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

28th Activity Report of the ACHPR

2010
MAKE PEACE HAPPEN

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*African Commission on Human
& Peoples' Rights*



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**28TH ACTIVITY REPORT OF THE AFRICAN COMMISSION
ON HUMAN AND PEOPLES' RIGHTS (ACHPR)**

Submitted in Accordance with

Article 54 of the African Charter on Human and Peoples' Rights

28th Activity Report of the ACHPR

2010
MAKE PEACE HAPPEN

Introduction

1. This is the Twenty-Eighth (28th) Activity Report of the African Commission on Human and Peoples' Rights (the ACHPR).
2. The Report describes the activities undertaken by the ACHPR from November 2009 to May 2010, including the 8th Extra-Ordinary Session of the ACHPR, held in Banjul, The Gambia, from 22 February to 3 March 2010 and the 47th Ordinary Session of the ACHPR held in Banjul, The Gambia, from 12 to 26 May 2010.

Events Preceding the 47th Ordinary Session

3. Members and staff of the ACHPR participated in, and collaborated with other human rights organisations in a series of activities preceding, and on the margins of the Session, including in the following:

January 2010

- Budget presentation and defence;¹
- "Gender is My Agenda" Campaign;²
- Permanent Representatives Committee (PRC) meeting;³
- Executive Council meeting;⁴
- African Union (AU) Summit;⁵

February 2010

- Preparatory Mission for the 47th Ordinary Session;⁶
- Promotional Mission to Mauritania;⁷
- 8th Extraordinary Session of the ACHPR;⁸

March 2010

- Meeting of AU Organs on the Human Rights Strategy for Africa;⁹
- Meeting of AU Organs/institutions and stakeholders on the African Governance Architecture;¹⁰
- Technical Meeting with Regional Economic Communities, AU Organs, Experts and Stakeholders on the African Charter on Democracy, Elections and Good Governance;¹¹
- Mission of the Working Group on Indigenous Populations (WGIP);¹²
- Promotional Mission to Mozambique;¹³

¹ Addis Ababa, Ethiopia, 15 - 24 January 2010
² Addis Ababa, Ethiopia, 21 - 24 January 2010
³ Addis Ababa, Ethiopia, 25 - 26 January 2010
⁴ Addis Ababa, Ethiopia, 28-29 January 2010
⁵ Addis Ababa, Ethiopia, 30 January to 2 February 2010

⁶ Tunis, Tunisia, 8 – 12 February 2010
⁷ 8 – 12 February 2010

⁸ Banjul, The Gambia, 22 February to 3 March 2010

⁹ Banjul, The Gambia, 11 – 13 March 2010. Organised by the DPA/AUC

¹⁰ Banjul, The Gambia, 15 – 17 March 2010. Organised by the DPA/AUC

¹¹ Banjul, The Gambia, 18 – 20 March 2010. Organised by the DPA/AUC

¹² Brazzaville, Republic of Congo, 15 – 24 March 2010

¹³ 22 – 26 March 2010

April 2010

- Regional Workshop on the Death Penalty for West and North Africa;¹⁴
- African Implementation Group meeting;¹⁵
- Informal Joint Implementation Group;¹⁶
- Second Annual Review Meeting of the European Commission (EC) 55 Million Euro;¹⁷
- Promotional Mission to Angola;¹⁸
- Ninth Session of the United Nations (UN) Permanent Forum on Indigenous People;¹⁹
- Meeting of the Committee on the Prevention of Torture in Africa;²⁰
- Meeting of the Optional Protocol to the Convention against Torture(OPCAT);²¹
- Robben Island Guidelines (R.I.G) Workshop;²²
- Meeting between the ACHPR and the AfCHPR.²³

May 2010

- Workshop on Enhancing Cooperation between Regional and International Mechanisms for the Promotion and Protection of Human Rights;²⁴
- AU/EU Human Rights Dialogue ;²⁵
- NGO Forum;²⁶
- Meeting of the WGIP in Africa;²⁷
- Meeting on Human Rights Strategy for Africa;²⁸
- Presentation on Examining the Challenges of Maternal Mortality and HIV/AIDS and its Impact on Women's Right to Adequate Housing, Land and Property in Africa;²⁹
- Meeting on *"Examining the Protocol on the Rights of Women in Africa: An Innovative Instrument for the Protection of Women's Right to Health and Adequate Standard of Living."*³⁰
- Open Discussion on *"Citizenship: the Rights to a Nationality as it Impacts on the Enjoyment of Other Rights Established by the African Charter on Human and Peoples' Rights;"*³¹

¹⁴ Cotonou, Republic of Benin, 12 – 15 April 2010
¹⁵ Addis Ababa, Ethiopia, 12 April 2010
¹⁶ Addis Ababa, Ethiopia, 13 -14 April 2010
¹⁷ Addis Ababa, Ethiopia, 15-16 April 2010
¹⁸ 19 – 23 April 2010
¹⁹ 16 – 23 April 2010
²⁰ Dakar, Senegal, 26 April 2010
²¹ Dakar, Senegal, 27 – 28 April, 2010
²² Dakar, Senegal, 29 April 2010 R.I.G Workshop
²³ Arusha, Tanzania, 27 – 29 April 2010
²⁴ Geneva, Switzerland, 3 – 4 May. Organised by OHCHR
²⁵ Brussels, Belgium, 7 May 2010. Organized by the DPA/AUC
²⁶ Banjul, The Gambia, 8 – 10 May 2010
²⁷ Banjul, The Gambia, 8 – 10 May 2010
²⁸ Banjul, The Gambia, 10 – 11 May 2010. Organized by the PAD/AUC
²⁹ Banjul, The Gambia, 11 May 2010. Organised by COHRE
³⁰ Banjul, The Gambia, 11 May 2010. Organised by Centre for Reproductive Rights

- Official launching of the ACHPR Guidelines on State Reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Attendance at the Session

4. The following members of the ACHPR attended the 47th Ordinary Session:
- Commissioner **Reine Alapini-Gansou**, Chairperson
 - Commissioner **Mumba Malila**; Vice-Chairperson
 - Commissioner **Catherine Dupe Atoki**;
 - Commissioner **Musa Ngary Bitaye**;
 - Commissioner **Mohamed Fayek**;
 - Commissioner **Mohamed Bechir Khalfallah**;
 - Commissioner **Soyata Maiga**;
 - Commissioner **Kayitesi Zainabou Sylvie**;
 - Commissioner **Pansy Tlakula**; and
 - Commissioner **Yeung Kam John Yeung Sik Yuen**.

The Opening Ceremony

5. A total of **five hundred and twenty-three (523)** participants attended the 47th Ordinary Session of the ACHPR, including: representatives from States Parties, International and Inter-Governmental Organizations, AU Organs, National Human Rights Institutions (NHRIs), as well as African and International Non-Governmental Organizations (NGOs).

6. At the Opening Ceremony, speeches were delivered by the following:
- i. Honourable Commissioner Reine Alapini Gansou, Chairperson of the ACHPR;
 - ii. H.E. Commissioner Julia Dolly Joiner, Commissioner for the DPA/AUC,
 - iii. Mrs. Hannah Forster, Executive Director of the African Centre for Democracy and Human Rights Studies, on behalf of NGOs,
 - iv. Honourable Victor Toupanou, Keeper of the Seal and Minister of Justice, Legislation and Human Rights, and Government Spokesman of the Republic of Benin, on behalf of the AU Member States,
 - v. Mr. Lawrence Mushwana, Vice-Chairperson of the Network of NHRIs, on behalf of NHRIs, and
 - vi. Honourable Edward Gomez, Attorney General and Minister of Justice of the Republic of The Gambia on behalf of the Government of The Gambia.

7. In her opening statement, the Chairperson of the ACHPR, Honourable Commissioner **Reine Alapini Gansou**, on behalf of the Members of the ACHPR,

³¹ Banjul, The Gambia, 11 May 2010. Initiated by Citizenship Rights in Africa Initiative [CRAI]

and on her own behalf, expressed sincere appreciation to the Government and people of the Republic of The Gambia, for not only graciously accepting to host another Session of the ACHPR, but for the conducive environment and excellent facilities provided to ensure the success of the 47th Session.

8. In her opening remarks, **Commissioner Gansou** said that in her address at the end of the deliberations of the 46th Ordinary Session of the ACHPR, she had indicated that Africa needs to commit its collective conscience to resolving its urgent human rights problems, especially those related to democratic governance, rule of law and free and fair elections.

9. She recognised that though democracy has varying interpretations, she was of the view that democracy is a political system that should be underpinned by the rule of law. She emphasised that for there to be peace in Africa, States must adhere to those fundamental principles that make democracy work. She stated that there is no doubt that Africa has, through the AU, taken full stock of what is at stake by taking decisions on the need to get States Parties to adopt the democratic route. She urged States Parties not only to ratify the Charter on Democracy, Elections, Governance, but also to implement the AU Decision on 'Unconstitutional Change of Government'.

10. The Chairperson underscored that Africa cannot speak of respect for or promotion of human rights in a context of bad governance, in a context of electoral violence or of truncated elections flawed by serious and massive human rights violations. She stressed that one cannot speak of respect for human rights in a context of the exploitation of the wealth of the people. She also said that there cannot be good governance where arbitrary arrests, torture in custody, problems of gender based discrimination and other forms of violations are the order of the day; or where the most basic of fundamental freedoms are muzzled and are replaced by restrictive rights.

11. She noted that unfortunately, the human rights violations about which the ACHPR is usually called upon to act, emanate most often from the contexts of bad governance, from the systematic denial of democratic change and the refusal to recognize the fundamental rights of the human being as well as the unacceptable reversal of constitutional order, with no regard for the rights of the populations.

12. She recalled that 2010 has been declared the Year of Peace and Security by the Assembly of Heads of State and Government during the 14th Summit of Heads of State and Government. She thus underscored the need for Africans to give an account on what they are doing to promote peace and democratic values in their various communities. She concluded by informing the 47th Ordinary Session that the ACHPR has received the Torch of Peace from the AU Executive Council and called upon the Secretary to the Commission to ignite it.

13. Speaking on behalf of the African Union Commission, **H. E. Mrs Julia Joiner**, Commissioner for Political Affairs, noted that as Africa moves into the second decade of the 21st century, it stands witness to a simple and irreversible reality – that Africans are establishing, expressing and asserting their human rights more than ever before. She informed the audience of the 47th Session that as Africa grapples with the continuing human rights challenges, it needs to take a step back and look at the journey travelled and the progress registered.

14. **Commissioner Joiner** stated that as Africa articulates its achievements and seeks to build a more consolidated human rights path, it is imperative that it builds on those organisations which have succeeded in putting human rights to the fore, the most significant of which are the ACHPR and the African Court on Human and Peoples' Rights.

15. **Commissioner Joiner** stated that the promotion and protection of human rights in Africa is a collective effort. She said that whilst human rights activists have a propensity to emphasise the role and responsibility of States Parties, they should not forget to remind themselves that human rights success stories hinge on building wider ownership and ensuring that the burden of responsibilities and actions is shared across all sectors of societies. She said that in as much as our humanism is best reflected in our interactions with others, exercise of rights must also be predicated on our respect for the rights of others, as this might go a long way in building the rights culture all our instruments and mechanisms are seeking to establish.

16. **Mrs. Hannah Forster**, Director of the African Centre for Democracy and Human Rights Studies, gave a statement on behalf of participants of the Forum of NGOs to the 47th Ordinary Session of the ACHPR. In reviewing the human rights situation in Africa for the last six months, she concluded that it was characterised by ongoing human rights violations and concerns. She informed the Session that migrants, refugees and internally displaced persons, human rights defenders, journalists, the elderly, women and children and indigenous populations face serious human rights challenges in Africa.

17. She called attention to human rights challenges in countries like Burundi, Cameroon, DRC, Ethiopia, Guinea Conakry, Niger, Rwanda, Somalia, the Sudan, Uganda and Zimbabwe that are of concern to the Forum. She said that the intention of the Forum is not to name and shame, but a call for action to the ACHPR to address the potentially deteriorating situation of human rights in those countries. She said that in Burundi, Malawi, Rwanda and Uganda, there are reports of increased intimidation, harassment and homophobic attacks directed at people of different sexual orientation. She called on the ACHPR to continue its investigative mandates in all countries where human rights are under threat, and also to conduct fact finding missions to those countries.

18. Mrs. Forster also highlighted the continuing depletion of Africa's natural resources as well as the deterioration of the environment due to lack of transparency in investment and corporate policies of some organisations. She stated that while it was commendable for the ACHPR to set up a Working Group under this theme, it was necessary to consider the formation of mechanisms to protect vulnerable people from exploitation in its various forms. In connection with this threat, she also highlighted the human rights dimension of climate change as another disturbing threat to the enjoyment of human rights on the continent. She said that many African nations are realizing that the threats from climate change are serious and urgent.

19. In conclusion, she said that though some of the news coming out of Africa has not been very good, there has been some real and positive development. She cited the spirit of good will and cooperation of the Government of Kenya to implement the recommendation of the ACHPR relating to the Endorois Peoples and the increasing trend of collaboration between state and non-state actors for human rights in Africa.

20. Speaking on behalf of the AU Member States, **H. E. Victor Toupanou**, Keeper of the Seal and Minister of Justice, Legislation and Human Rights and Government Spokesperson for the Republic of Benin, recognised the important role of the ACHPR's Sessions. He said that the agenda of the Session included many pertinent human rights issues on the continent, giving the various stakeholders the opportunity to exchange views in an open manner. He said that it also gave participants the opportunity to take stock of the recent progress on the implementation of the rights and freedoms guaranteed by the African Charter on Human and Peoples' Rights.

