims that experience has shown that such is not the kind of politically-sensitive litigation that a judiciary firmly under the control of the President would like to handle and it is a contest in which the complainant is not going to receive a fair hearing.
27. The Complainant concludes that under the circumstances asking the Bakweri to seek domestic relief will merely prolong the agony of the Bakweri in seeking a resolution to their Land Problem.

28. In its 4th February 2004 further written submissions on the admissibility of the complaint, the Complainant contends that BLCC is the accredited agent of the Bakweri People on whose behalf it filed the present communication, that the complaint is not pending before any other international tribunal, that the allegations contained therein are backed by documentary evidence, and that there is no insulting language used. In elucidating further on Article 56(5) of the African Charter, the complainant alleges that the thrust of the provision therein is to check whether an effective legal remedy exists in Cameroon of which the complainant could avail itself. The complainant alleges that no such remedy existed and that special circumstances excused it from compliance with the exhaustion requirement.
29. One, the complainant alleges that in Cameroon, the judiciary is neither free nor impartial with the result that justice tends to be dispensed in a discretionary manner thereby making recourse to domestic avenues of redress uncertain, impractical and undesirable. Second, the complainant alleges that the Government of Cameroon has had ample time to resolve the Bakweri Land Claims problem but has only failed to do so, instead, has effectively blocked inferior decision-making organs from taking on the matter.
30. The Complainant proceeded to argue that in deciding whether BLCC has made full use of the available legal remedies, attention ought to be focused on what in the Cameroon context passes for effective remedies. It alleges that the legal and political context in which justice is administered in Cameroon is one where the President wields extraordinary powers. It is a unified Executive wherein the last word in domestic remedies whether of an administrative or legal nature in the Cameroonian context is the President of the Republic. Presidential decisions carry a kind of *res judicata* on other state institutions and organs.
31. The Complainant argues that Cameroon's judiciary lacks independence. To substantiate this, it cites the 1999 and 2001 **Human Rights Reports on Cameroon** produced by the United States Department of State, and a newspaper report. Although the President is assisted by a Higher Judicial Council in the appointment of members of the bench and officials of the legal department, judicial officers serve as the President's pleasure. Besides, the Judicial Council is completely under the control of the President who appoints the majority of its members and presides over all its meetings.
32. The Complainant avers that the supremacy of the Presidency and its dominance of the judiciary give rise to a peculiar form of *de facto* Executive 'pre-emption' of decision making by subordinate state organs, regardless of whether there is an actual conflict between them or not. Presidential 'pre-emption' of decision-making at all levels and in all areas, judicial as well as non-judicial, operates in much the same way as an ouster clause which bars

“the ordinary courts from taking up cases placed before the special tribunals or entertaining any appeals from the decisions of the special tribunals.” [International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa Jr. and Civil Liberties Organization Vs. Nigeria, Comm. No. 137/94, 139/94, 154/96 and 161/97]. The Bakweri case is not entirely dissimilar to ACHPR Communication 137/94 et al. as the presidential ‘pre-emption’ ousts the jurisdiction of the ordinary courts thus depriving the complainant of effective domestic relief.

33. The complainant further reminds the Commission that the relief it is seeking is for the Government to acknowledge in writing its legal title to the Bakweri Lands, which can only come from the authority that issued the Privatisation Decree of 1994, which is non-other than the President of the Republic. The later can theoretically be ordered to do so by the courts. Yet, that would not be possible as the court system remains under the President’s total control, whose judges are personally appointed, promoted or removed by him.
34. The Complainant avers that in Cameroon, justice is exercised in a discretionary manner through a process of *de facto* ousting of the jurisdiction of the courts. Executive-controlled organs including Ministers can and do make judicial decisions by-passing the courts. Besides, there is inordinate control in the dispensation of justice exercised by law officials, like the procurer of the Republic, who is an official of the legal department, can order law enforcement officers to either enforce a court judgement or ignore it. For this, the complainant cites the procurator’s discretionary action not to enforce a court judgement in the Cameroon Tea Estates (CTE) (which plants tea on disputed Bakweri lands) management dispute, where it was ordered that the Board of the CTE reinstate the general manager whom they dismissed. The complainant further alleges that there is also a discretionary exercise of power evident in the judiciary. This has implications on the requirement of exhaustion of domestic remedies by the complainant as the procurator’s refusal to enforce the decision in the management dispute foreshadowed the fate of the BLCC if a court were to exercise jurisdiction *in rem* over the disputed Bakweri lands, which also introduced uncertainty undermining confidence in the court system. The Complainant draws the Commission’s attention to its decision in the Communication. No. 60/91, Constitutional Rights Project Vs. Nigeria. The issue in that communication was a provision in the Robbery and Firearms Act (Special Provisions) which conferred on the State Governor the power to confirm or disallow a conviction for violations of this law by a special tribunal and the African Commission had held that “the Governor’s power was discretionary extraordinary remedy of a non-judicial nature” and that “it would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles.”

35. In expounding further on its claim that the Government of Cameroon had adequate notice and opportunity to remedy the violations, the complainant argues that more than nine years have passed since they referred the matter to the President of the Republic, following the privatisation decree of 1994 affecting the Bakweri lands. The President was also sent another memorandum from Bakweri landowners in 1999. The complainant argues that these were done in light of the primacy of the Presidency under the Republic's Constitution and the existent presidential pre-emption of decision-making at all levels. The Government of Cameroon has been duly notified of this problem as the Bakweri lands problem has been around for several decades, nine years have passed since the government was seized of it, that in January 2003, a special envoy of the President met and assured the Bakweri chiefs that the government intended to "provide a sustainable and durable solution" to the Bakweri lands problem, and that the Government's own representatives before the UN Sub-Commission in February 2002 had expressed the Government's readiness to resolve the problem amicably. The Complainant argues that where the Republic has been aware of the problem for at least nine years and that where the opportunity to redress the problem has been squandered due to unwarranted delay and slow state response, it should not be compelled to exhaust local remedies.
36. The Complainant further avers that the remedies in Cameroon are inadequate and unduly prolonged and hence need not be exhausted. It, however, admits that although the matter never went to court but was referred to the President of the Republic for a political/administrative solution, the government's own conduct in the matter implicitly admitted the impracticality or undesirability for complainant to seize the courts of Cameroon as demonstrated by the declaration made by the representatives of the government to the UN Sub-Commission to resolve the matter satisfactorily. Still, the complainant maintains that it tried to engage pressure authorities through various means but to no avail. The lack of progress, it holds, meant to suggest that remedies either do not exist or cannot be effective in the Complainant's situation and in any event, their application is being increasingly prolonged.
37. The Complainant also argues that remedies in Cameroon are unavailable and to the extent they exist ineffective. The continued classification of the Bakweri lands as State Property afforded complainant no basis for legally challenging the government's acts or omissions that violate its ownership rights. Besides, the rule of exhaustion of remedies should not be invoked where it offers no possibility of success, which the government will not be able to prove. An insistence on the pursuit and exhaustion of domestic remedies will only prolong the application of the Bakweri people.