21. Referring to the human rights situation of Benin, he said that Benin is doing all it can to promote good governance and an open democratic system, and to actively collaborate with the ACHPR. In that regard, he said that Benin submitted, at the 45th Session of the ACHPR, its consolidated Periodic Report for 2000-2008 on the programmes and policies it has adopted to guarantee the promotion and protection of the rights and freedoms guaranteed by the Charter. He informed the Session that one of the priorities of the Government of Benin and of its Leader, President Boni YAYI, is to guarantee equal access for all the citizens to basic social services and the enjoyment of their rights, with no discrimination.

22. He concluded by stating that Benin is committed to implementing the ideals of the African Charter. He also re-affirmed his Government's commitment to supporting the work of the ACHPR. He said that to achieve that objective, Benin will not only continue to welcome visits by the members of the ACHPR, but also stands ready to supply the ACHPR with information on how Benin is implementing its international obligations.

23. The representative of the African National Human Rights Institutions (NHRIs), Mr Laurence Mushwana, Vice Chairperson of the Network of African NHRIs in his statement expressed appreciation to the ACHPR for its tireless efforts to make human rights a reality on the continent, despite being confronted with multiple challenges. He also recognised the courage and zeal with which human rights defenders and NHRIs in Africa have acted to improve the human rights situation in the continent despite the difficulties.

24. He noted with concern that the 47th Session was being held at a time when the situation of human rights defenders in Africa has deteriorated considerably due to political and social instability, while violence in the context of elections, civil wars, ethnic and xenophobic attacks have been witnessed in different parts of the continent. In that regard, he called for cooperation with regional intergovernmental human rights organisations in the struggle to protect human rights defenders. He said that as a first step, African states should create, develop or improve strategies and programmes for the physical protection of defenders in their respective countries.

25. In conclusion, Mr Laurence Mushwana said that NHRIs in Africa are conscious of the various challenges in the continent, and pledged that they shall play their role in addressing them, especially in helping to strengthen the regional human rights infrastructure, promoting the rule of law and monitoring governance structures. He said that the Network of African NHRIs will nurture existing NHRIs and encourage more African nations to form these institutions in line with the international normative

standards, the *Paris Principles relating to the status of NHRIs*, so that they can be better able to promote and protect human rights.

26. The 47th Ordinary Session was officially opened by **Honourable Mr. Edward Gomez**, Attorney General and Minister of Justice of the Republic of The Gambia. He welcomed the Members of the ACHPR and the participants to Banjul, The Gambia.

27. He stated that within the last six months many changes have taken place in Africa in the area of democracy, good governance and human rights, adding that in 2010, Africa witnessed many unrests, which continue to violate the rights of many Africans. He urged the ACHPR to continue working diligently with Member States to carry out its mandate, which is to monitor, promote and protect human rights.

28. He reiterated the commitment of the Government of The Gambia to collaborate with and support the activities of the ACHPR in the promotion and protection of human rights. He also stated that in the process of discharging their mandates, true promoters and protectors of human rights should act responsibly and not make misleading and unsubstantiated claims of alleged human rights violations or statements founded on ulterior motives.

Agenda of the Session

29. The Agenda of the Session was adopted on 12 May 2010 and is attached to this Report as **Annex I**.

Cooperation and Relationship with NHRIs and NGOs

Application for Observer Status

30. The ACHPR considered applications for **Observer Status** from nine (9) NGOs. It granted Observer Status to eight (8) NGOs in accordance with the 1999 Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights, ACHPR/Res.33 (XXV) 99. The NGOs granted Observer Status are the following:

- i. *Collectif pour la defense du Droit a l'Energie* (CODDAE) ;
- ii. Network of African Human Rights Institutions, Nairobi, Kenya;
- iii. Association MIBEKO;
- iv. The Association of the Defense of Women and Children's Rights (HAGURUKA a.s.d.i) Kigali, Rwanda;
- v. The Association for Media Development in Southern Sudan;
- vi. *Union Nationale de la Femme Tunisienne*, Tunis, Tunisie ;
- vii. The General Forum for Arab-African Non-Governmental Organisations, Tripoli, Libya;
- viii. *Organisation Tunisienne des Meres*, Tunis, Tunisie.

31. This brings the total number of NGOs with Observer Status before the ACHPR to **four hundred and twelve (412)**.

32. The ACHPR decided to defer the application for Observer Status of the Open Society Initiative for Southern Africa (OSISA), based in South Africa, to the next Ordinary Session, for lack of adequate information.

33. The ACHPR decided, after a vote, not to grant Observer Status to the Coalition for African Lesbians (CAL), South Africa, whose application had been pending before it. The reason being that, the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter.

Application for Affiliate Status

34. The ACHPR considered the application of the National Human Rights Commission of Mauritania, and decided to grant it **Affiliate Status**. This brings the number of NHRIs with Affiliate Status with the ACHPR to **twenty - two (22)**.

Human Rights Situation in Africa

35. Statements were made by State delegates from Algeria, Angola, Burkina Faso, Ivory Coast, Egypt, Ethiopia, Kenya, Libya, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Senegal, South Africa, the Sudan, Tanzania, Togo, Tunisia and Zimbabwe on the human rights situations in their respective countries. The summarised texts of these statements are reflected in the Session Report of the 47th Ordinary Session of the ACHPR.

36. Representatives of AU Organs, International and Intergovernmental Organisations, and NHRIs also addressed the ACHPR on the various human rights issues on the continent, and the need to continue cooperation with the ACHPR, to better promote and protect human rights. These organisations included the African Committee of Experts on the Rights and Welfare of the Child, the Office of the High Commissioner for Human Rights, International Organisation of the Francophonie, South African Human Rights Commission, Tanzania Human Rights Commission, National Human Rights Commission of Algeria, National Human Rights Commission of Rwanda, and National Human Rights Commission of Mauritania.

37. A total of **forty-four (44)** NGOs, having Observer Status with the ACHPR also made statements on the human rights situation in Africa.

Activities of Members of the ACHPR During the Inter- Session

38. The Chairperson and members of the ACHPR presented Reports on the activities that they undertook during the period between the 46th Ordinary Session in November 2009, and the 47th Ordinary Session in May 2010. The reports covered activities undertaken in their capacities as members of the ACHPR, Special Rapporteurs, and/or Members of Special Mechanisms. The activities are set out hereunder.

Commissioner Reine Alapini Gansou - Chairperson of the ACHPR ***Report on activities as Commissioner***

39. From 2 to 4 December 2009, the Chairperson participated in a seminar on "*Penalties to be Imposed in Instances of Flagrant and Systematic Violation of Human*

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Rights,” organised by the International Centre for Transitional Justice in Strasbourg, France. The seminar gave participants from different Human Rights Organisations a chance to share their experiences on the subject.

40. From 7 to 11 December 2009, the Chairperson organized a Training Seminar on the “*Legal Instruments of Human Rights for Primary and High School Teachers*” in Cotonou, Benin. One of the objectives of this seminar was to equip the teachers with tools on International and Regional Instruments on Human Rights.

41. On 10 December 2009, the Chairperson attended a televised Round Table Discussion on Child Rights in the Republic of Benin, on the initiative of the Embassy of the Republic of Germany in Benin, on child rights, human rights for prisoners, detained persons and the question of the death penalty. She made a presentation on the activities of the ACHPR and its special mechanisms, and on the human rights situation on the continent, outlining various human rights problems to be addressed by Benin.

42. From 12 to 20 December 2009, a delegation made up of the Chairperson, together with Commissioners Catherine Dupe Atoki, and Kayitesi Zainabou Sylvie undertook a human rights promotion mission to the Republic of Algeria.

43. From 25 January to 2 February 2010, she attended the 14th Summit of the AU in Addis Ababa, where she presented the 27th Activity Report of the ACHPR. During the Summit, she highlighted the major constraints preventing effective implementation of the mandate of the ACHPR.

44. On 6 February 2010, the Chairperson attended a Conference on Human Rights, Globalisation and Economic Development in Amsterdam, The Netherlands. This Conference was organized by the Dutch United Nations Student Association, Utrecht (DUNSA) under the theme of its 2010 Edition “*Globalization and its Impact on Fundamental Liberties*”. During the Conference, she made a presentation on “*The role of the ACHPR.*”

45. From 26 February to 1 March 2010, she attended the 8th Extraordinary Session of the ACHPR held in Banjul, The Gambia.

46. From 9 to 18 March 2010, the Chairperson undertook a promotion mission to the Islamic Republic of Mauritania together with Commissioners Soyata Maiga and Mohamed Béchir Khalfallah. During the mission, they had very fruitful discussions with the Political and Administrative authorities involved in human rights activities, civil society, the National Commission Human Rights and other partners able to provide information to the ACHPR.

47. From 11 to 17 March 2010, the Chairperson participated in two meetings organized in Banjul, The Gambia, by the DPA/AUC: first on the Human Rights Strategy in Africa, and subsequently on African Governance Architecture. These meetings brought together representatives of AU Organs with human rights mandate, the Regional Economic Communities, representatives from the High Commission on Human Rights, the UN Economic Commission for Africa, as well as Civil Society and partner organisations.

48. On 12 April 2010, she attended the Regional Conference on the Death Penalty in Africa, in Cotonou, Benin, organised by the Working Group on the Death Penalty of the ACHPR. During the Conference, she delivered a statement at the opening ceremony.

49. From 13 to 16 April 2010, the Chairperson participated in the Second Ordinary Session of the Second Legislative Pan - African Parliament (PAP) in South Africa, where she presented a paper on the human rights situation on the continent from the point of view of the ACHPR. She used the opportunity to strengthen collaboration between the ACHPR and PAP.

50. From 19 to 22 April 2010, the Chairperson undertook a working visit to the Secretariat of the ACHPR to assess the state of preparedness for the 47th Session Ordinary Session.

51. From 27 to 29 April 2010, the Chairperson attended the third Joint Meeting of the ACHPR and the AfCHPR in Arusha, Tanzania. The main objective of the meeting was to examine the provisions of the Rules of Procedure of the AcCHPR that deal with complementarity between both Institutions.

52. From 3 to 4 May 2010, the Chairperson attended an International Workshop on the Strengthening of Cooperation between Regional and International Mechanisms for the Protection and Promotion of Human Rights, organised by the United Nations High Commission on Human Rights, in Switzerland, Geneva. During this Workshop, she made presentations on: *“The Enforcement of Decisions and Recommendations of Existing Regional Human Rights Mechanisms and the International System of Human Rights”* and *“The Current Regional Human Rights Mechanisms: Lessons Learned and Proposals for Strengthening Cooperation between the United Nations System and Regional Mechanisms on Human Rights.”*

53. On 7 May 2010, the Chairperson took part in the Sixth Dialogue between the AU and EU in Brussels, Belgium. This meeting followed five other meetings organised since 2008, aimed at promoting cooperation between the two systems. It was convened to review the human rights situation at various levels with the purpose of merging efforts to tackle the various human rights violations reported. During the meeting, she made a brief presentation on the activities of the ACHPR and met with EU Representatives in view of forming future partnerships

54. From 9 to 10 May 2010, the Chairperson attended the NGO Forum, organised by the African Centre for Democracy and Human Rights Studies in Banjul, The Gambia. She made a statement at the end of the Forum where she reiterated the commitment of the ACHPR to the Forum.

55. From 10 to 12 May 2010, the Chairperson attended the second meeting on the Human Rights Strategy in Africa organised by the DPA/AUC in Banjul, The Gambia.

56. As part of her administrative activities, she evaluated the activities conducted by the Secretariat in view of implementing various recommendations formulated by the ACHPR during the 46th Ordinary and 8th Extraordinary Sessions according to Article 23 of the Rules of Procedure of the ACHPR.

57. Following her activities during the intersession, the Chairperson made some recommendations, which include:

- i. The ACHPR should strengthen cooperation with other Organs;
- ii. Development of the African Strategy on Human Rights should be accelerated;
- iii. The ACHPR should maintain and amplify constructive dialogue with other stakeholders;
- iv. The ACHPR should pursue its efforts to find alternative financial resources to relieve the heavy financial burden of AU Member States' contributions to the AU Budget;
- v. The ACHPR should find appropriate and sustainable solutions for capacity building of its members and staff of its Secretariat;
- vi. The AU Member States should continue to show interest in the activities of the ACHPR by extending open invitations to conduct missions as well as to hold Sessions in their countries.

Commissioner Mumba Malila -Vice Chairperson of the ACHPR

Activities as Commissioner

58. From 10 to 12 December 2009, the Vice - Chairperson attended a meeting of Eminent African Jurists on HIV and Law in the 21st Century, co - hosted by the International Association of Women Judges (IAWJ), International Commission of Jurists (ICJ), UNAIDS and UNDP.

59. The meeting which was convened to discuss current scientific, epidemiological, social and medical knowledge and recent developments, reviewed a number of HIV-related judgments and authoritative legal instruments, summarized in existing or specially commissioned papers for the conference. Jurists living with HIV, notably judges, also participated in the meeting and gave personal accounts of the epidemic. The meeting also heard directly from networks of people living with HIV, speaking about how law has made a positive difference in their lives.

60. The meeting also highlighted the role of the judiciary in the response to HIV, including through examples of judicial involvement in programmes to promote access to justice and reduce HIV-related stigma and discrimination. The Vice-Chairperson chaired the Session on Access to Life-Saving Treatment which dealt with using the law to ensure, expand and sustain access to treatment in Africa.

61. From 17 to 18 December 2009, at the invitation of Commissioner Mohamed Fayek, he participated in a conference on "Ombudsman, Cultural Dialogue and Human Rights in a Changing Society," held in Cairo, Egypt.

62. The Conference, which was organized by the Ombudsman's Office under the Council for Human Rights in Egypt, brought together practitioners, intellectuals and academia actively engaged in ombudsman issues to capture perspectives and best practices through a participatory approach. African, Western, Middle-Eastern and Asian experiences were compared and discussed. The Vice-Chairperson spoke on the role of the Ombudsman's Office in promoting human rights and why and how the ACHPR should forge ties with these institutions to bring about greater observance of human rights in Africa.

63. From 25 January to 2 February 2010, the Vice- Chairperson attended the meeting of the Permanent Representative Committee of the African Union in Addis Ababa, Ethiopia. The meeting was preparatory to the meetings of the Executive Council and the Assembly, which were held in succession soon after. On the sidelines of these meetings, he met and spoke with various African Ambassadors accredited to the AU on the need for them to support the ACHPR. In the company of the Chairperson, Commissioner Maiga and the Secretary, he met with the United Nations High Commissioner for Human Rights, and discussed ways in which the UN and the African system of human rights could enhance cooperation.

64. From 22 February to 3 March 2010, he attended the 8th Extra-Ordinary Session of the ACHPR in Banjul, The Gambia, to finalise the Rules of Procedure of the ACHPR, and consider Communications and outstanding Reports, among other urgent matters.

65. From 4 to 5 March 2010, he attended a Symposium on Judicial Independence organized by the International Commission of Jurists (ICJ) in conjunction with the Judiciary and Law Society of Lesotho under the theme "*Strengthening the Independence, Impartiality and Accountability of the Judiciary in the Context of Lesotho.*" He presented a paper on the "*Jurisprudence of the ACHPR regarding the Independence of the Judiciary*".

66. On 8th March 2009, he participated in the activities that were organised by women's groups in Lusaka to commemorate the International Women's Day under the theme "*Equal Opportunities for All*". He took part in the nearly 10km walk to mark the important day in solidarity with hundreds of women in Zambia.

67. From 22 to 26 March 2010, as Commissioner responsible for promotional activities in Mozambique, he undertook a promotional mission to Mozambique.

68. On 26 April 2010, he had a meeting with a delegation made up of human rights institutions which was in Zambia to launch a report on the human rights situation in selected Zambian prisons. The delegation appealed to the ACHPR, through him, to study the research findings and if possible join in urging the Zambian Government to pay heed to the recommendations for the sake of improving the welfare of prisoners in the country.

69. From 27 to 29 April 2010, he participated in the Third Joint Meeting between the ACHPR and the AfCHPR which was held in Arusha, Tanzania, to conclude the harmonization of the Rules of Procedure of the two institutions.

70. On 9 May 2010, he attended the meeting of the NGO Forum in Banjul, The Gambia. The Forum adopted resolutions and recommendations to be forwarded to

the ACHPR as a contribution to the deliberations of the 47th Ordinary Session of the ACHPR.

71. From 10 to 11 May 2010, he attended the 2nd Meeting of AU Organs on the Human Rights Strategy for Africa in Banjul, The Gambia, organized by the DPA/AUC.

72. On 11 May 2010, in Banjul, The Gambia, he participated in a Roundtable Meeting on the Establishment of a Special Rapporteurship for the protection of the rights of people living with HIV and those at risk. The discussion was organised by the Human Rights Development Initiative in conjunction with the Centre for Human Rights of the University of Pretoria.

Activities as Member of the Working Group on the Death Penalty in Africa

73. From 12 to 15 April 2010, he attended a Regional Conference on the Death Penalty in Africa for West and North Africa held in Cotonou, Benin. The Conference was organised to debate the issues concerning the death penalty in Africa with a view to adopting a Protocol on the abolition of the death penalty in Africa.

74. He delivered a paper entitled “*Arguments for and Against the Death Penalty*” on behalf of Prof. Carlson Anyangwe, a member of the Working Group who could not attend the conference.

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

75. From 8 to 10 May 2010, he participated in the regular meeting of the Working Group on Indigenous Populations/ Communities in Africa held in Banjul, The Gambia, to discuss activities undertaken during the inter-session period and to plan for the Group’s future activities.

Activities as Chairperson of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa

76. As Chairperson of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, he undertook no project during the intersession, as the membership of the Working Group would only be constituted at the 47th Ordinary Session.

Commissioner Catherine Dupe Atoki
Activities as a Commissioner

77. From 14 to 18 December 2009, Commissioner Atoki was part of the delegation of Commissioners that conducted a promotion mission to the Peoples’ Democratic Republic of Algeria. The objective of the mission was to conduct dialogue with the Algerian Government and other stakeholders involved in the promotion and protection of human rights.

78. Following reports about alleged violations of human rights including torture, unlawful arrest and detention during the electoral campaign in the Republic of Sudan, Commissioner Atoki sent a letter to the President of the Republic of The Sudan – His

Excellency Omar Hassan Al Bashir, on 16 December 2009, drawing his attention to the said allegations and calling for prompt investigation.

79. From 22 February to 3 March 2010, in Banjul, The Gambia, Commissioner Atoki attended the 8th Extra-Ordinary Session of the ACHPR. During the Session, comments from States Parties to the African Charter and other stakeholders on its Draft Rules of Procedure of the ACHPR were considered

80. From 11 to 13 March 2010, she attended a meeting organized by the DPA/AUC in consultation with other AU Organs/Institutions and Regional Economic Communities on developing a Human Rights Strategy for Africa, in Banjul, The Gambia. During the meeting, various papers and studies were considered, including the "*Road Map for the Development of a Human Rights Strategy for Africa*", the "*Report on the Mapping Exercise on the Development of a Comprehensive Human Rights Strategy for Africa*", the "*Report of Brainstorming/Consultative Meeting of AU Organs on their Working Relations*", held in Ouagadougou, Burkina Faso from 28 – 30 September 2008, and a paper on "*The African Governance Architecture (AGA)*".

81. On 2 April 2010, Commissioner Atoki was invited by the Institute for Advanced Legal Studies, in Abuja, Nigeria, to attend the induction into the Hall of Fame of the former Chief Justice of India, P. N. Bhagwati who is well known for his advancement of the principles of public interest litigation in India.

82. Commissioner Atoki conceived the idea to popularise the African Charter through the serialisation of its Articles in Nigerian newspapers. Accordingly, in February 2010, she was granted a space in "*This Day*" Newspaper, widely read in Nigeria, to expound on each Article of the African Charter and support same with decisions of the ACHPR where applicable. The monthly column dedicated to this effect has published two series so far, and the serialisation of each Article continues.

83. The Commissioner also wrote Articles for publication in various widely read Nigerian newspapers on the human rights perspective on a number of human rights themes, including issues of the death penalty, unconstitutional change of government and terrorism.

84. On 16 April 2010, Commissioner Atoki wrote a letter to the Speaker of the Nigerian House of Representatives, Honourable Oladimeji Bankole, drawing his attention to the National Human Rights Commission (Amendment) Bill that would restore the independence of the National Human Rights Commission of Nigeria, pending before the House of Representatives for six years. The letter urged an expedited action to pass the Bill, in order to empower the Nigerian Human Rights Commission to discharge its mandate effectively.

85. From 10 to 12 May 2010, Commissioner Atoki participated in a meeting of the AU Organs on the Human Rights Strategy for Africa held in Banjul, The Gambia. This meeting was a follow - up on the meeting convened in March 2010, and it sought to concretise the gains from the earlier meeting. The meeting provided the basis for collective reflection on the theme of the January 2011 AU Summit, "*Shared Values*." The values are the third pillar of the Strategic Plan of the AUC for 2009-2010. Under that theme, Africa seeks to promote existing and agreed values across the continent,

which includes good governance, democracy, respect of human rights, accountability and transparency.

Activities as Special Rapporteur on Prisons and Places of Detention in Africa

86. From 7 to 8 December 2009, Commissioner Atoki was invited by the Nigerian Bar Association to its Annual Conference to chair a Session on Prison Decongestion. This provided an opportunity to enlighten lawyers present on the working mechanisms of the ACHPR, particularly the work of her own mandate – Prisons.

87. From 9 to 11 December 2009, she participated in various events and activities to mark the 20th Anniversary of Penal Reform International in Geneva, Switzerland. She presented a paper on “*The Mandate and the Mechanisms of the ACHPR*”.

88. From 14 to 18 December 2009, she undertook a promotion mission to the Republic of Algeria together with Commissioner Zainabou Sylvie Kayitesi who was Head of the delegation and Commissioner Reine Alapini Gansou. During the mission, she visited some prisons in Algiers and engaged in fruitful dialogue with senior officials of the justice system on the issue of prison reform.

89. From 8 to 10 April 2010, she attended the African Regional Workshop on Prison and Correctional Services in Sierra Leone, jointly organised by the Sierra Leone Prisons Service, the African Correctional Services Association, the Prisoners Rehabilitation and Welfare Action and the African Security Sector Network. Commissioner Atoki chaired the opening Session of the Workshop and presented a paper titled “*Consolidating Peace through Correction,*” where she underscored that the consolidation of peace through corrections in prisons can serve as a catalyst to sustain peace and unity in society. At the end of the Workshop, the Controller of Prisons, Mr Moses Showers, invited her to carry out a Needs Assessment Mission of prisons in Sierra Leone.

90. On 20 April 2009, an attempted jail break in Kaduna State of Nigeria, resulted in the Governors of some States in Nigeria deciding to give orders to execute prisoners on death row, who are alleged to have initiated the riot leading to the attempted escape. In this regard, on 22 April 2010, Commissioner Atoki wrote a letter of Appeal to His Excellency, Dr Goodluck Jonathan, drawing his attention to Resolution ACHPR/Res.42 (XXVI) 99, adopted at the 26th Ordinary Session of the ACHPR held in Kigali, Rwanda, which urged States Parties to the African Charter to envisage a moratorium on the death penalty. She also engaged the Minister of Justice Honorable Abubaker Adoke SAN and the Controller – General of Prisons, Mr Olusola Ogundipe, on the need to set up a mechanism to address the overpopulation of prisons in Nigeria.

91. After reviewing the situation of prisons in Africa during the Inter -Session, she made some recommendations, which include requesting:

- i. The ACHPR to help State Parties to the African Charter to seek credible and workable alternatives to imprisonment;
- ii. States Parties to increase prison capacity and reroute minor cases;

- iii. States Parties to develop solutions to keep youths out of prison, like treating rather than punishing drug addicts, the mentally disordered and terminally ill offenders; and
- iv. States Parties to ratify the Optional Protocol to the Convention Against Torture and establish National Preventive Mechanisms.

Activities as Chairperson of the Committee on the Prevention of Torture in Africa

92. On 26 April 2010, Commissioner Atoki, chaired a meeting of the Committee for the Prevention of Torture in Africa (CPTA), in Dakar, Senegal. The meeting was convened to discuss terms of reference and the work plan of the CPTA for 2010 / 2011, as well as strategies for their effective implementation. The CPTA also discussed possible partnership/cooperation with the OPCAT mechanisms, UN Sub-Committee for the Prevention of Torture (SPT) and the National Preventive Mechanism (NPM), and other relevant national, regional and international stakeholders, including NGOs.

93. On 27 April 2010, Commissioner Atoki, Chairperson of CPTA also participated in a regional seminar on the OPCAT in Africa, jointly organised by the ACHPR, Amnesty International, Senegal and the Association for the Prevention of Torture (APT), in Dakar, Senegal. Some of the objectives of the Seminar included:

- i. Promoting prompt ratification of the OPCAT in signatory States;
- ii. Encouraging the exchange of experience and good practices on the establishment and the functioning of National Preventive Mechanisms in Africa; and
- iii. Creating a regional dynamic and encouraging interaction and cooperation between African National Preventive Mechanisms, National Preventive Mechanisms from different regions, as well as with the UN sub-Committee on the Prevention of Torture and the CPTA.

94. On 29 April 2010, Commissioner Atoki organized a one-day Workshop on the Robben Island Guidelines (RIG) in Dakar, Senegal. The objectives of the Workshop included:

- i. Enhancing the knowledge of participants to engage with the implementation of the RIG;
- ii. Developing strategies for the effective implementation of the RIG; and
- iii. Identifying relevant roles and responsibilities for participants who will form a nucleus of activism for CPTA activity in the various countries.

95. Commissioner Atoki made some general recommendations aimed at eradicating the practice of torture in Africa, including the following:

- i. The commitment of States Parties to ensuring that education and information on the use of the RIG is included in the training of law

- enforcement personnel and any other persons who may be involved with people in custody;
- ii. Criminalisation of torture.

Commissioner Musa Ngary Bitaye

Activities as a Commissioner

96. During the 46th Ordinary Session of the ACHPR, Commissioner Bitaye was tasked to prepare draft guidelines on the format and contents of reports of promotion missions. In this regard, he produced a draft paper which was considered by the ACHPR during its 47th Ordinary Session.

97. In January, 2010, as Chairperson of the ACHPR Advisory Committee on Budget and Staff Matters, Commissioner Bitaye was part of the delegation that participated in the meeting of the PRC, during which the budgets of all the AU Organs were considered.