38. In its submission on admissibility, dated 31st January 2003, the Respondent State requested the Commission to declare it inadmissible. It raised the following preliminary objections, that:
- the author of the communication does not show any proof that it is the victim of a violation of the Charter;
 - the object of the communication is unclear as it interchangeably speaks about the violation of the “right to own land in Cameroon,” “the dispossession of indigenous peoples of lands that they have historically owned and occupied,” and “the violation of the right of an indigenous ethnic minority in Cameroon to own land;”
 - the communication is improper as the author deliberately remains imprecise about the actual illicit act for which the State of Cameroon is blamed: privatisation or sale;
 - the author did not exhaust local remedies as all the actions the BLCC took certainly do not correspond to remedies mentioned by the African Charter;
 - the communication casts such suspicions and aspersions on the Cameroonian judicial system and hence could be considered insulting per Article 56 of the Charter; and
 - the UN Sub-Commission has already settled the case brought before the African Commission (*ACHPR Communication 15/88 Mpaka-Nsusu Andre Alphonse Vs. Zaire*).
39. In its further submission of 5th May 2003, the Respondent State avers that there is no provision under Cameroonian law that excludes any form of appeal against acts of the executive. It argues that “it must not hastily be concluded that a State Party to the convention has neglected to act in compliance with its obligation to provide effective local remedies” [*Iner-American Human Rights Court, Velasquez Rodriguez case*] The BLCC should not be allowed to transform the African Commission into a court of first instance. The rule of exhaustion of local remedies implies legal action brought before the courts and not just political actions. Since 1994, the BLCC has never taken any action against the State of Cameroon before the courts. Seizure of judicial bodies cannot be avoided on the basis of subjective suspicions or because of allegations that it is a politically charged case or a politically sensitive case.
40. In its 4th March and 22nd August 2003 memorials, the complainant rebutted the preliminary objections raised by the Respondent State.
41. At its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003, the African Commission granted audience to the parties to complement their respective written submissions orally.

42. In its oral submission, the Complainant stated that since it has come forward with a ***prima-facie*** case, the burden should shift to the Respondent State to prove that domestic remedies are available, effective and adequate. There are no such remedies, including the Constitutional Council before which BLCC has no standing. BLCC has attempted to settle the matter amicably; yet, the Respondent State was not willing and has resorted to harassment, and intimidation. BLCC has been sued and an injunction been issued against it declaring it an illegal body, to curtail it from representing the victims and to generally frustrate the efforts of the victims to exercise their rights under the African Charter. Should the matter be deferred to local procedures, the Complainant requested an indication from the Respondent State to where it may be directed.
43. The Respondent State, in its turn, stated that BLCC has the right to bring its case before the competent bodies in Cameroon. The Government respected its own institutions and that it would not accept arguments that its legal system is incompetent to receive or deal with any case from anyone, while it is evident that there are thousands of cases being entertained by its courts. The Government respects the African Commission and hopes that it won't admit the present matter when no attempt has been made to seize its courts. The UN Sub-Commission has ruled that the petitioners need to seek local remedies. The Commission could open a floodgate by admitting the present communication despite the fact that no attempt was made to exhaust local remedies. The Commission should thus declare it inadmissible for BLCC be directed to vindicate itself before local courts. Indeed BLCC is sued in the local courts, but it is not by the Government but a private entity. But as an advice, all the BLCC had to do was to seek a declaratory judgment from the High Court to the effect that "XYZ are the beneficiaries or residual title holders of the disputed land".
44. The Commission has examined the respective written and oral submissions on admissibility of the parties and rules as follows.
45. To the Respondent State's objection that the complainant does not have standing (*locus standi*) to bring, the complainant avers that the complainants (including the counsel representing them) are all Bakweri and hence victims of the violation. BLCC represents the Bakweri and has authority to speak for them as backed by a resolution adopted by the custodians of the Bakweri lands (Resolution attached in the file).
46. The African Commission notes that the ***locus standi*** requirement is not restrictive so as to imply that only victims may seize the African Commission. In fact, all that Article 56 (1) demands is a disclosure of the identity of the author of the communication, irrespective of him/her being

the actual victim of the alleged violation. This requirement is conveniently broad to allow submissions not only from aggrieved individuals but also from other individuals or organisations (like NGOs) that can author such complaints and seize the Commission of a human rights violation. The existence of direct interest (like being a victim) to bring the matter before the Commission is not a requirement under the African Charter. The clear rationale here for allowing a broad gateway for complaints under the Charter is the practical understanding, in Africa, that victims may face various difficulties impairing them from approaching the African Commission. That notwithstanding, in the present communication, the present complainants are themselves Bakweri, who allege violation of their ownership of historical lands, and that the counsel himself and the BLCC has been duly authorized, by a resolution of chiefs, to further the interests of the Bakweri, which fact has not been denied by the Respondent State. The Commission adds that one may be represented, through express consent or by the self-initiative of the author who speaks for him/her, irrespective of the fact that it is known to the Commission that one is soundly capable of representing oneself. The Commission holds, thus, that the present complainant has *locus standi* and is entitled to bring this communication before the African Commission.

47. To the objection that the complainant failed to show a ***prima facie*** case [the Respondent State alleging that the communication is unclear, interchangeably spoke of various matters, and is improper as it remained deliberately imprecise about the illicit acts], the complainant avers that it has provided precise allegations of facts supported by relevant documents. The Commission examined the original complaint and its supporting documents. Contrary to the Respondent State's objections, it is evident in the file that the Complainant is indeed clearly alleging the alienation of the Bakweri Lands, which was triggered by the Presidential Decree No.94/125 of 14th July 1994 where the Government of Cameroon listed the Cameroon Development Corporation (CDC) which is situate on Bakweri lands. It has alleged that this development will in effect result in the alienation, to private purchasers, of approximately 400 square miles (104,000 hectares) of lands in the Fako division traditionally owned, occupied or used by the Bakweri. The Complainant alleges that the transfer would extinguish the Bakweri (who are a particular ethnic group whose status is never anywhere disputed by the Respondent State) title rights and interests in two-thirds of the minority group's total land area in violation of Articles 7(1)(a), 14, 21, 22 of the African Charter. In deciding to be seized of this matter at its 32nd Ordinary Session held from 17th – 23rd October 2002 in Banjul, The Gambia the African Commission had found this presentation/narration of violation of rights protected under the Charter to be sufficiently clear to be taken up by the Commission, and hence, finds the present objection of the Respondent State untenable.

48. To the objection that the communication casts such suspicions and aspersions on the Cameroonian judicial system and hence could be considered insulting per Article 56 (3) of the African Charter, the African Commission finds that there is nothing in the various submissions of the Complainant to warrant the invocation of Article 56(3) of the African Charter so as to declare the complaint inadmissible on the grounds of its being written in disparaging or insulting language. The Complainant can allege, among others, and as it did with a view to be exempted from exhausting local remedies, that the president of the Republic wielded extraordinary powers so as to influence the judiciary and that the judiciary is impartial and lacked independence. This would be nothing but a mere allegation depicting, as it perceives it, the complainants comprehension of the offices that it thought would not provide it with any remedies as the African Commission would demand. Whether the allegations are true is another matter. At best, the Respondent State may, if it so wishes, employ other means to acquaint the African Commission that the situation is indeed otherwise. The African Commission notes, however, that such a rebuttal is not necessary for purposes of examination under Article 56 (3). Accordingly, thus, the African Commission finds the Respondent State's objection per Article 56(3) of the African Charter unsustainable.
49. To the objection that the UN Sub-Commission has settled the matter and hence the African Commission should not entertain the matter per Article 56(7) of the African Charter, the Complainant responded saying that the Respondent State failed to distinguish complaints before the African Commission that are pending before another international tribunal from those where the tribunal was seized of the matter but declined to take action. It alleges that the African Commission has indeed addressed this distinction in *ACHPR Communication 40/90 Bob Ngozi Njoku Vs. Egypt*; which the UN Sub-Commission had decided not to entertain. The African Commission had held that the rejection by the UN Sub-Commission "does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled as required by Article 56 (7)."
50. Desirous of getting to the bottom of this issue in the present communication, the African Commission requested for the copy of the decision by the UN Sub-Commission as relates to the Bakweri lands dispute from both parties. None of them, however, was able to furnish the Commission with a copy of the same. The complainant, however, had availed the African Commission a copy of a letter, dated 18th July 2002, from the Governor of the South West Province of Cameroon, on behalf of the Minister of External Relations, to the President of the BLCC on the "**Decision of the UN High Commission on Human Rights on Bakweri Claim,**" the relevant contents of which are summarized as follows [During its oral submissions at

the 34th Ordinary Session, the Respondent State has claimed that, not denying the fact, the Governor had no right to write such a letter]:

“...On matters of procedure, the Commission felt that the petitioners did not fully exploit local avenues available to solve the problem and the Cameroon judicial system was deemed competent to handle the petition. Concerning the content of the petition, the Commission commended the government’s position on the issue and encouraged government’s efforts in her continuous willingness to resolve once and for all, this matter of Bakweri Lands.

Considering the above, the Commission considered itself incompetent to handle the matter, and therefore asked the matter to be closed.”

51. The African Commission also heard the parties at its 34th Ordinary Session on this and other issues. Regarding the veracity of this particular claim on the decision of the UN Sub-Commission, both parties seemed to be on all fours that it was in fact so decided. Given that, thus, and although a copy of the said decision was not made available to the African Commission to examine, the Commission notes that the content of that letter adequately reflected the outcome of the complainant’s petition to the UN Sub-Commission.
52. As alleged by the Complainant, thus, the African Commission notes that the UN Sub-Commission did not decide on the merits of the case so as to warrant the discontinuance of the consideration of this matter by the African Commission as per Article 56 (7) of the African Charter. The principle behind the requirement under this provision of the African Charter is to desist from faulting Member States twice for the same alleged violations of human rights. This is called the ***non bis in idem*** rule (also known as the Principle or Prohibition of Double Jeopardy, deriving from criminal law) and ensures that, in this context, no state may be sued or condemned for the same alleged violation of human rights. In effect, this principle is tied up with the recognition of the fundamental ***res judicata*** status of judgements issued by international and regional tribunals and/or institutions such as the African Commission. [***Res judicata*** is the principle that a final judgement of a competent court/tribunal is conclusive upon the parties in any subsequent litigation involving the same cause of action.]
53. The parties before the African Commission have not disputed the fact that they were the very same parties at loggerheads before the UN Sub-Commission disputing the same issues as before the African Commission. They both, however, admit that there has been no final judgment on the

merits of their dispute by the UN Sub-Commission. The contents of the excerpts of the letter reproduced in paragraph 47 above have not been contested either, thereby buttressing the fact that the matter was not conclusively dealt with by the UN Sub-Commission. This means that the provision of Article 56(7) incorporating the principle of ***ne bis in idem*** does not apply in the present case as there has been no final settlement of the matter by the UN Sub-Commission. Therefore, the African Commission holds that the Respondent State's allegation that the communication be declared inadmissible per the provision of Article 56(7) is unmaintainable.

54. Finally, to the objection that the complainant did not exhaust local remedies as all the actions the BLCC took certainly do not correspond to remedies mentioned by the African Charter, the complainant claimed that local remedies in Cameroon were unavailable, ineffective and inadequate. Both in writing and orally before the African Commission, the complainant admitted that it has not exhausted local remedies. Besides, it claimed that the circumstances in Cameroon warrant that it be granted waiver of this requirement. It argued, among others, that:

- it has been trying to seek relief for the matter from the Cameroonian authorities, including from the President of the Republic, for over nine years, but to no avail;
- the judiciary is not independent;
- the Government has had ample time and opportunity to resolve the matter but failed to do so;
- the Executive and other organs can pre-empt the decisions of courts thereby rendering approach to the courts futile;
- to approach the courts under the present circumstances means merely prolong the agony of the Bakweri; etc.

55. The African Commission notes that the exhaustion of local remedies requirement under Article 56 (5) of the African Charter should be interpreted liberally so as not to close the door on those who have made at least a modest attempt to exhaust local remedies. Under this Article, all the African Commission wishes to hear from the complainant is that it has approached either local or national judicial bodies. [ACHPR Communication No. 221/98 *Alfred B. Cudjoe Vs. Ghana*] As can be seen from the set of facts adduced before the African Commission by both parties in writing and orally, the complainant, not even once, has seized any local or national court. For this, it explained that the courts are not independent and are likely to decide in favour of the Respondent State whose President has a say on their appointment. The African Commission, however, holds that the fact that the complainant strongly feels that it could not obtain justice from the local courts does not amount to saying that the case has been tried in Cameroonian Courts. [ACHPR Communication 92/93 *International Pen Vs.*

Sudan] Besides, the complainants assertions are merely subjective assessments on which the African Commission cannot base itself in holding that there indeed lacks an effective remedy in Cameroon to resolve the matter. [*ACHPR Communication No. 135/94, Kenya human Rights Commission Vs. Kenya; UN Human Rights Committee Communication No. 192/85, S.H.B. Vs. Canada*] The African Commission is of the view that it is the duty of the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to merely doubt the ability of the domestic remedies of the State to absolve it from pursuing the same.

56. The African Commission would be setting a dangerous precedent if it were to admit a case based on a Complainant's apprehension about the perceived lack of independence of a country's domestic institutions, in this case the Judiciary. The African Commission does not wish to take over the role of the domestic courts by being a first instance court of convenience when in fact local remedies remain to be approached.

For these reasons, the African Commission declares the Communication inadmissible.

Adopted at the 36th Ordinary Session of the African Commission that was held from 23rd November to 7th December 2004 in Dakar, Senegal.

**263/02 Kenyan Section of the International Commission of Jurists,
Law Society of Kenya, Kituo Cha Sheria/Kenya**

Rapporteur:

33rd Session: Commissioner Andrew Chigovera

34th Session: Commissioner Andrew Chigovera

35th Session: Commissioner Andrew Chigovera

36th Session: Commissioner Andrew Chigovera

Summary of Facts

1. The Complainants are The Kenya Section of the International Commission of Jurists (1st complainant), Law Society of Kenya (2nd complainant) and Kutuo Cha Sheria (3rd complainant), all based in the Republic of Kenya.
2. The Complaint was received at the Secretariat of the Commission on 18th October 2002 and is against the Republic of Kenya a State Party to the African Charter on Human and Peoples' Rights (the African Charter) since 1991.
3. According to the Complainants, the Constitution of Kenya Review Act Chapter 3 A of the laws of Kenya (the Review Act) sets up the Constitution Review Commission (CKRC) to facilitate the comprehensive review of the Constitution by the people of Kenya and for connected purpose.
4. Pursuant to the provisions of the Constitution of Kenya Review Act and in exercise of the rights conferred upon it by Section 79 of the Constitution of Kenya and Article 9 (2) of the African Charter, the 1st Complainant submitted a written memorandum on the Judiciary and Human Rights in Kenya to the CKRC.
5. The 1st Complainant also facilitated an examination of the Kenya Judiciary by a panel of eminent jurists drawn from the Commonwealth, which in turn presented its views in a form of a written memorandum to the CKRC. Among other things, the written memorandum highlighted the fact that from the programme of consultation, the advisory panel concluded that as constituted, the Kenyan judicial system suffered from a serious lack of public confidence and was generally perceived as being in need of fundamental structural reform.
6. The 2nd and 3rd Complainants submitted written memoranda pursuant to their mandate and in exercise of rights conferred upon

them by Section 79 of the Constitution of Kenya and Article 9 (2) of the African Charter. In the memoranda, presentations were also made on how the Kenyan judicial system could be improved.