98. From 22 February to 3 March 2010, Commissioner Bitaye attended the 8th Extraordinary Session of the ACHPR which took place in Banjul, The Gambia.

99. From 11 to 13 March, 2010, he was also a member of the ACHPR's delegation which attended the African Human Rights Strategy meeting organized by the DPA/AUC in Banjul, The Gambia. The purpose of the meeting was to move forward the African Human Rights Strategy.

100. On 26 and 29 April 2010, Commissioner Bitaye attended a meeting organized by the CPTA, in Dakar, Senegal, as a member of the Committee.

101. From 27 to 28 April 2010, he also attended a joint meeting of the CPTA in collaboration with the APT and Amnesty International Senegal in Dakar, Senegal.

102. During the Inter - Session:

- i. Progress was made on the "*Know your Rights*" Project of the ACHPR;
- ii. The African Charter was translated into the Fulfulde language;
- iii. The Protocol on the Rights of Women was translated into the Moore language;
- iv. The Protocol to the African Charter on the Establishment of the African Court was translated into the Fulfulde language;
- v. The Protocol on the Rights and Welfare of the Child, was translated into the Moore language.

103. The Open Society for Justice Initiative, East Africa, has expressed interest in the project with a view to contribute to the various tools and mechanism for the implementation on the ground and to also facilitate funding for the project.

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

104. The following activities were carried out under the supervision of Commissioner Bitaye, as Chairperson of the Working Group:

105. In December 2009, Mr. Kalimba Zephiryn, expert member of the Working Group, attended a seminar in Bangkok, on the role of national human rights institutions in promoting the implementation on the UN Declaration on the Rights of Indigenous Peoples organised by the Office of the High Commission on Human Rights. During the seminar, he provided an overview of the work of the Working Group and the challenges of indigenous peoples in Africa.

106. From 1 to 17 March 2010, the Working Group undertook a Research and Information visit to the Republic of Kenya. The Delegation was made up of Dr. Melakou Tegegn, expert Member of the Working Group and Dr. George Mukundi, member of the Working Group's Advisory Network of Experts.

107. During the visit, the delegation held meetings with stakeholders such as government ministries, national and international NGOs and indigenous communities in order to gather information about the human rights situation of indigenous populations in the country, and to provide information about the Working Group's report and the position of the ACHPR on the rights of indigenous populations. Indigenous communities in the different regions of Kenya were also visited, including, among others, those from the Mau Forest, the lake Beringo, Nanyuki, and Garissa.

108. From 15 to 24 March 2010, the Working Group undertook a country visit to the Republic of Congo. The delegation was made up of Commissioner Musa N. Bitaye, (Chairperson of the Working Group), Commissioner Soyata Maiga (Member), Dr Robert Eno, (Senior Legal Officer from the Secretariat), and Dr Albert Barume, (expert member of the Working Group). The delegation held meetings with different stakeholders including government ministries, national and international NGOs, UN bodies and indigenous communities in Sibiti in the southern part of Congo, where they conducted a site visit. They also followed up on the drafting of a law on indigenous peoples initiated by the Government of Congo.

109. In March 2010, Mr. Mohamed Khattali, expert member of the Working Group, attended a seminar in Geneva, on the participation of indigenous peoples in decision - making, organised by the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).

110. In April 2010, the Commissioner Bitaye, attended the first week of the 9th session of the UN Permanent Forum on Indigenous Issues in New York, USA. The focus was on development, culture and identity. He had the opportunity to meet with different stakeholders as well as with the Indigenous African Caucus.

111. From 8 to 10 May 2010, the Working Group held a meeting in Banjul, The Gambia, prior to the 47th Ordinary Session of the African Commission, to discuss activities undertaken during the inter-session and plan for future activities.

112. The Working Group also held an informal meeting with the indigenous people's representatives attending the 47th Ordinary Session to explore ways of collaboration and sharing of information.

113. The Working Group carried out other activities during the Inter-Session as follows:

- i. Publication of the reports of the Information and Research visit to Gabon and Libya in both French and English;
- ii. Finalisation of the Report of the Country Mission undertaken to the Republic of Rwanda in December 2008;
- iii. Translation of the Summary of the ACHPR's 2003 Report on Indigenous Populations into *Fula* and *Tamazight* languages;
- iv. Dr. Korir Sing'oei, a consultant from the Working Group's advisory network of expert, was engaged to develop a manual for indigenous peoples' rights advocates on how to efficiently use the ACHPR platform as well as other African mechanisms such as the AfCHPR.
- v. Drafting of a concept note for developing a manual on best practices by the Working Group, with the aim of documenting best practices by African governments, NGOs and other non-state actors on the rights of indigenous people.
- vi. The Working Group is in the process of producing a video film and a producer has already been engaged. The film will last for 45 minutes, and basically focuses on the situation of indigenous peoples in Africa and the work of the ACHPR on indigenous issues. The overall aim of the film is to provide the ACHPR with a strong awareness - raising tool for the promotion and the protection of the rights of indigenous populations in Africa. Filming took place in Kenya in April 2010, as well as during the Working Group's meeting, prior to the 47th Ordinary Session of the ACHPR, and will continue in Cameroon in June 2010.

Commissioner Mohamed Fayek
Activities as Commissioner

114. From 17 to 18 December 2009, he organized, through the Egyptian Ombudsman Office, an international conference entitled "*Ombudsman Cultural Dialogue and Human Rights in a Changing Society*", in Cairo, Egypt. The conference was attended by Ombudsman Institutions from Africa, Asia, and Europe and other institutions.

115. The Conference examined the regional cooperation between Ombudsman Institutions, more specifically, the African and European experiences through the "African Ombudsman Association" and the "European Ombudsman Institution". It also studied the role of Ombudsman Institutions with regards to societal changes generated by globalization, war against terrorism, and crises such as the food, financial and environmental crises.

116. He was interviewed by Al-Ahram on the work of the ACHPR and the guarantees in the African Charter for Human and Peoples' Rights.

117. On 1 February 2010, he participated in a conference in Paris entitled "*Human Right Universal Principles and Regional Guarantees*" organized by Mr. Jean Paul Delovoye, the French Republic's Mediator, in collaboration with Pantheon Assas University in Paris and the Johns Hopkins University in Washington DC. The Conference deliberated on the concepts of universalism and relativism of human rights by focussing on the issue of the death penalty, gender discrimination, freedom of speech and other related issues.

118. On 4 May 2010, he made a presentation on the African Charter and other African Union Instruments at the African Association in Cairo, Egypt on the occasion of the latter's 50th anniversary.

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

119. From 7 to 9 December 2009, he participated in an International Conference on Migration in the African-Arab world in Cairo, Egypt, organized by the Egyptian Council for Human Rights in partnership with UNESCO.

120. The Conference examined South-South migration and highlighted the role of National and International Human Rights Institutions in the protection of the rights of migrants and refugees, and their responsibilities in regulating the legal status of those migrants and refugees.

121. On 9 April 2010, he received an Urgent Appeal from the International Refugee Rights Initiative, through the Secretariat of the ACHPR requesting the Arab Republic of Egypt to refrain from expelling two Sudanese, Mr. Mohamed Adam Abdalla and Mr. Ishaq Fadl Dafallah, from Egypt to Sudan on suspicion of trying to cross the boarder to Israel. He sent an urgent letter to the Ministry of Foreign Affairs and the Ministry of Interior of Egypt, as well as to the UN office of Refugees in Cairo and was able to obtain the consent of the Egyptian authority, not only to stop the deportation of the two Sudanese but also to release them.

122. Through wide contacts with different Somali organisations and experts, he came to the conclusion that the magnitude of the violations to which Somalis are subjected has reached a level that necessitates action. Somalis are killed in great numbers and there is a sharp increase in the number of displaced Somalis and refugees to the neighbouring counties. The problem is seriously escalating. These sustained conditions entrench the influence of the war lords who have interwoven interests with non-governmental foreign forces that provide the required tools for the pirates, such as advanced launches in return for a share in their loot.

123. The persistence of these conditions are reflected on the human rights situation in the countries where Somalis seek refuge. These conditions further affect stability in the Horn of Africa region as well as the navigation in the Red Sea.

124. He recommended that, the solution can only be through the support of the state authority via strong internal alliances with forces that are not involved in terrorism, and the support of this authority by increasing the number of police forces and coast guards in the country, especially in the capital.

Commissioner Mohamed Khalfallah
Activities as Commissioner

125. On 11 December 2009, Commissioner Khalfallah participated in a Roundtable discussion on the theme *“Human Rights and State Sovereignty.”* The Roundtable was organised by the Tunisian Bar Association Without Borders and the National Union of Tunisian Journalists.

126. From 9 to 17 February 2010, he undertook a joint promotional mission to the Islamic Republic of Mauritania, together with the Chairperson of the ACHPR, and the Special Rapporteur on the Rights of Women in Africa.

127. From 22 February to 3 March 2010, he participated in the 8th Extraordinary Session of the ACHPR in Banjul, The Gambia.

128. From 27 to 29 April 2010, Commissioner Khalfallah attended the Third Joint Meeting of the ACHPR and the AfCHPR in Arusha, United Republic of Tanzania.

129. From 8 to 10 May 2010, he participated in the NGO Forum which preceded the 47th Ordinary Session of the ACHPR in Banjul, The Gambia.

130. On 11 May 2010, he participated in a group meeting on *“Human Rights Defenders and National Legislations”* organised by the International Service for Human Rights. The Panel provided him with an opportunity to inform the defenders about his opinion with regard to strategies to be put in place to address challenges that they encounter in the exercise of their activities.

131. From 10 to 11 May 2010, he participated in the second meeting on the African Human Rights Strategy, organized in Banjul, The Gambia, by the DPA/AUC.

Activities as a Special Rapporteur on Human Rights Defenders in Africa

132. From 8 to 10 May 2010, within the framework of the NGO Forum, Commissioner Khalfallah examined the situation of human rights defenders in Africa. He talked about the challenges and perspectives for the promotion and protection of human rights for the decade 2010-2020, in collaboration with Human Rights Defenders present in the Forum.

133. The Special Rapporteur sent Notes Verbales to the Republic of Côte d'Ivoire, Congo Brazzaville, Liberia, Ethiopia, DRC, and Central African Republic requesting for promotional missions to the countries. He has received responses from Cote d'Ivoire, Congo Brazzaville and Liberia.

134. He also sent Letters of Appeal and Press Releases to States Parties to the African Charter where violations of human rights were alleged. During the Inter - Session, he dealt with thirty (30) cases and sent letters to the Governments according to the need and urgency of the situation.

135. During the Inter - Session, he also published nine (9) Press Releases, two (2) of which were related to two human rights defenders in Cameroon and in the Democratic Republic of Congo. In addition, he published a Communiqué of appreciation in relation to the release of a Mauritanian human rights defender by the authority.

136. During the Inter - Session, he observed that the situation of human rights defenders has deteriorated compared to the preceding Inter - Session. In this regard, he made the following recommendations:

- i. That States Parties to the Africa Charter should work in collaboration with human rights defenders for a better protection of their rights;
- ii. That the civil society should continue to develop all the best strategies for the promotion and protection of the right of human rights defenders on the continent by following the adage, *"All for One, One for All."*

Activities as Chairperson of the Working Group on ECOSOC

137. During the Inter - Session, the Commissioner Khalfallah did not carry out any activities as Chairperson of the Working group on ECOSOC.

Commissioner Soyata Maiga

Activities as Commissioner

138. On 18 January 2010, Commissioner Maiga forwarded Notes Verbales to the Republic of Angola, Gabon and Niger pertaining to future promotion missions.

139. From 29 to 30 January 2010, she participated in the 15th Ordinary Session of the Executive Council of the AU in Addis Ababa, Ethiopia.

140. From 31 January to 2 February 2010, she participated in the Summit of Heads of State and Government of the African Union in Addis Ababa, Ethiopia.

141. From 22 February to 3 March 2010, Commissioner Maiga attended the 8th Extraordinary Session of the ACHPR which was held in Banjul, The Gambia.

142. From 9 to 10 March 2010, she participated in a workshop organized by the Ministry of Justice of Mali for liberal professions on the theme *"The Legal Profession and the Challenge of Justice Renewal"*, in Bamako, Mali. The aim of the Workshop was to enable liberal professions to discuss with magistrates and agree on the reform of the justice system in Mali.

143. From 19 to 26 April 2010, Commissioner Maiga undertook a promotional mission to the Republic of Angola.

144. From 27 to 29 April 2010, she took part in the Third Joint Meeting between the ACHPR and the AfCHPR, in Arusha, Tanzania.

145. On 11 May 2010, she took part in the meeting organised by the DPA/AUC in Banjul, The Gambia on Human Rights Strategy for Africa..

Activities as Special Rapporteur on the Rights of Women in Africa

146. From 7 to 9 December 2009, the Special Rapporteur participated in the second edition of the Mibeko Forum, which was held in Brazzaville on the theme: “*Women’s Leadership and Sustainable Development in Africa*”. This meeting enabled participants from Central and West Africa to discuss issues relating to gender and women’s status within society. The responsibility of the female elite in the quest for citizenship, peace and development were also discussed in depth.

147. From 7 to 8 January 2010, the Special Rapporteur participated in the deliberations of the Board of Directors of the International Centre for Rights and Democracy, commonly known as Rights and Democracy, in Montreal, Canada.