7. In September 2002, the CKRC published a draft report of its work, which collated the views submitted by Kenyans in terms of the Review Act. In so far as the legal system was concerned, the CKRC reported, among other things, that many Kenyans submitted that they had lost confidence in the judiciary as a result of corruption, incompetence and lack of independence. To this end, the CKRC recommended the inclusion of several basic principles of a fair and acceptable judicial system into the draft Constitution.
8. After the publication of the report, Justice Moiwo Ole Keiwua, a judge of the Court of Appeal of Kenya and Justice Vitalis Juma, a Judge of the High Court, jointly sought leave before the High Court of Kenya to file Judicial Review proceedings against the CKRC and its chairperson, Professor Yash Pal Ghai.
9. Amongst other things, the judicial review proceedings sought an order of certiorari for the quashing of the decision and/or proposals actual or intended and/or recommendations of the CKRC and Professor Ghai concerning and touching on the Kenyan Judiciary contained in the CKRC report.
10. On 26 September 2002, Justice Andrew Hayanga, judge of the High Court issued an order granting leave of Court to file a Judicial Review. The Complainants allege that the effect of this order was that in terms of Order 53 of the Civil Procedure Rules of Kenya it doubled as a staying order on further proceedings subject to the review application.
10. Subsequent to this ruling, the Complainants allege that High Court barred the CKRC, its Chairperson and a national forum yet to be constituted known as the National Constitutional Conference from discussing or making any suggestions in relation to any provisions touching upon the Judiciary.
11. On 30 September 2002 the CKRC published its Bill of the Constitution of Kenya in terms of the Review Act and further issued a notice that the National Constituency Conference would be held in early November 2002.
12. The Complainants allege that the existence of the suit by the Judges and the staying orders granted by the High Court of Kenya pose an effective and immediate threat to the denial of a new constitutional

Review process which will result in the denial of a new constitution that protects all human rights to which all Kenyans are entitled under the African Charter and these rights have been proposed to be guaranteed in the new Constitution of Kenya.

13. The Complainants allege that the following Articles of the African Charter have been violated: Articles 1, 7(1)(a), 9(2) and 46 of the African Charter

N.**O. Procedure**

14. The communication was sent by DHL and was received at the Secretariat of the African Commission on 18th October 2002.
15. At its 33rd Ordinary Session, the African Commission considered the communication and decided to postpone its decision on seizure pending receipt of the following information from the Complainants -:
 - Status of the work of the Constitution of Kenya Review Commission (CKRC) bearing in mind the major developments that had taken place in relation to constitutional review process in Kenya;
 - Whether or not the Complainants cannot challenge the staying orders granted by the High Court before a court of superior jurisdiction in Kenya because from the facts presented on the file, it is evident that the matter is still before the High Court of Kenya
16. On 29th August 2003, a letter was sent to the Complainants reminding them to provide the information requested for by the African Commission.
17. On 4th November 2003, the Complainants transmitted a written response to the additional information requested for by the African Commission.
18. During the 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the Complainants made oral submissions Session urging the African Commission to be seized with the matter. The African Commission considered the complaint and decided to be seized thereof.
19. On 4th December 2003, the Secretariat wrote informing the parties to the communication that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within 3 months.

20. By letter and Note Verbale dated 15th March 2004, the parties to the communication were reminded to forward their written submission on admissibility of the communication.
21. On 25th March 2004, the Secretariat of the African Commission received the Respondent State's written submissions on admissibility.
22. By Note Verbale dated 26th March 2004, the Secretariat of the African Commission acknowledged receipt of the Respondent State's submissions on admissibility and forwarded the same to the Complainant by fax.
23. On 2nd April 2004, the Secretariat of the African Commission received the Complainants' written submissions on admissibility.
24. By letter dated 6th April 2004, the Secretariat of the African Commission acknowledged receipt of the Complainants' submissions on admissibility and forwarded a copy of the same by DHL to the Respondent State.
25. At its 35th Ordinary Session held in Banjul, the Gambia from 21 May to 4 June 2004, the African Commission decided to defer further consideration on admissibility of the matter to its 36th Ordinary Session because the complainant undertook to provide the African Commission with information in respect of Miscellaneous Case No. 1110 of 2002 – Justice Ole Keiwua and Justice Vitalis Juma versus In the Matter of Prof. Yash Pal Ghai and two others which was heard in the High Court of Kenya.
26. By Note Verbale dated 15 June 2004 addressed to the Responding State and by letter carrying the same date address to the complainant, both parties were informed of the African Commission's decision.
27. By letter dated 23 September 2004, the complainant was reminded to submit the information they undertook to submit during the 35th Ordinary Session of the African Commission.
28. At its 36th Ordinary Session held from 23 November to 7 December in Dakar, Senegal, The African Commission considered the communication and declared it inadmissible.

LAW

Admissibility

29. The African Commission was seized with the present communication at its 34th Ordinary Session which was held in Banjul, The Gambia from 6th to 20th November 2003. Both the Respondent State and the Complainants have presented their written arguments on admissibility of the communication.
30. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with Article 55 of the African Charter.
31. The Respondent State contends that the requirements of Article 56(5) have not been met by the Complainants. Article 56(5) of the African Charter provides:-

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

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

32. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and is premised on the principle that the Respondent State must first have an opportunity to redress by its own means and within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.
33. The Complainants submit that the circumstances that gave rise to this communication are peculiar. It is based on a suit that was instituted by a Judge of the High Court and a Judge of the Court of Appeal with the aim of defeating the rights of Kenyan citizens to contribute to the constitution making process in the country.
34. Therefore, the Complainants claim that exhausting local remedies in this case would be impossible and inordinately convoluted because the judiciary is compromised and severely lacking in independence. Furthermore, the Complainants argue that the said judges who instituted the matter are arguably representative of all the members of the judiciary and as such it would be virtually impossible to obtain a fair hearing from the same judiciary.
35. In applying the rule of exhausting domestic remedies, the African Commission often requires the Complainant to provide information on attempts made to exhaust local remedies⁵³.

⁵³ Communication 127/94 – Sana Dumbuya/The Gambia

36. While considering the file for seizure at its 33rd Ordinary Session, the African Commission realised that the Complainants were bringing a matter that was evidently still before the High Court of Kenya. Consequently, the African Commission deferred being seized with the communication and sought clarification on developments that had taken place with respect to the whole constitutional review process upon which some aspects of this communication was based. In addition, the African Commission sought information from the Complainants as to whether or not they could not challenge the staying orders that had been granted by the High Court before a court of superior jurisdiction in Kenya.
37. In their response to the clarifications sought by the African Commission, the Complainants argued that it would not be possible for them to be admitted as interested parties in the suit without leave of court. They stated that leave is granted at the discretion of the judge and under the circumstances they were apprehensive that leave would not be granted. Furthermore, they argued that they could not practically enforce any right of appeal against orders obtained in a suit in which the primary Respondent/Appellant had boycotted the court's jurisdiction; And even if the primary Respondents had defended the suit, the Complainants submitted that the likelihood of enforcing their rights as interested parties at Appeal Court would have been unsuccessful because the Court of Appeal through Justice Moiwo ole Keiwua was itself a party to a suit in the nature of a class action.
38. The Complainants argued further that the principle that they want the African Commission to settle is whether judges can hear matters that actually affect them.
39. In their subsequent submissions on admissibility the Complainants informed the African Commission that indeed they went ahead together with other members of the civil society in Kenya to make an application moving court as 'ordinary citizens and taxpayers' to join them as interested parties in the suit against the CKRC and the Chair of the CKRC. Their "application" to be joined as interested parties in the judicial review application was allowed.
40. Quite evidently from the situation described above, the Complainants eventually approached the courts even though they believed that no member of the judiciary in Kenya would make a decision against the interests of their fellow 2 judges. However, such concerns should have

been eliminated when the judges actually granted the application in their favour.

41. The African Commission is of the view that it is incumbent on the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences. In this regard, the African Commission would like to refer to the decision of the Human Rights Committee in *A v Australia*⁵⁴ in which the Committee held that “mere doubts about the effectiveness of local remedies or prospect of financial costs involved did not absolve the author from pursuing such remedies”.⁵⁵
42. The African Commission would be setting a dangerous precedent if it were to admit a case based on a Complainant’s apprehension about the perceived lack of independence of a country’s domestic institutions, in this case the Judiciary. More so, where, as in this case, the Complainants have not adduced ample evidence to demonstrate the validity of their apprehensions. Furthermore, the Complainants have not even tested the principle that they wish the African Commission to settle before the domestic courts; and by so doing they are in essence asking the African Commission to take over the role of the domestic courts, a role which clearly does not belong to the African Commission as a treaty body⁵⁶.
43. The Respondent State has argued that the issues in the communication have been overtaken by events. Both Justices Moijo ole Keiwua and Vitalis Juma are currently on suspension and are under investigation by a tribunal. They have also indicated that the Application brought by Justices Moijo ole Keiwua & Vitalis Juma against the Chair of the CKRC and the CKRC is for all intents and purposes dead because none of the parties have pursued it.
44. The African Commission has also been made aware that the Respondent State has set up special investigative tribunals to investigate those members of the judiciary that have been implicated as having acted unethically in the performance of their functions. Presented with such information, the African Commission is of the

⁵⁴ Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

⁵⁵ See also *L Emil Kaaber v Iceland*, Communication No. 674/1995. UN Doc. CCPR/C/58/D/674/1995 (1996). See also *Ati Antoine Randolph v. Togo*, Communication No. 910/2000, UN Doc. CCPR/C/79/D/910/2000 (2003).

⁵⁶ Communication 211/98 – Legal Resources Foundation/Zambia

view that the situation as it is now allows the Complainants to approach the domestic courts in Kenya without any apprehension that there will be an unfair adjudication in the matter.

45. Therefore, since the Complainants now have *locus standi* in the judicial review proceedings, they should exhaust the local remedies available and also seize this opportunity to challenge the court orders that were issued by the High Court before a superior court of jurisdiction in Kenya.

For these reasons, the African Commission in conformity with Article 56(5) of the African Charter declares this communication inadmissible for non-exhaustion of local remedies.

Adopted by the African Commission on Human and Peoples' Rights at its 36th Ordinary Session held from 23 November – 7 December 2004, in Dakar, Senegal.

ANNEX 2

RESOLUTIONS ADOPTED AT THE 36TH ORDINARY SESSION

- Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa
- Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa
- Resolution on Economic, Social and Cultural Rights in Africa

RESOLUTION ON THE MANDATE OF THE SPECIAL RAPPOREUR
ON REFUGEES, ASYLUM SEEKERS AND INTERNALLY
DISPLACED PERSONS IN AFRICA

The African Commission on Human and Peoples' Rights meeting at its 36th Ordinary Session held from 23rd November to 7th December 2004, in Dakar, Senegal;

Mindful of the fact that the African Charter on Human and Peoples' Rights recognises and guarantees enjoyment, promotion and the protection of the rights and freedoms of every individual, 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 other status;

Considering that the African Charter, while guaranteeing the freedom of movement and freedom of residence of every individual within a state subject to being law abiding, recognises that when persecuted, every individual shall have the right to seek and obtain asylum in other countries in accordance with the respective laws of the said countries, and international law,

Conscious of the fact that in spite of the adoption of the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa, refugees in Africa continue to face untold suffering arising principally from the lack of respect of their basic and fundamental human rights as individuals, *inter alia*, women, children and the elderly being the most vulnerable among refugees,

Aware also that in the recent past the incidence of conflicts, and in certain cases, natural calamities have forced mass movement of people to seek refuge, thus causing a huge problem of internal displacement of populations within national borders,

Recalling the Memorandum of Understanding signed between the African Commission and the United Nations High Commissioner for Refugees on strengthening mutual cooperation in the effective promotion and protection of the human rights of refugees, asylum seekers, returnees and other persons of concern in Africa;

Recalling that the African Commission, during its 34th Ordinary Session designated a focal point on refugees and internally displaced persons, with a limited responsibility of monitoring developments concerning the plight of refugees and internally displaced persons in Africa, while the Commission reviewed its special rapporteur mechanism,

Recalling its decision to establish the position of Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa at its 35th

Ordinary Session held from 21st May to 4 June 2004 in Banjul, The Gambia and decided to designate, for an initial period of two years, Commissioner Bahame Tom Nyanduga, as the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa;

Reaffirming the importance of the mechanism of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa;

Noting the numerous problems faced by refugees, asylum seekers and internally displaced persons in Africa and the urgent need to develop appropriate strategies to ensure their protection;

1. **Decides that** the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa shall operate under the following mandate to -:
 - a. seek, receive, examine and act upon information on the situation of refugees, asylum seekers and internally displaced persons in Africa;
 - b. undertake studies, research and other related activities to examine appropriate ways to enhance the protection of refugees, asylum seekers and internally displaced persons in Africa;
 - c. undertake fact-finding missions, investigations, visits and other appropriate activities to refugee camps and camps for internally displaced persons;
 - d. assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers and internally displaced persons in Africa;
 - e. cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental and non governmental bodies, international and regional mechanisms involved in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons;
 - f. develop and recommend effective strategies to better protect the rights of refugees, asylum seekers and internally displaced persons in Africa and to follow up on his recommendations;
 - g. raise awareness and promote the implementation of the UN Convention on Refugees of 1951 as well as the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa;
 - h. submit reports at every ordinary session of the African Commission on the situation of refugees, asylum seekers and internally displaced persons in Africa;
2. **Calls upon** Member States to take all necessary measures to ensure the protection of refugees, asylum seekers and internally displaced persons and to include information on measures taken to that effect;

3. ***Urges*** Member States to co-operate with and assist the Special Rapporteur in the performance of his tasks and to provide all necessary information for the fulfilment of his mandate;
4. ***Invites*** its members to incorporate the issue of refugees, asylum seekers and internally displaced persons in their promotional activities;
5. ***Requests*** the African Union to provide adequate resources, assistance and support in the implementation of this Resolution.

Adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights in Dakar, Senegal, on 7th December 2004.