148. From 21 to 22 January 2010, she participated in the civil society 15th Consultative Meeting on Gender Integration in the African Union in Addis Ababa, Ethiopia. The meeting was organized by the network “*Gender: My Agenda*” (GIMAC) and was coordinated by Africa Women Solidarity (AWS) with the support of the UN Economic Commission for Africa (UNECA), Open Society Initiative (OSI), the United Kingdom Ministry for International Development (DFID), the African Women’s Development Fund (AWDF), and the Foreign Ministries of Finland and Norway. She made a presentation on the status of the Maputo Protocol in terms of its ratification and implementation. She also made a presentation on the Guidelines relating to the presentation of State Reports by States Parties of their reports adopted during the 46th Ordinary Session of the ACHPR.

149. From 22 to 24 January 2010, the Special Rapporteur participated in the third African Union Pre-Summit meeting on Gender, organized by the Department of Women, Gender and Development of the AUC in Addis Ababa, Ethiopia.

150. On 24 January 2010, in Addis Ababa, she delivered an address during the launching of a new publication by FEMNET on the theme: “*Freedom of Information and Women’s Rights in Africa*”. The publication is a compilation of case studies of Cameroon, Ghana, Kenya, South Africa and Zambia, which examine freedom of information and expression and their impact on the rights of African women.

151. On 31 January 2010, in Addis Ababa, Ethiopia, she participated in the launching of the United Nations Secretary General’s campaign on violence against women titled, “*UNITE to End Violence against Women*”.. The launch took place under the leadership of the personal representative of the United Nations Secretary General, the Director General of the Economic Commission for Africa, the Department of Women, Gender and Development of the AUC, and several Ministers, and representatives of States Parties participated in the event.

152. From 9 to 17 February 2010, she undertook a promotional mission to Mauritania with Commissioners Reine Alapini-Gansou and Mohamed Khalfallah. During this mission, she had the opportunity to meet with the authorities and NGOs involved in the promotion of women’s rights and to hold fruitful meetings on the situation of human rights in general and on women’s rights in particular.

153. On 19 February 2010, she signed a letter of support for the campaign of the International Human Rights Federation “*Africa for Women’s Rights, Ratify! Respect*”. The campaign aims to promote the ratification of regional and international instruments of protection of women’s rights as well as their effective implementation by all countries in the continent.

154. On 8 March 2010, on International Women’s Day, the Special Rapporteur published a Press Release highlighting the importance of the year 2010 because it opens the African Women’s Decade, and marks the 5th anniversary of the entry into force of the Protocol to the African Charter on the Rights of Women in Africa.

155. From 30 to 31 March 2010, she participated in a strategic seminar in Addis Ababa, Ethiopia dealing with the questions of change through gender in Africa. It was a consultative meeting funded by DFID. The Seminar was attended by about twenty gender experts from the UN, the AU, regional Institutions (UN-ECA, SADC, COMESA, ECOWAS, NEPAD, EAC, ADB, UNDP, UNIFEM) and regional women organizations (FAS, FEMNET, WILDAF, AWDF, SOAWR). The objective of the seminar was for participants to agree on priorities and mechanisms for supporting civil society organizations with the aim of promoting governmental reforms in the area of equality and access to development.

156. On 3 April 2010, Commissioner Maiga took part in the celebrations commemorating the 50th anniversary of Senegal’s independence in Dakar, Senegal. During the celebrations, the “*Gender Award*” which is an initiative of civil society organizations under the direction of Africa Women Solidarity (AWS) was awarded to the President of Mozambique. It seeks to reward Mozambique’s efforts in integrating a gender perspective in policies, programs and development plans which contributed to the improvement of the political, economic, and legal status of women in the country concerned.

157. On 8 May 2010, she made a presentation as part of the Panel discussion organized by the African Centre for Democracy and Human Rights Studies (ACDHRS), Femmes Africa Solidarité (FAS), and the United Nations Office for West Africa (UNOWA) to commemorate the 10th Anniversary of the United Nations Security Council Resolution 1325.

158. On 8 May 2010, the Special Rapporteur also made a presentation at a panel discussion convened by People Opposing Women Abuse (POWA) on the implementation of the Protocol on the Rights of Women in Africa in relation to the right to health and the right to be protected from HIV/AIDS.

159. On 11 May 2010, she participated in a discussion organised by the Centre for Housing Rights and Evictions in collaboration with the Centre for Reproductive Rights. The theme of the meeting was “*Examining the Protocol on the Rights of Women in Africa: An Innovative Instrument for the Protection of Women’s Rights to Health and Adequate Standard of living*”. The discussion examined, among other things, jurisprudence on women reproductive rights.

160. On 13 May 2010, the Special Rapporteur officially launched the Guidelines on State Reporting under the Protocol to the African Charter on the Rights of Women in

Africa, on the margins of the 47th Ordinary Session of the ACHPR. This activity was organised in partnership with the Centre for Human Rights and Solidarity for African Women's Rights (SOAWR).

161. During the Inter-Session, the Special Rapporteur forwarded reminders to States Parties to the African Charter that have not yet ratified the Maputo Protocol, urging them to do so.

162. In collaboration with the Centre for Human Rights of the University of Pretoria, she is currently developing a publication on the work and mandate of the Special Rapporteur on the Rights of Women in Africa. The objective of this publication, to be used as a promotional tool, is to explain and comment on the Special Rapporteur's mandate and activities.

163. With regards to the contribution to the mechanism of the Special Rapporteur in promoting women's rights at all levels, she wrote a paper entitled "*30 Years of the CEDAW on the African Continent: Progress, Challenges and Prospects*" which will be published in the women's magazine Mibeko. The paper evaluates the implementation of CEDAW on the African continent by examining the degree of transposition of the Convention in the Maputo Protocol and by reviewing the progress achieved 30 years after its adoption. The paper also deals with future prospects and challenges that remain to be addressed in order to facilitate better implementation of the Convention and the Protocol throughout the continent.

Activities as a Member of the Working Group on Indigenous Populations / Communities in Africa (WGIP)

164. From 15 to 24 March 2010, Commissioner Maiga undertook a mission to the Republic of Congo together with Commissioner Musa Ngary Bitaye. Objectives of the mission included amongst others: gathering information on the situation of indigenous populations in Congo; discussing with the Government on the situation of indigenous populations and the specific situation of the rights of indigenous women and children; and interacting with indigenous communities with a view to understanding the challenges that they encounter in the enjoyment of their rights.

165. From 8 to 10 May 2010, she participated in the meeting of the WGIP in Africa with partners and NGOs working on indigenous rights in Banjul, The Gambia.

***Commissioner Kayitesi Zainabou Sylvie
Activities as Commissioner***

166. From 14 to 18 December 2009, as Commissioner responsible for promotion activities in Algeria, she undertook a promotion mission to the People's Democratic Republic of Algeria, together with the Chairperson of the ACHPR and the Special Rapporteur on Prisons and Places of Detention in Africa.

167. On 26 January 2010, she had a meeting with the United Nations Adviser on Human Rights in Rwanda, during which they discussed the possibility of initiating a project "Know Your Rights" which will facilitate the large scale popularization of the international and regional human rights instruments in the country, and the strategies

to strengthen references to international and regional human rights instruments in judgments.

168. From 9 to 12 February 2010, she participated in a workshop on “*The mechanisms for the protection of human rights and the Universal Periodic Review*”, in Gicumbi, Northern Rwanda, organized by the Office of the United Nations Resident Coordinator in Rwanda in collaboration with the Human Rights League in the Great Lakes Region. She delivered a paper on “*the African Mechanisms for the Promotion and Protection of Human Rights*”.

169. From 22 February to 3 March 2010, she attended the 8th Extra-Ordinary Session of the ACHPR in Banjul, The Gambia, to finalise the Rules of Procedure of the ACHPR, and to consider Communications and outstanding Reports, among other urgent matters.

170. On 29 February 2010, she met with the Head of the Association for the Defence of Rights of Women and Local Children (HAGURUKA) with whom she discussed the strategies and approaches to adopt for the dissemination of the African Charter on the Rights and Welfare of the Child, and how to accelerate the presentation process of the State Report pursuant to this Charter.

171. The promotion mission to the Republic of Burundi, scheduled for the 12 to 18 April, could not take place because it coincided with the Second Regional Conference on the Death Penalty which took place in Benin. A Note Verbale was sent to the Republic of Burundi requesting the State Party to agree to new dates to allow the realisation of the said mission.

Activities as Chairperson of the Working Group on the Death Penalty in Africa

172. From 12 to 15 April 2010, Commissioner Kayitesi chaired the deliberations of the Sub-regional Conference for North and West Africa on the issue of the Death Penalty in Africa, which took place in Cotonou, Benin. The Conference followed that which had been organized in September 2009 in Kigali, Rwanda, which brought together participants from East, Southern and Central Africa. The Conference brought together representatives from States Parties to the African Charter, International Organisations, National Human Rights Institutions and NGOs working on the issue of the death penalty.

173. The Conference adopted “*The Cotonou Framework Document on the Abolition of the Death Penalty in Africa*”. The document contains some strategies for the abolition of the Death Penalty in Africa, as well as recommendations on the need to have a Protocol on the abolition of the Death Penalty in Africa.

174. On the sidelines of this Conference the members of the Working Group seized the opportunity to meet and discuss the future activities of the Working Group, including the finalisation of the document on the position of the ACHPR on the issue of the death penalty. The document on the ACHPR position on the death penalty will be reviewed and given more substance on the basis of the two framework documents adopted at the Kigali and Cotonou conferences. The Working Group will present that document at the next Ordinary Session of the ACHPR.

175. On 25 February 2010, the Working Group on the Death Penalty participated in the 4th World Congress against the Death Penalty and the Round Table on Sub-Saharan Africa which was held in Geneva, Switzerland on the Theme “*From Moratorium to the Abolition of the Death Penalty*”. It was represented by one of the members of the Working Group on the Death Penalty, Professor Philip Iya, who made a presentation focusing on “The Role of the ACHPR in Urging States Parties to the Charter to Abolish the Death Penalty”.

176. At the end of February 2010, she sent an urgent appeal to the Republic of The Gambia and in May 2010, to the Federal Republic of Nigeria, urging them not to execute the death sentence and continue to observing a moratorium. This was in reaction to reports received that these two countries planned to resume executions.

Activities as Member of the Working Group on Specific Issues

177. During February and March 2010, Commissioner Kayitesic continued to work on the document on the Rules of Procedure of the ACHPR which were later finalised during the 8th Extra-Ordinary Session of the ACHPR held from 22 February to 3 March 2010, in Banjul, The Gambia.

Commissioner Pansy Tlakula ***Activities as Commissioner***

178. On 12 January 2010, she was invited by a South African private television station, ETV, to participate in a debate on the rights of Lesbians, Gays, Bisexuals, Transgenders and Intersex (LGBTI) in Africa, with particular reference to the situation of LGBTIs in Cameroon, Nigeria, Malawi, and Uganda. She was requested to articulate the rights of LGBTIs within the African human rights system.

179. On 5 March 2010, Commissioner Tlakula was invited by the Human Rights Committee of the Pan-African Parliament (PAP) to brief the members of the Committee on the work of the ACHPR in general, and the situation of the right to freedom of expression in The Gambia, in particular. The importance of the need to strengthen collaboration between the ACHPR and PAP was highlighted, which made her recommend to the ACHPR that PAP should be invited to the Ordinary Sessions of the ACHPR in future.

180. On 16 April 2010, Commissioner Tlakula attended a meeting convened by the Lesbian and Gay Equality Project of Fahamu and the Arcus Foundation in Nairobi, Kenya. The theme of the meeting was “*Winning and Defending LGBTI Equality in Africa*.” During the meeting, she gave a presentation on “*LGBTI Rights and the African Charter on Human and Peoples Rights*.”

181. On 28 April 2010, she gave a lecture to the LLM Students of the Centre for Human Rights, University of Pretoria on “*The Procedures of the African Commission on Human and Peoples Rights*.”

Activities as Special Rapporteur on Freedom of Expression and Access to Information in Africa

182. From 7 to 9 February 2010, she attended the African Regional Conference on the Right of Access to Information in Accra, Ghana. This Conference was organised by the Carter Center in collaboration with the Special Rapporteur, the Media Forum of West Africa, and the Open Democracy Advocacy Centre (ODAC). She made a presentation on the importance of access to information in promoting transparency in Africa, and gave an overview of the status of adoption of access to information laws on the continent. The Conference adopted the "*African Regional Findings and Plan of Action for the Advancement of the Right of Access to Information.*"

183. From 11 to 13 March 2010, the Special Rapporteur attended the Regional Advocacy Conference on the Right to Information hosted by ODAC in Cape Town, South Africa. The purpose of the Conference was to discuss the outcomes of the African Regional Conference on the Right of Access to Information that was organised by the Carter Centre in Ghana, in February 2010, to share experiences and information on plans for advocacy on the right to information, and to explore potential regional and continental advocacy initiatives. She made a presentation on the "*Right to Information Advocacy: Interventions and Plans of the Special Rapporteur on Freedom of Expression and Access to Information.*"

184. As part of her mandate to submit at each Ordinary Session of the ACHPR, a report on the status of adoption of access to information laws on the continent, the Special Rapporteur submitted a report that indicates that in the following countries, Access to Information Bills have been pending before Parliaments since 2008:

- i. Southern Africa - Malawi, Mozambique and Zambia
- ii. East Africa - Democratic Republic of Congo, Kenya, Ethiopia and Tanzania
- iii. West Africa - Burkina Faso, Ghana (Bill tabled in Parliament in February 2010), Liberia, Nigeria and Sierra Leone
- iv. North Africa - Algeria

185. The Special Rapporteur forwarded letters of appeal to the Federal Republic of Nigeria and Republic of the Sudan. In the former, she expressed concern about the compliance of the proposed Nigerian Press Council and Practice of Journalism in Nigeria Bill 2009 with Article 9 of the African Charter and the Declaration of Principles of Freedom of Expression in Africa.