**RESOLUTION ON THE MANDATE AND APPOINTMENT OF A SPECIAL
RAPPORTEUR ON FREEDOM OF EXPRESSION IN AFRICA**

The African Commission on Human and Peoples' Rights meeting at its 36th Ordinary Session held from 23rd November to 7th December 2004, in Dakar, Senegal;

Recalling the Resolution on Freedom of Expression adopted at its 29th Ordinary Session held from 23rd April to 7th May 2001, in Tripoli, Libya to initiate an appropriate mechanism to assist it review and monitor adherence to freedom of expression standards and to investigate violations and make appropriate recommendations to the African Commission;

Recalling the Declaration of Principles on Freedom of Expression in Africa adopted at its 32nd Ordinary Session held from 17th to 23rd October 2002, in Banjul, The Gambia;

Recalling further the decision taken at its 33rd Ordinary Session held in Niamey, Niger from 15 – 29 May 2003 to nominate a Focal Point responsible for overseeing any activity relating to the implementation of the Declaration of Principles on Freedom of Expression in Africa in line with the resolution adopting the Declaration;

Bearing in mind the recommendations of the Johannesburg Consultative Meeting on Freedom of Expression held in Johannesburg in August 2003 and the African Conference on Freedom of Expression held in Pretoria in February 2004;

Recalling the decision taken at its 35th Ordinary Session held from 21 May – 4 June 2004, in Banjul, The Gambia to postpone the appointment of a Special Rapporteur on Freedom of Expression pending the elaboration of an appropriate mandate;

Reaffirming the commitment of the African Commission on Human and Peoples' Rights to promote the right to freedom of expression and monitor the implementation of the Declaration of Principles on Freedom of Expression in Africa within Member States of the African Union;

1. **Decides** to appoint a Special Rapporteur on Freedom of Expression in Africa with the following mandate:
 - (a) analyse national media legislation, policies and practice within Member States, monitor their compliance with freedom of expression standards in general and the Declaration of Principles on Freedom of Expression in particular, and advise Member States accordingly;

- (b) undertake investigative missions to Member States where reports of massive violations of the right to freedom of expression are made and make appropriate recommendations to the African Commission;
 - (c) undertake country Missions and any other promotional activity that would strengthen the full enjoyment of the right to freedom of expression in Africa;
 - (d) make public interventions where violations of the right to freedom of expression have been brought to his/her attention. This could be in the form of issuing public statements, press releases, urgent appeals;
 - (e) keep a proper record of violations of the right to freedom of expression and publish this in his/her reports submitted to the African Commission; and
 - (f) submit reports at each Ordinary Session of the African Commission on the status of the enjoyment of the right to freedom of expression in Africa.
2. **Further decides** to appoint Commissioner Andrew Ranganayi Chigovera as Special Rapporteur on the Right to Freedom of Expression in Africa for the remainder of his mandate;
 3. **Calls upon** Member States of the African Union to take all necessary measures to ensure the protection of the right to freedom of expression and to include information on measures taken to ensure the enjoyment of the right to freedom of expression in their periodic reports to the African Commission;
 4. **Urges** Member States of the African Union to co-operate with and assist the Special Rapporteur in the performance of his tasks and to provide all necessary information for the fulfilment of his mandate;
 5. **Invites** its Members to incorporate the issue of freedom of expression in their promotional activities to Member States;
 6. **Requests** the African Union to provide adequate resources, assistance and support for the implementation of this Resolution.

Adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights in Dakar, Senegal, on 7th December 2004.

RESOLUTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA

The African Commission on Human and Peoples' Rights meeting at its 36th Ordinary session held from 23rd November to 7th December 2004 in Dakar, Senegal.

Recalling that the African Charter enshrines economic, social and cultural rights, in particular in Articles 14, 15, 16, 17, 18, 21 and 22.

Considering regional and international human rights instruments that stress the indivisibility, interdependence and universality of all human rights, including the African Charter, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Universal Declaration of Human Rights, the Declaration on the Right to Development, the International Covenant on Economic, Social and Cultural Rights and the Convention for the Elimination of All Forms of Discrimination Against Women;

Recognising also that the objectives and principles of the Constitutive Act include a commitment to the promotion and protection of human and peoples' rights, respect for democratic principles, human rights, rule of law and good governance and the promotion of social justice to ensure balanced economic development;

Noting that despite the consensus on the indivisibility of human rights, economic, social and cultural rights remain marginalized in their implementation;

Concerned that there is inadequate recognition by States Parties of economic, social and cultural rights that results in the continued marginalization of these rights, which excludes the majority of Africans from the full enjoyment of human rights;

Appreciating the vast positive impact that information and communication technologies (ICTs), transfer of technology, economic and regional integration can have on the promotion, protection and realization of economic, social and cultural rights;

Recognising that there are several constraints that limit the full realisation of economic, social and cultural rights in Africa;

Deeply concerned by the ongoing and longstanding conflicts in the sub-regions of Africa, which impede the realization of economic, social and cultural rights;

Concerned Further by the lack of human security in Africa due to the prevailing conditions of poverty and under-development and the failure of African States to address poverty through development;

Further Recognizing the urgent need for human rights, judicial and administrative institutions in Africa to promote human dignity based on equality and to tackle the core human rights issues facing Africans including, food security, sustainable livelihoods, human survival and the prevention of violence;

1. **Adopts** the attached *Declaration* of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, adopted on 17 September 2004, in Pretoria, South Africa;
2. **Requests** the Secretary to the African Commission on Human and Peoples' Rights to forward the Pretoria Statement to the Commission of the African Union, Ministries of Justice and Social affairs and Chief Justice, National Human Rights Institutions of all States parties, International institutions working in African and Regional economic communities, Bar Associations and Law Schools in Africa and civil society organizations including non-governmental organizations with observer status, and to report to the 37th Ordinary session;
3. **Urges** its members, its Special Rapporteurs and Working Groups to pay particular attention to economic, social and cultural rights during their missions and in the discharge of their respective mandates;
4. **Further decides** to establish a working group composed of Members of the African Commission on Human and Peoples' Rights and non-governmental organizations with a mandate to:

develop and propose to the African Commission on Human and Peoples' Rights a draft Principles and Guidelines on Economic, Social and Cultural Rights;

elaborate a draft revised guidelines pertaining to economic, social and cultural rights, for State reporting;

undertake, under the supervision of the African Commission on Human and Peoples' Rights, studies and research on specific economic, social and cultural rights;

make a progress report to the African Commission on Human and Peoples' Rights at each Ordinary session;

5. Requests the African Union to provide the Working group with all support and assistance needed to implement this mission.

Adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights in Dakar, Senegal, on 7th December 2004.

Pretoria Declaration on Economic, Social and Cultural Rights in Africa

In conformity with its mandate under Article 45 of the African Charter on Human and Peoples' Rights to promote and protect human and peoples' rights in Africa, the African Commission on Human and Peoples' Rights in collaboration with the International Centre for Legal Protection of Human Rights (INTERIGHTS), the Cairo Institute for Human Rights Studies and the Centre for Human Rights, University of Pretoria, held a Seminar on Economic, Social and Cultural Rights in Pretoria, South Africa, from 13 – 17 September 2004. The participants at the workshop, who included members of the African Commission, representatives of 12 African States, civil society organizations, national human rights institutions, academics and representatives of UN organizations and Regional Economic Communities (RECs) adopted the following Statement, which is recommended for consideration and adoption by the African Commission on Human and Peoples' Rights at its 36th Ordinary Session:

Preamble

Recalling that the African Charter enshrines economic, social and cultural rights, in particular in its Article 14, Article 15, Article 16, Article 17, Article 18, Article 21 and Article 22;

Recognising the existence of regional and international human rights standards that stress the indivisibility, interdependence and universality of all human rights. Among these are the African Charter, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Universal Declaration of Human Rights, the Declaration on the Right to Development, the International Covenant on Economic, Social and Cultural Rights and the Convention for the Elimination of All Forms of Discrimination Against Women;

Recognising also that the objectives and principles of the Constitutive Act include a commitment to the promotion and protection human and peoples' rights, respect for democratic principles, human rights, the rule of law and good governance and the promotion of social justice to ensure balanced economic development;

Noting that despite the consensus on the indivisibility of human rights, economic, social and cultural rights remain marginalized in their implementation;

Concerned that there is resistance to recognizing economic, social and cultural rights that results in the continued marginalization of these rights, which excludes the majority of Africans from the enjoyment of human rights;

Appreciating the positive impact that information and communication technologies (ICTs) can have on the promotion, protection and realization of economic, social and cultural rights;