186. In the letter of appeal to the Republic of the Sudan, she brought to the attention of the government, the allegation of the disruption of a symposium entitled "*Elections and Democratic Transition,*" by the National Intelligence and Security Services officers in Sudan, in which one of the organisers of the symposium, Mr. Hatem Salah, was arrested 15 minutes before the symposium because of his human rights activities, and subsequently released following interrogation. She requested the latter to investigate the allegations and urgently inform the ACHPR of the steps taken to address the allegations, if they are true.

Commissioner Yeung Kam John Yueng Sik Yuen

Activities as Commissioner

187. On 23 March 2010, at the invitation of the University of Mauritius, Commissioner Yeung Kam John Yueng Sik Yuen made a presentation on the ACHPR to more than 100 Law students. The aim of the presentation was for the students to learn about the ACHPR and its work in promoting and protecting human rights.

188. On 14 April 2010, as head of the Mauritian delegation visiting the Judiciary of the Seychelles in the fulfilment of a Biennial Exchange Agreement between the Judiciary of the two countries, he made a presentation on the ACHPR. It was very appreciated by audience of judges, lawyers, NGOs and other stakeholders.

189. On 3 May 2010, he received a delegation from the African Union led by Mr. Khalifa, former Minister of the Republic of Senegal and present Mayor of the city of Dakar, in his chambers at the Supreme Court of Mauritius. The delegation was part of a team of 30 observers from the AU that was in Mauritius during the general elections held on 5 May 2010. The delegation enquired about the electoral system and the involvement of the Court with pre and post-election petitions. It also inquired about the uniqueness of Mauritius Best Loser System which is linked with the mandatory requirements for the candidate to declare the 'Community' to which he belongs at the time of submission of his nomination paper.

Activities as the Chairperson of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa

190. On 30 April 2010, he sent out for publication by the University of London an article on "*The Rights of Older Persons and People with Disabilities in Africa*". He had received a request from Professor Masood Baderin for such a contribution to his book.

Private Session
Report of the Executive Secretary

191. In her Report to the 47th Ordinary Session of the ACHPR, the Executive Secretary, Dr. Mary Maboreke, set out the activities undertaken during the Inter-Session period between the 46th and 47th Ordinary Sessions; updated on administrative, budgetary and staffing issues; analysed the various challenges faced in the implementation of AU Policy decisions; and made recommendations on the way forward.

192. She indicated that the staffing situation at the Secretariat has reached critical levels, across all sections, but particularly within the legal section and the finance and administration units. The situation had been worsened by the resignation of the Senior Legal Officer for Protection, which leaves the Protection Unit with only one Legal Officer who is on a short-term contract.

193. The Executive Secretary noted that high staff turnover, combined with the ACHPR's chronic understaffing, are some of the factors that lie at the heart of the challenges confronting the ACHPR in its processing and consideration of Communications. Consequently, she requested expedited recruitment to the positions approved for the ACHPR, as well as for the appointment of more temporary staff, pending the recruitment to regular positions.

194. Concerning implementation of AU Policy decisions, Dr. Maboreke observed that there had not been much movement during the Inter-Session period on the issue of the construction of the permanent Headquarters of the ACHPR.

195. Regarding the long-standing issue of the review of honorarium and allowances for members of the ACHPR, she said the proposals for the allowances and honorarium of ACHPR Commissioners had been forwarded to the AUC for placement on the agenda of the relevant PRC Sub-Committee, for consideration and recommendation to the Policy Organs as appropriate.

196. She also informed the ACHPR that the draft of the report requested by the Executive Council on the challenges facing the ACHPR in its handling of communications was ready for consideration by the ACHPR, in time for it to be placed before the Executive Council during the Council's 2010 July Session.

197. The Executive Secretary also called attention to the Assembly Decision requesting the AUC to work with the ACHPR to have the status of the ACHPR as an AU Organ regularized, and indicated that action is still pending on the matter.

198. Dr. Maboreke also recalled the Secretariat's earlier recommendation for a review of the scheduling of the Sessions of the ACHPR, given that it had been a huge challenge for the ACHPR to meet the timelines set for submission of documents to be considered by AU Policy Organs. This is due to the current timing of the ACHPR's Sessions (May and November), which allows very little time for the preparation, finalisation and translation of the ACHPR's Activity Report and its

annexes, prior to submission to the Executive Council and the Summit (January and June/July). Following discussions, the ACHPR decided to re-schedule the Sessions to April and October of every year, with effect from 2011.

Consideration of State Reports Under Article 62 of the Charter

199. The Republic of Cameroon and the Republic of Rwanda presented their Periodic Reports in accordance with Article 62 of the African Charter. The ACHPR examined the Reports and engaged in constructive dialogue with the two States Parties.

200. The ACHPR adopted Concluding Observations on the Periodic Reports of the Republic of Botswana, the Republic of Cameroon, the Federal Republic of Ethiopia, and the Republic of Rwanda.

Status of Submission of State Reports

201. The status of submission and presentation of the Periodic Reports of States as at the 47th Ordinary Session of the Commission stood as follows:

No.	Category	Number of States
1.	States which have submitted and presented all their Reports	10
2.	States that are late by one (1) Report.	7
3.	States that are late by two (2) Reports	7
4.	States that are late by three (3) Reports	2
5.	States that are late by more than three (3) Reports	12
6.	States that have not submitted any Reports	12
7.	States that have submitted all their Reports and will present at the 48 th Ordinary Session	3

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

No.	State Party
1.	Algeria
2.	Benin
3.	Botswana
4.	Cameroon
5.	Congo Brazzaville
6.	Ethiopia

7.	Mauritius
8.	Nigeria
9.	Rwanda
10.	Uganda

b) States which have **submitted one or more Reports but still owe more:**

1	Angola	6 overdue Reports
2	Burkina Faso	2 overdue Reports
3	Burundi	4 overdue Reports
4	Cape Verde	6 overdue Reports
5	Central African Republic	2 overdue Report
6	Chad	4 overdue Reports
7	Egypt	3 overdue Reports
8	Gambia	7 overdue Reports
9	Ghana	4 overdue Reports
10	Guinea	6 overdue Reports
11	Kenya	1 overdue Reports
12	Lesotho	4 overdue Reports
13	Mali	4 overdue Reports
14	Mauritania	2 overdue Reports
15	Mozambique	6 overdue Reports
16	Namibia	3 overdue Reports
17	Niger	2 overdue Reports
18	Saharawi Arab Democratic Rep	2 overdue Reports
19	Senegal	2 overdue Reports
20	Seychelles	2 overdue Reports
21	South Africa	1 overdue Report
22	Sudan	1 overdue Report
23	Swaziland	4 overdue Reports
24	Tanzania	1 overdue Report
25	Togo	4 overdue Reports
26	Tunisia	1 overdue Report
27	Zambia	1 overdue Report
28	Zimbabwe	1 overdue Report

c) States which have **submitted all their Reports and will present at the 48th Ordinary Session of the ACHPR:**

No.	State Party
1.	Libya
2.	Madagascar
3.	Democratic Republic of Congo

d) States which have **not submitted** any Reports:

No.	State Party	Status
1.	Comoros	11 overdue Reports
2.	Côte d'Ivoire	9 overdue Reports
3.	Djibouti	9 overdue Reports
4.	Equatorial Guinea	12 overdue Reports
5.	Eritrea	5 overdue Reports
6.	Gabon	12 overdue Reports
7.	Guinea Bissau	12 overdue Reports
8.	Liberia	13 overdue Reports
9.	Malawi	10 overdue Reports
10.	Sao Tome & Principe	11 overdue Reports
11.	Sierra Leone	13 overdue Reports
12.	Somalia	13 overdue Reports

202. ACHPR congratulates States Parties to the African Charter who are up to date with their Reports, and continues to urge those that have not yet done so, to submit their Initial and Periodic Reports. States Parties are also reminded that they can combine all the overdue Reports into a single cumulative Report, for submission to the ACHPR.

Protection Activities

203. During the Inter-Session period, the ACHPR undertook several measures pursuant to Articles 46 to 59 of the African Charter, to ensure the protection of human and peoples' rights on the continent. These included, among others, writing Urgent Appeals, in reaction to allegations of human rights violations received from stakeholders, and Press Releases addressing human rights violations.

204. In addition, a total of eighty-one (81) Communications were tabled before the ACHPR: **five (5)** on Seizure; **fifty-seven (57)** on Admissibility; **eighteen (18)** on the Merits; and **one (1)** for review.

205. The following Communications were seized of by the ACHPR;

- i. Communication 385/10 - ICJ-Kenya v Kenya;
- ii. Communication 386/10 - REDRESS (on behalf of Dr. Farouk Mohamed Ibrahim) v Republic of Sudan;
- iii. Communication 387/10 - Mr. Koffi Yamgname v Togo;
- iv. Communication 388/10 - Mr. Ntiroranya Adrien v Burundi;

206. The parties concerned (States Parties and Complainants) have been duly

informed of the decisions of the ACHPR in their respective cases.

207. The ACHPR declared the following Communications admissible:

- i. Communication 320/06 - Pierre Mamboundou v Gabon;
- ii. Communication 348/07- *Collectif des Familles des Disparus en Algérie v Algérie* ;
- iii. Communication 355/07 - Hossam Ezzat & Rania Enayet v Egypt ;
- iv. Communication 365/08 - Mr. Christopher Byangonza v Uganda

208. Communication 373/06 - Interights and Another v Mauritania which was adopted during the 8th Extra-Ordinary Session, is also attached to this Report as Annex II.

209. The ACHPR declared Communication 333/06 - SANGONET v Tanzania inadmissible. The said Communication is attached to this Report as Annex III.

210. The ACHPR finalised its decision on the Merits for Communication 313/05 - Kenneth Good v Botswana, attached to this Report as Annex IV.

211. Communications 279/03-Sudan Human Rights Organisation v the Sudan and 296/05-Centre on Housing Rights and Evictions v the Sudan, adopted during the 45th Ordinary Session of the ACHPR is also attached to this Report as Annex V.

212. The ACHPR deferred seventy-four (74) Communications to its 48th Ordinary Session, for various reasons, including time constraints and lack of response from one or both parties.

Adoption of Documents of the ACHPR

213. The ACHPR adopted the following documents :

- i. Draft Paper on Mission Report Format;
- ii. Draft Editorial Guidelines on Communications;
- iii. The Report on Challenges in Handling Communications;
- iv. Draft Guidelines on Economic, Social and Cultural Rights (ECOSOC).

214. During the consideration of the draft Principles and Guidelines on ECOSOC rights, the ACHPR decided that, Guidelines for State Reporting on ECOSOC rights should be extracted from the document prepared for presentation in a separate, simpler and more user-friendly document.

Adoption of Mission Reports

215. The ACHPR adopted the following Promotional Mission Reports:

- i. Promotional Mission to the Republic of Algeria
- ii. Promotional Mission to the Republic of Namibia
- iii. Promotional Mission to the Federal Republic of Nigeria
- iv. Promotion Mission to the United Republic of Tanzania.

216. The ACHPR adopted the Reports of the missions of the following Special Mechanisms:

- i. Mission of the Special Rapporteur on the Rights of Women in Africa to the Democratic Republic of Ethiopia;
- ii. Mission of the Committee for the Prevention of Torture in Africa to the Republic of Uganda;
- iii. Mission of the Working Group on Indigenous Populations in Africa to the Republic of Rwanda.

Adoption of the Rules of Procedure of the ACHPR

217. During the Third Joint Meeting of the ACHPR and the AfCHPR held from 27 to 30 April 2010, in Arusha, Tanzania, the ACHPR and the AfCHPR finalised the harmonization of their Rules of Procedure (RoPs).

218. Subsequent to that, the ACHPR adopted its RoPs during the 47th Ordinary Session. The RoPs will come into effect three months (3) from the end of the said Session.

Appointment of Expert Members of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa

219. During its 46th Ordinary Session held in Banjul, The Gambia, from 11 to 25 November 2009, in accordance with Rule 28 of its current RoPs, the ACHPR adopted a Resolution Establishing a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa.

220. Following the establishment of the Working Group, the ACHPR mandated its Secretariat to compile a list of interested candidates who will constitute the Independent Expert Members of that Working Group. Due consideration was to be given to expertise on extractive industries and human rights issues in Africa, as well as gender, geography, legal traditions and religious aspects.

221. During the 47th Ordinary Session, the ACHPR reviewed the applications received and appointed the following as Expert Members of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa:

- i. Ms. Valerie Coullaird – Canada
- ii. Professor James Thuo Gathii - Kenya
- iii. Ms. Berita Rudo Kopolu - Zimbabwe
- iv. Dr. Gilbert Maoundonodjil - Chad
- v. Mr. Samuel Nguiffo - Cameroon
- vi. Mr. Clement Nyaletsossi Voule – Togo

222. Noting the lack of adequate geographic and gender representation among the applicants, the ACHPR decided to re-advertise the position for Members of the Working Group, specifically targeting female applicants from Northern Africa.