Recognising that there are several constraints that preclude the full realisation of economic, social and cultural rights in Africa;

Deeply disturbed by the ongoing and longstanding conflicts in the regions of Africa, which impede the realization of economic, social and cultural rights;

Concerned further by the lack of human security in Africa due to the prevailing conditions of poverty and under-development and the failure to address poverty through development;

Further recognizing the urgent need for human rights, judicial and administrative institutions in Africa to promote human dignity based on equality and to tackle the core human rights issues facing Africans including, food security, sustainable livelihoods, human survival and the prevention of violence;

The participants state that:

1. States Parties to the African Charter on Human and People's Rights have solemnly undertaken to respect, protect, promote and fulfil all the rights in the Charter including economic, social and cultural rights.
2. By doing so, States Parties have agreed to adopt legislative and other measures, individually or through international cooperation and assistance, to give full effect to the economic, social and cultural rights contained in the African Charter, by using the maximum of their resources. States parties have an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the African Charter.
3. States are therefore called upon to address with all appropriate measures their obligations in relation to the full realization of economic, social and cultural rights as well as tackling the following constraints:
 - Lack of good governance and planning and failure to allocate sufficient resources for implementation of economic, social and cultural rights;
 - Lack of political will;
 - Corruption, misuse and misdirection of financial resources;
 - Poor utilization of human resources and absence of effective measures to curtail brain drain;
 - Failure to ensure equitable distribution of income from natural resources;
 - Trafficking in women and children;
 - Continued outflow and existence of refugees and internally displaced persons;
 - Illiteracy and lack of awareness,

- Conditionality of aid and unserviceable debt burdens,
 - Privatization of essential services
 - Cost recovery including access fees and charges for essential services;
 - Lack of support for and recognition of the work of civil society organizations;
 - Lack of implementation of obligations assumed under international law into national law,
 - Under development of social amenities;
 - Limited engagement with human rights on the part of some judges;
 - Lack of protection of African indigenous knowledge;
 - Failure to enforce some judicial decisions against the state;
 - The adverse effects of globalization.
4. States Parties have also undertaken to eliminate all forms of discrimination, including all forms of discrimination against women, and to promote the equal enjoyment of all human rights. Non-discrimination and equal treatment are the key components of economic, social and cultural rights since vulnerable and marginal groups including refugees and internally displaced persons are disproportionately affected by a failure of the state to respect, protect and fulfill these rights.
5. The right to property in Article 14 of the Charter relating to land and housing entails among other things the following:
- Protection from arbitrary deprivation of property;
 - Equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women;
 - Adequate compensation for public acquisition, nationalization or expropriation;
 - Equitable and non-discriminatory access to affordable loans for the acquisition of property;
 - Equitable redistribution of land through due process of law to redress historical and gender injustices;
 - Recognition and protection of lands belonging to indigenous communities;
 - Peaceful enjoyment of property and protection from arbitrary eviction;
 - Equal access to housing and to acceptable living conditions in a healthy environment.
6. The right to work in Article 15 of the Charter entails among other things the following:
- Equality of opportunity of access to gainful work, including access for refugees, disabled and other disadvantaged persons;
 - Conducive investment environment for the private sector to participate in creating gainful work;

- Effective and enhanced protections for women in the workplace including parental leave;
 - Fair remuneration, a minimum living wage for labour, and equal remuneration for work of equal value;
 - Equitable and satisfactory conditions of work, including effective and accessible remedies for work place-related injuries, hazards and accidents;
 - Creation of enabling conditions and taking measures to promote the rights and opportunities of those in the informal sector, including in subsistence agriculture and in small scale enterprises activities;
 - Promotion and protection of equitable and satisfactory conditions of work of women engaged in household labour;
 - The right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights;
 - Prohibition against forced labour and economic exploitation of children, and other vulnerable persons;
 - The right to rest and leisure, including reasonable limitation of working hours, periodic holidays with pay and remuneration for public holidays.
7. The right to health in Article 16 of the Charter entails among other things the following:
- Availability of accessible and affordable health facilities, goods and services of reasonable quality for all;
 - Access to the minimum essential food which is nutritionally adequate and safe to ensure freedom from hunger to everyone and to prevent malnutrition;
 - Access to basic shelter, housing and sanitation and adequate supply of safe and potable water;
 - Access to reproductive, maternal and child health care based on the life cycle approach to health;
 - Immunization against major infectious diseases;
 - Education, prevention and treatment of HIV/AIDS, malaria, tuberculosis and other major killer diseases;
 - Education and access to information concerning the main health problems in the community including methods of preventing and controlling them;
 - Training for health personnel including education on health and human rights;
 - Access to humane and dignified care of the elderly and for persons with mental and physical disabilities;
8. The right to education in Article 17 of the African Charter entails among other things the following:

- Provision of free and compulsory basic education that will also include a programme in psycho-social education for orphans and vulnerable children;
 - Provision of special schools and facilities for physically and mentally disabled children;
 - Access to affordable secondary and higher education;
 - Accessible and affordable vocational training and adult education;
 - Addressing social, economic and cultural practices and attitudes that hinder access to education by girl children;
 - Availability of educational institutions that are physically and economically accessible to everyone;
 - Development of curricula that address diverse social, economic and cultural settings and which inculcate human rights norms and values for responsible citizens;
 - Liberty of parents and guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down by the State, and to ensure the religious and moral education of their children in conformity with their own convictions;
 - Continued education for teachers and instructors including education on human rights and the continuous improvement of the conditions of work of teaching staff;
 - Education for development that links school curricula to the labour market and society's demands for technology and self-reliance.
9. The right to culture in Articles 17 and 18 of the African Charter entail among other things the following:
- Positive African values consistent with international human rights realities and standards;
 - Eradication of harmful traditional practices that negatively affect human rights;
 - Participation at all levels in the determination of cultural policies and in cultural and artistic activities;
 - Measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;
 - Recognition and respect of the diverse cultures existing in Africa;
10. The social, economic and cultural rights explicitly provided for under the African Charter, read together with other rights in the Charter, such as the right to life and respect for inherent human dignity, imply the recognition of other economic and social rights, including the right to shelter, the right to basic nutrition and the right to social security.

11. Having highlighted the core contents of economic, social and cultural rights under the African Charter, participants make the following recommendations:

a) States Parties should:

- i.* Ratify, if they have not done so, the treaties mentioned in the Preamble, especially the Protocol on the Rights of Women in Africa;
- ii.* Incorporate into domestic law and fully implement the provisions of regional and international treaties on economic, social and cultural rights;
- iii.* Establish constitutional protection of economic, social and cultural rights subject to non-discrimination and equality;
- iv.* Come up with National Action Plans, which set out benchmark indicators for the progressive realization of social economic and cultural rights;
- v.* Take effective measure to ensure budgetary processes are transparent and consultative;
- vi.* Involve civil society in meaningful consultations in policymaking and in the implementation of economic, social and cultural rights generally;
- vii.* Review all national policies, which undermine the realization of specific economic, social and cultural rights;
- viii.* Provide reports under Article 62 of the Charter on how far they have gone in making economic, social and cultural rights both accessible and non discriminatory;
- ix.* Adopt measures for the prudent use of resources, including the investigation of affordable alternatives for health drugs e.g. generic vs. patent medicines
- x.* Ensure effective citizen participation in government through credible electoral processes, liberalization of the mass media and in the formulation of legislation and policies;
- xi.* Adopt special measures for women and address the economic, social and cultural rights of vulnerable and marginalized groups including children, indigenous peoples, displaced persons, refugees, persons living with HIV/AIDS and the disabled;