Resolutions

223. The ACHPR adopted the following Resolutions:

- i. Resolution Establishing a Committee on the Rights of People Living with HIV(PLHIV) and Those at Risk, Vulnerable to and Affected by HIV;
- ii. Resolution on the 2010 Elections in Africa;
- iii. Resolution on the Protection and Prevention of Women and Child Trafficking and Sexual Exploitation in South Africa During the 2010 World Cup;
- iv. Resolution on the Deteriorating Situation of Freedom of Expression and Access to Information in Africa.

Session Report

224. The ACHPR deferred the adoption of the 47th Ordinary Session Report to a later Session, due to time constraints.

8th Extra-Ordinary Session

225. The ACHPR held its 8th Extra- Ordinary Session from 22 February to 3 March 2010 in Banjul, The Gambia.

226. The following Members of the ACHPR attended the Extra-Ordinary Session:

- Commissioner **Reine Alapini Gansou** - Chairperson;
- Commissioner **Mumba Malila** - Vice-Chairperson;
- Commissioner **Catherine Dupe Atoki**;

- Commissioner **Musa Ngary Bitaye**;
- Commissioner **Mohamed Fayek**;
- Commissioner **Mohamed Bechir Khalfallah**;
- Commissioner **Soyata Maiga**;
- Commissioner **Kayitesi Zainabou Sylvie**.

227. The Extra-Ordinary Session was presided over by its Chairperson, Honourable Commissioner Reine Alapini-Gansou; and was convened to consider urgent issues, including the Draft Rules of Procedure of the ACHPR, Communications and outstanding Reports. The detailed Report of the 8th Extra-Ordinary Session is attached to this Report as **Annex VI**.

Dates and Venue of the 48th Ordinary Session

228. The ACHPR decided that the 48th Ordinary Session will be held from 10 to 24 November 2010, at a venue still to be determined.

Submission of the Twenty – Eighth Activity Report

229. In accordance with Article 54 of the African Charter on Human and Peoples' Rights, the ACHPR submits the present 28th Activity Report to the 18th Ordinary Session of the Executive Council of the African Union, for consideration and onward transmission to the 15th Summit of the AU Heads of State and Government.

ANNEXURES

- ANNEX I: AGENDA OF THE 47TH ORDINARY SESSION OF THE ACHPR
 DECISIONS ON ADMISSIBILITY**
- ANNEX II: COMMUNICATION 373/06 –INTERIGHTS AND ANOTHER
 V MAURITANIA**
- ANNEX III : COMMUNICATION 333/06 – SANGONET V TANZANIA
 DECISIONS ON THE MERITS**
- ANNEX IV: COMMUNICATION 313/05 – KENNETH GOOD V BOTSWANA**
- ANNEX V: COMMUNICATIONS 279/03– SUDAN HUMAN RIGHTS
 ORGANISATIONS V THE SUDAN AND 296/05 – CENTRE ON
 HOUSING RIGHTS AND EVICTIONS V THE SUDAN**
- ANNEX VI: REPORT OF THE 8TH EXTRA-ORDINARY SESSION
 OF THE ACHPR**
- ANNEX VII: PROPOSAL ON HONORARIUM AND ALLOWANCES OF THE
 MEMBERS OF THE ACHPR PURSUANT TO ASSEMBLY
 DECISION Assembly/AU/Dec.200 (XI) AND EXECUTIVE
 COUNCIL DECISIONS Dec. EX.CL/529 (XV) AND Dec.
 EC.CL/575 (XVI)**

EX.CL/600(XVII)

ANNEX I

AGENDA OF THE 47TH ORDINARY SESSION OF THE ACHPR

**AGENDA OF THE 47TH ORDINARY SESSION OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

(12 – 26 May 2010, Banjul, The Gambia)

- Item 1: Opening Ceremony** (Public Session)
- Item 2: Adoption of the Agenda** (Private Session)
- Item 3: Organization of Work** (Private Session)
- Item 4: Human Rights Situation in Africa** (Public Session)
- a) Statements by State Delegates;
 - b) Statement by African Union Organs with Human Rights mandate;
 - c) Statements by Intergovernmental and International Organizations;
 - d) Statements by National Human Rights Institutions;
 - e) Statements by NGOs.
- Item 5: Cooperation and Relationship with National Human Rights Institutions (NHRIs) and Non-Governmental Organizations (NGOs)** (Public Session)
- a) Relationship between the ACHPR and NHRIs
 - b) Cooperation between the ACHPR and NGOs:
 - i. Relationship with NGOs;
 - ii. Consideration of Applications for Observer Status from NGOs.
- Item 6: Consideration of State Reports** (Public Session)
- a) Status of Submission of State Party Reports
 - b) Consideration of the :
 - i. Periodic Report of the Democratic Republic of Congo;
 - ii. Periodic Report of the Republic of Cameroon;
 - iii. Periodic Report of the Republic of Rwanda.
- Item 7: Activity Reports of Members of the Commission & Special Mechanisms** (Public Session)
- a) Presentation of the Activity Reports of the Chairperson, Vice-Chairperson and Members of the ACHPR;
 - b) Presentation of the Activity Reports of Special Mechanisms of the ACHPR:

- i. Special Rapporteur on Prisons and Conditions of Detention in Africa;
- ii. Special Rapporteur on the Rights of Women in Africa;
- iii. Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa;
- iv. Special Rapporteur on Human Rights Defenders in Africa;
- v. Special Rapporteur on Freedom of Expression and Access to Information in Africa;
- vi. Chairperson of the Committee for the Prevention of Torture in Africa;
- vii. Chairperson of the Working Group on the Situation of Indigenous Peoples/Communities in Africa;
- viii. Chairperson of the Working Group on Economic, Social and Cultural Rights in Africa;
- ix. Chairperson of the Working Group on the Death Penalty; and
- x. Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities.

Item 8: Adoption of the Rules of Procedure of the ACHPR (Private Session)

Item 9: Consideration of (Private Session)

- a) The proposals for membership of the Working Group on Extractive Industries;
- b) The Report on Challenges in handling Communications;
- c) Draft Paper on Mission Report Format;
- d) Draft Editorial Guidelines on Communications;
- e) Draft Guidelines on Economic, Social and Cultural Rights in Africa; and
- f) Draft Paper on Sexual Orientation in Africa.

Item 10: Consideration and Adoption of Draft Reports of (Private Session)

- a) Promotion Missions to the:
 - i. Republic of Namibia;
 - ii. Republic of Tanzania;
 - iii. Federal Republic of Nigeria;
 - iv. Republic of Algeria; and
 - v. Republic of The Sudan.
- b) Mission of Special Mechanisms to the:
 - i. Federal Democratic Republic of Ethiopia;
 - ii. Republic of Uganda; and
 - iii. Republic of Rwanda.

Item 11: Consideration of Communications: (Private Session)

Item 12: Report of the Executive Secretary: (Private Session)

Item 13: Consideration and Adoption of (Private Session)

- a) Recommendations, Resolutions and Decisions;
- b) Concluding Observations on the Periodic Report of the:
 - Democratic Republic of Congo;
 - Republic of Botswana;
 - Federal Democratic Republic of Ethiopia ;
 - Republic of Cameroon;
 - Republic of Rwanda; and
 - Republic of Mauritius.

Item 14: Dates and Venue of the 48th Ordinary Session of the ACHPR (Private Session)

Item 15: Any Other Business (Private Session)

Item 16: Adoption of: (Private Session)

- a) 8th Extraordinary Session Report;
- b) 47th Session Report;
- c) 28^h Activity Report;
- d) Final Communiqué of the 47th Ordinary Session; and

Item 17: Reading of the Final Communiqué and Closing Ceremony (Public Session)

Item 18: Press Conference (Public Session)

EX.CL/600(XVII)

DECISIONS ON ADMISSIBILITY

EX.CL/600(XVII)

ANNEX II
COMMUNICATION 373/06 – INTERIGHTS AND ANOTHER V
MAURITANIA

Communication 373/2009 (formerly 242/2001) – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l’Homme* v Islamic Republic of Mauritania

Decision on Complainants’ Request for Review

1. On 1 September 2004, the Secretariat of the African Commission received from the Complainants, a request to review the Commission’s decision on the merits of **Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l’Homme*/Islamic Republic of Mauritania**, adopted at the African Commission’s 35th Ordinary Session, held in Banjul, The Gambia in May 2006.

2. The request was considered at the 36th Ordinary Session of the Commission held in Dakar, Senegal, from 23 November – 7 December 2006, and the Commission decided to bring the request to the attention of the Respondent State for the latter’s comments. In spite of numerous reminders; the Commission has not received any response from the Respondent State. The Commission will therefore proceed to take a decision on the Complainants’ request, in spite of the fact that the State has not responded.

3. In the request, the Complainants raised two issues: the first issue relates to the decision of the African Commission being *infra petita*, and the second issue relates to the fact that the decision of the Commission ‘did not represent the required guarantees of impartiality’.

4. Regarding the first issue, the Complainants argue that having found the Respondent State in violation of certain provisions of the African Charter, the African Commission failed to address itself to the prayers of the Complainants, so as to restore the victim to his rights. According to the Complainants, this failure to pronounce on the prayers renders the Commission’s decision *infra petita*.

5. On the question of impartiality, the Complainants submit that the principles of natural justice were not respected. They claim that one of the Members of the African Commission, a national of the Respondent State, took part in the deliberations that arrived at the final decision on the Communication. According to the Complainants, this is against Rule 109 of the Rules of Procedures of the African Commission, which forbids Members of the Commission from participating in the deliberation of a Communication when they have a “personal interest” or have “participated in whatever capacity in the adoption of whatever decision relating to the case referred to by the Communication”.

6. To consider this request, the African Commission has to address two preliminary issues:

- Whether or not it is competent to review its own decision; and
- Under what circumstances its decision should be reviewed?

On the Competence of the Commission

7. Neither the African Charter nor the Commission's own Rules of Procedure provide for a review of the African Commission's decision on the merits. Provision is made within the Commission's Rules of Procedure only for the review of a decision on admissibility, and even then, only in a situation where a Communication has been declared inadmissible.³²

8. This notwithstanding, the African Commission can draw inspiration from the practices of similar regional and international bodies to determine whether it can review its own decision. In **Purohit & Moore v The Gambia**³³ the Commission was confronted with a similar request and it invoked Articles 60 and 61 of the African Charter, and adopted the principles and practices of other international tribunals with similar mandate. In that Communication, the Commission was persuaded by the practices of the International Court of Justice (ICJ), whereby Article 61(1) of the ICJ Statute requires that, 'an application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming review, always provided that such ignorance was not due to negligence'.³⁴

9. The African Commission further adopts the ICJ's reasoning that an application for revision must be made within a certain period of time.³⁵

10. Therefore, like all tribunals, domestic and international, judicial and quasi-judicial, the African Commission has the competence to review its decision on the merits, especially where it is evident that the application for review has introduced a new or compelling issue which, had the Commission had knowledge of, would have impacted on the decision; or where the Commission has inadvertently failed to take into account certain facts during the consideration of the case.

11. In other words, the Commission can review its own decision when it is apparent that the application introduces a new or compelling element, the failure to consider which would be an affront to *fairness, justice and good conscience*.

12. After determining that it is competent to review its own decision and the circumstances under which it can review its own decisions, the African Commission will now examine whether the application of the Complainants meet the African

³² See Rule 118(2).

³³ Communication 241/2001.

³⁴ Statute of the International Court of Justice. See www.icj-cij.org/documents

³⁵ It should be noted that the ICJ has held that the application should be submitted 'at latest within six months of the discovery of the new fact' and 'no application for revision may be made after the lapse of ten years from the date of the judgment.' See ICJ Statute – Article 61 (4 & 5).

Commission's requirements for a review of its decision, that is, whether the *application introduces a new or compelling element*.

13. In the present Communication, the Complainants have seized the Commission on two main issues:

- (a) allegation that the decision of the Commission was *infra petita*; and
- (b) allegation of partiality.

14. Can the Commission consider these two issues to be new or compelling to warrant a review of its decision?

15. While the two issues raised by the Complainants do not raise any new element relating to the substance of the Communication that they submitted, they certainly are compelling enough to warrant a review.

On the question that the decision is *infra petita*

16. The Complainants in their application for review are not raising new facts. They have also not introduced evidence that was not brought to the attention of the African Commission during the consideration of the Communication on the merits. Rather they are asking the Commission to pronounce itself on each of the prayers they made when the Communication was submitted to the Commission.

17. The Complainants, in the Communication, had requested the Commission that should the latter find the State in violation of any of the provisions of the African Charter, it should:

- urge the State to restore all rights of the UFD/EN and instruct it to restore all confiscated properties;
- request the Mauritanian authorities to harmonise national legislation in accordance with the relevant provisions of the African Charter pertaining to fair trial and freedom of association and expression;
- ask the Mauritanian government to take necessary measures to ensure that such violations against political parties not be repeated;
- call on the State to put an end to such infractions; and
- request the Mauritanian government to inform the Commission of any measures it takes to address the breaches elaborated in the Communication.

18. In its decision, the African Commission held with respect to the allegations made against the State that "the dissolution of *UFD/Ere Nouvelle* political party by the Respondent State was not proportionate to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of Article 10(1) of the African Charter". The Commission did not pronounce itself on any of the prayers made by the Complainants.