- xii.* Develop mechanisms to hold non-state actors especially multi-national corporations and businesses accountable for violations of economic, social and cultural rights in such matters relating to child labour, industrial safety standards, protection against forced evictions and low wages, protection of the environment, including global warming and its impact on ecosystems, livelihood and food security;
- xiii.* Strengthen the capacity of State institutions to produce disaggregate data that would provide an accurate assessment of the implementation of economic, social and cultural rights;
- xiv.* Promulgate and implement comprehensive ICT policies and programmes;
- xv.* Consult with civil society organisations in the nomination and election of members of the African Commission and judges of the African Court;
- xvi.* Ratify the Protocol on the African Human Rights Court and make the declaration under Article 34(6) of the Protocol allowing individuals and non-governmental organisations to file cases, if they have not done so;
- xvii.* Nominate and elect judges of the African Human Rights Court so that it may be established without further delay;
- xviii.* Take necessary measures to reduce military spending significantly in favour of increasing spending on the implementation of economic, social and cultural rights;
- xix.* Ensure that economic, social and cultural rights take primacy in the negotiations of bilateral and multilateral trade and economic agreements;
- xx.* Create independent, impartial and well-resourced national human rights institutions and if they already exist to strengthen their independence and impartiality.

b) The African Union should:

- i.* Urge Member States that have not done so, to ratify the human rights treaties mentioned in the Preamble, in particular the Protocol on the Rights of Women in Africa;
- ii.* Provide sufficient funds for African human rights institutions to enable them to effectively fulfil their mandate;

- iii.* Establish the African Court on Human and Peoples' Rights without further delay;
- iv.* Urge Member States that have not done so to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, and to make the necessary declaration under Article 34(6) of the Protocol;
- v.* Establish the Human Rights Fund as recommended by the First AU Ministerial Conference on Human Rights held in Kigali, Rwanda, in May 2003;
- vi.* Strengthen the Secretariat to enhance the functioning of the African Commission;
- vii.* Urge the AU Peace & Security Council to adopt urgent measures to address the conflicts in Africa in order to create a conducive environment for the respect of economic, social and cultural rights;
- viii.* Call upon the organs of the AU to encourage Member States to uphold economic, social and cultural rights and to hold them accountable for violations of economic, social and cultural rights;
- ix.* Integrate the monitoring of economic, social and cultural rights into the work of relevant AU institutions as well as the CSSDCA Peer Review Mechanism and New Partnership for Africa's Development (NEPAD) African Peer Review Mechanism process;
- x.* Follow up recommendations of the African Commission to ensure implementation of its decisions by Member States.

c) The African Commission should:

- i.* Elaborate principles and guidelines on economic, social and cultural rights and establish a working group for this purpose;
- ii.* Integrate economic, social and cultural rights into the mandates of existing Special Rapporteurs and Working Groups;
- iii.* Urge States to duly submit their reports to the African Commission under Article 62 of the African Charter;
- iv.* Address economic, social and cultural rights during the examination of State Reports under Article 62 during questions and concluding observations;

- υ.* Review its guidelines for state reporting pertaining to economic, social and cultural rights;
- vi.* Consider alternative means of examining implementation of provisions of the Charter by a State that is in perpetual default of its reporting obligations under Article 62 of the Charter;
- vii.* Provide substantive recommendations to the AU Assembly on economic, social and cultural rights;
- viii.* Undertake studies and research under Article 45 on specific economic, social and cultural rights;
- ix.* Pay special attention to economic, social and cultural rights during promotional visits to States;
- x.* Ensure effective dissemination of relevant decisions and resolutions of the Commission in collaboration with relevant governmental and non-governmental national and sub-regional institutions;
- xi.* Further elaborate the economic and social rights implicit in the African Charter;
- xii.* Urge the AU to establish the African Human Rights Court without further delay and those States that have not done so, to ratify the Protocol establishing the Court and to make the necessary declaration under Article 34(6) of the Protocol.

d) Civil Society should:

- i.* Play a more pro-active role in the nomination of and lobby for the election of candidates to the African Commission who are conversant with economic, social and cultural rights;
- ii.* Advocate for States to ratify the Protocol of the African Human Rights Court and to make the declaration allowing NGOs and individuals to file cases;
- iii.* Advocate for the African Human Rights Court to be established without further delay;
- iv.* Prioritize monitoring of economic, social and cultural rights in their advocacy work;

- v.* Play a role in raising public awareness of economic, social and cultural rights and the obstacles to fulfillment of these rights in particular harmful cultural practices;
- vi.* Actively participate in the budgetary process, both in terms of formulation and analysis;
- vii.* Develop partnerships with both the State and private sector, where possible, for the protection of economic, social and cultural rights;
- viii.* Compile and submit to the African Commission shadow reports on economic, social and cultural rights;
- ix.* Improve networking amongst NGOs and their support activities of the African Commission and its Special Rapporteurs and Working Groups;
- x.* Bring more cases on economic, social and cultural rights to the African Commission, the African Committee on the Rights and Welfare of the Child, national courts, and the African Human Rights Court, when it is established;
- xi.* Become involved in specific projects in the implementation of economic, social and cultural rights especially in the rural areas;
- xii.* Advocate for comprehensive national and regional ICT policies and programmes, and to incorporate ICT training, provision and access in their work plans.

e) National Human Rights Institutions should

- i.* Undertake studies, monitor and report on economic, social and cultural rights;
- ii.* Scrutinise existing laws and administrative acts and make submissions to Parliament on bills relating to economic, social and cultural rights;
- iii.* Publish and distribute their reports on economic, social and cultural rights;
- iv.* Establish regional networks /coalitions and involve NGOs in these coalitions;
- v.* Apply for affiliate status with the African Commission, if they have not done so;

- vi.* Raise awareness on economic, social and cultural rights among particular groups such as the public service, the judiciary, the private sector and the labour movement and encourage the Government to integrate human rights in the school curricula;
- vii.* Examine complaints of infringements of economic, social and cultural rights and make recommendations on redress, and where possible file cases before national courts;
- viii.* Conduct follow up activities in the implementation of recommendations of international treaty bodies and publicize their reports, especially on economic, social and cultural rights;
- ix.* Advocate for States to ratify the Protocol of the African Human Rights Court and to make the declaration allowing NGOs and individuals to file cases;
- x.* Advocate for the African Human Rights Court to be established without further delay;

f) International and regional entities should:

- i.* Pay particular attention to African needs related to development and the realisation of economic, social and cultural rights;
- ii.* Cancel the unserviceable debt burdens of African States;
- iii.* Ensure that bilateral and multilateral trade and economic agreements conform to international treaty obligations relating to economic, social and cultural rights;
- iv.* Play a role in the implementation of economic, social and cultural rights including through assistance and co-operation with African States;
- v.* Take measures to regulate trade in extractive industries (such as oil, mining) that are exploitative, corrupt and fuel conflicts in Africa;
- vi.* Co-operate with African countries in their efforts to repatriate money and cultural artefacts that have been unlawfully removed from African countries;
- vii.* Ensure compliance with the principles of corporate social responsibility.

12. In conclusion, the African Union, its Member States, international and national organisations and non-state actors should fully recognise human rights as a fundamental objective of development and that development has to achieve the full realisation of all human rights. Economic, social and cultural rights should therefore be integrated into development planning and implementation so that African needs and aspirations are fully addressed.

**Adopted on 17 September, 2004
in Pretoria, South Africa**

EX.CL/167 (VI)
ANNEX 1
Original: English

EIGHTEENTH ACTIVITY REPORT OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS

2005

Report of the 17th annual activity report of the African Commission on human and peoples' rights

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