19. Does the fact that the Commission did not address the prayers of the Complainants make its decision *infra petita*? Put differently, could the Commission's decision not to pronounce on the prayers made by the Complainants be considered *infra petita*?

What is an *infra petita* decision?

20. The term *infra petita* is a Latin expression sometimes used to describe a situation where the court has failed to pronounce itself on one of the main claims of a petition. In terms of Article 190 (2)(c) of the **Swiss Federal Statute on Private International Law (PILA)**, an arbitral award or remedy can be set aside if the tribunal has adjudicated beyond the relief sought (*ultra-petita*) or granted relief different than what was sought (*extra-petita*) or failed to adjudicate certain claims raised by the complainant (*infra-petita*).

21. To fully appreciate whether the Commission's decision was *infra petita*, there is need to differentiate between an 'allegation' or 'claim' and a 'prayer' or 'remedy'.

22. An allegation is a claim by a party in a pleading, which the party intends to prove in a court of law. According to the Black's Law Dictionary, an allegation is an assertion, claim, declaration or statement of a party to an action, made in a pleading, setting out what he expects to prove. Allegations thus remain assertions without proof, until they can be proved. Generally, in a civil complaint, as is the present case, the plaintiff (in this case, the Complainants) must carry the burden of proof and the burden of persuasion in order to prove their allegation.

23. In the present Communication, the Complainants allege or claim that the Respondent State has violated certain provisions of the Charter, which allegation/claim they want to prove before the Commission. Simply put, an allegation or a claim is a legal action to obtain a remedy, or the enforcement of a right against another party. It is a legal statement made to alert the accused of the legal implications.

24. A remedy on the other hand is an action taken by a court of law to enforce a right, impose a penalty, or make some other court order in order to resolve a dispute. According to the Black's Law Dictionary, a remedy is the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.

25. In the Communication under consideration, the Complainants allege/claim that the Respondent State has violated Articles 1, 2, 7(1), 9(1), 10(1), 13(1) and 14 of the African Charter, dealing with the State's obligations under the Charter, freedom from discrimination, the right to have one's cause heard, freedom of expression, freedom of association, the right to participate in government and the right to property. These, in the opinion of the Commission, are the Complainants' allegations/claims put before the Commission, which the Complainants want to prove had been violated by the Respondent State and which they required the Commission to pronounce itself on, based on the interpretation of the African Charter.

26. Apart from making these allegations, the Complainants also called upon the Commission that, should it find that they (the Complainants) have proven the allegations, it should adopt certain measures to reinstate the victim to his rights, including, urging the Respondent State to restore all rights of the UFD/EN and instruct it to restore all confiscated properties; requesting the Mauritanian authorities to harmonise national legislation in accordance with the relevant provisions of the African Charter pertaining to fair trial and freedom of association and expression; requesting the Mauritanian government to take necessary measures to ensure that such violation against political parties not repeat itself; call on the State to put an end to further violations; and requests the Mauritanian government to inform the Commission of measures it has taken to address the breaches elaborated in the Communication. In the opinion of the Commission, the above requests represent the remedies sought by the Complainants.

27. There is thus a clear distinction between an allegation/claim and a remedy/prayer. In the present Communication, the Complainants are not disputing the fact that the Commission addressed the allegations. They are rather arguing that the Commission, having considered the allegations and found a violation, did not provide them with the remedies they requested.

28. Naturally, when a petitioner brings a complaint before a tribunal, he/she expects the tribunal to make a determination as to his/her rights vis-à-vis the other party (in this case the State). There is a legitimate expectation on the part of the petitioner that where the tribunal (in this case, the African Commission) finds that a State has violated the rights of the petitioner, he/she would be provided with remedies so as to restore his/her rights; that the State would be cautioned to take measures to ensure that the act that resulted in the violation does not repeat itself; and the tribunal could make any other decision it deems necessary in the particular circumstance. These are legitimate expectations from the Complainants.

29. The right to a remedy for a violation has been firmly established under international law. This principle is provided in Article 63 (1) of the Inter-American Convention on Human Rights which provides that "...if the [Inter-American Court] finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party". In applying this provision, the Inter-American Court held in **Yakye Axa v Paraguay**³⁶ that, "any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations".

30. In the present Communication, the Commission found 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". It made no further

³⁶ Case of **Yakye Axa Indigenous Community v Paraguay**, Judgment of 17 June 2005, Series C No. 125. 5. I/A Court H.R.

determination, either by way of restoring the victim to his rights or proposing what the State should do to prevent a recurrence of the violation.

31. Does the fact that the Commission, after concluding that there was a violation of the Charter but failing to provide the remedies requested by the Complainants, renders its decision *infra petita*?

32. To answer this question, the Commission will have to analyse the decision to examine the claims made by the Complainants and the extent to which the Commission addressed them.

33. A tribunal will not be considered to have omitted to pronounce itself on a claim if it can be deduced from the judgment that the claim was implicitly rejected, or on the contrary, that the tribunal implicitly admitted it. It is usually the case for example, where a petition contains main, as well as, subsidiary claims.

34. In the present Communication, the allegation/claim of the Complainants before the Commission is clear - that by its action, the Respondent State has violated Articles 1, 2, 7(1), 9(2), 10(1), 13(1) and 14 of the Charter. These are mere allegations/claims which the Complainants have to prove before the Commission. At the same time, the remedies the Complainants requested were also clear. (See para 17 above).

35. After analyzing the submissions made by both the Complainants and the State, the Commission held with respect of the Complainants allegations/claims that Article 7(1) as alleged has not been violated (see Commissioner's arguments from paras 43 – 47 of the decision); that Articles 9 (2), and 13(1) as alleged have equally not been violated; but that Article 10(1) has indeed been violated as alleged (see paras 76 – 85 of the decision).

36. In its analysis of the Complainants allegations/claims, the Commission failed to address three allegations/claims, that is, the alleged violation of Articles 1, 2 and 14, dealing with the state obligations under the Charter, non-discrimination and the right to property, respectively.

37. While it is important for the Commission to provide remedies to a victim whenever it finds that the State has infringed the victim's right, failing to do so does not render the Commission's decision *infra petita*, if it can be deduced from the decision that all the allegations mentioned in the Communication have been addressed by the Commission.

38. From the analysis above, it is evident that that the Commission failed to pronounce itself on all the allegations made by the Complainants, in particular, it failed to pronounce itself on the alleged violation of Articles 1, 2 and 14, the latter being a principal allegation. To the extent that the Commission did not address all the allegations, the decision of the Commission is *infra petita*.

39. Having established that the decision is *infra petita*, can the Commission supplement its decision?

38. It is perfectly legal for a tribunal that has forgotten to decide on a claim (*infra petita*) to supplement its decision without affecting the *res judicata* character of the other claims decided upon. This procedure excludes recourse to a higher court and can be undertaken *suo moto* or on the request of one of the parties.

39. The Commission will therefore proceed to pronounce on the alleged violation of Articles 1, 2 and 14 of the Charter.

Alleged violation of Article 2

40. The Complainants allege that there the Respondent State has violated Article 2 of the African Charter. Article 2 states that: “ Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status”.

41. The Complainants do not demonstrate how the Respondent State discriminated against the victim, and as such the Commission cannot hold that the State violated Article 2 of the Charter.

Alleged violation of Article 14

42. The Complainants alleged that the State confiscated the property of the political Party in violation of Article 14 of the Charter which provides that ‘[t]he 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’.

43. The right to property is a traditional fundamental right in democratic and liberal societies. It is guaranteed in international human rights instruments as well as national constitutions, and has been established by the jurisprudence of the African Commission.³⁷ The role of the State is to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.

44. The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that States

³⁷

See Communications 71/92 - Rencontre Africaine pour la Défense des Droits de l’Homme/Zambia, Communication 292/2004 - Institute for Human Rights and Development in Africa/Republic of Angola, and Communication 159/1996 - Union Inter Africaine des Droits de l’Homme, Fédération Internationale des Ligues des Droits de l’Homme and Others v. Angola.

are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.

45. However, in the situation described by the present Communication, the State has not demonstrated that the property of the Complainant was confiscated for public interest or in accordance with any established law. The confiscation was done arbitrarily in a manner that violates Article 14 of the African Charter.

Alleged violation of Article 1

46. The African Commission concludes further that Article 1 of the African Charter imposes a general obligation on all States Parties to recognise the rights enshrined therein, and requires them to adopt measures to give effect to those rights. As such any finding of violation of those rights constitutes a violation of Article 1.

On the question of partiality

47. On the question relating to the participation of a Member of the Commission who is a national of the Respondent State, the Commission would like to reiterate that its Rule 109(1) requires that no Member shall take part in the consideration of a Communication:

- If s/he has any personal interest in the case, or
- If he/she has participated, in any capacity in the adoption of any decision relating to the case which is the subject of the 'Communication'.

48. Rule 109 (2) further empowers the Commission to rule on the applicability of Rule 109(1) where it is called to do so.

49. In the opinion of the African Commission 'take part' under Rule 109 (1) of its Rules of Procedure means contributing in the deliberations of a subject matter. While it is recommended that a Commissioner who recuses him/herself leaves the hall during deliberations, a Commissioner who recuses him/herself but chooses to sit in the hall cannot be considered to have taken part in the deliberations. In terms of Article 31, the members are independent experts of the highest reputation, known for their high morality, integrity, impartiality...and serve in their personal capacity. It is thus expected that Members of the Commission live up to the standards befitting their position.

50. It is not necessarily the case that a Member of the Commission from a country against which a complaint has been lodged would have an interest in that particular case. However, it is important to take into consideration the public perception or adopt the principle of a reasonable person in the consideration of a Communication. Would the public or a reasonable man believe that a member of the Commission would 'take part' in the deliberation of a Communication concerning his country and take a neutral decision?

51. The African Commission adheres strictly to the natural justice principle of *nemo iudex in sua causa*: "no man is permitted to be a judge in his own cause". This principle is very critical in the administration of justice, for justice must not only be done, but must be seen to be done.

52. The use of the word 'shall' in Rule 109 implies that the Commission would not compromise in the implementation of this principle. In the Complainants' submissions, they quoted paragraphs 2 and 17 of the Final Communiqué of the 35th Ordinary Session of the African Commission to buttress their argument that a Commissioner, a national from the Respondent State, took part during deliberations of the Communication in question.

53. In terms of Rule 106 of the Commission's Rules of Procedure, Communications are examined in private session and the Complainants could not have been privy to what transpired during the examination of the Communication in question.

54. The African Commission's records indicate that the Commissioner in question did not take part in the deliberations of the present Communication.

55. The burden of proving that he did rests with the Complainants. Under such circumstances, and relying on the presumption of regularity, it is presumed that the Commission complied with its procedures under Rule 109.

56. In terms of the presumption of regularity, there is a favourable presumption that all what the Commission does in the normal course of its duty is regular and valid. This evidentiary principle which has its historical roots in the presumption against misconduct of public officials, presupposes that every individual in his or her private and official capacity, does his or her duty, until the contrary is proved. In other words, it will be presumed that government officials (in this case, the Members of the Commission) have discharged their duty rightly and in good faith, unless the circumstances of the case provide adequate proof to the contrary

57. To overturn this presumption, the party that seeks to challenge the presumption, and in this case, alleges that the Commission did not comply with its Rules, bears the burden of proof.

58. The Commission noted in this instance that the fact that the name of the Commissioner, a national of the Respondent State, appeared in the Final Communiqué of the Commission does not signify that the latter took part in the proceedings regarding the Communication in question, in violation of Rule 109. The Complainants therefore have the burden to prove that the spirit and object of 109 have been breached. The only evidence that the Complainants adduced was the reference to the 2nd paragraph of the Final Communiqué of the 35th Ordinary session of the Commission which indicated that the Commissioner was one of the Members that attended that session.

59. In terms of the Commission's practice, the Final Communiqué lists the names of the Members who attend a particular session. The Communiqué however does not

indicate which Members took part in the deliberations of which any particular agenda item. In this case, the name of the Commissioner in question, like the names of all the other Members who attended the session, was indicated in the Final Communiqué of the session. This does not however mean that he took part in the deliberations with respect to the Communication in question.

60. Admittedly, the Complainants could have been misled by the Final Communiqué to assume that all the Members who attended the session also took part in deliberations on all the agenda items, especially as the Final Communiqué did not indicate whether or not any member recused themselves on any particular item.

61. The African Commission is very strict in its application of its Rules of Procedure, and in particular, Rules 109, and with respect to the said Rule, its application is not limited to the consideration of Communications, but extends to all items considered by the Commission.

62. The Commission is therefore of the view that the Complainants have not fully discharged their burden of proof, and to state that the Commissioner, a national of the Respondent State did not take part in the consideration of the Communication in question, and his participation at the session is not proof that he participated in the deliberation related to this Communication.

Decision of the African Commission

63. In view of the above, the Commission finds that:

- i the decision on the merits of Communication **Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l’Homme/Islamic Republic of Mauritania** is *infra petita*, to the extent that it did not address itself to the allegation of violations of Articles 1, 2 and 14 of the African Charter;
- ii the Respondent State did not violate Article 2 of the African Charter;
- iii the Respondent State violated Articles 1 and 14 of the African Charter;
- iv the Complainants have not discharged their burden of proof with respect to the allegation of partiality, and relying on the presumption of regularity, concludes that the Commission acted correctly and in good faith.

64. The African Commission recommends that:

- i) the Respondent State should pay adequate compensation to the victim for the loss suffered;
- ii) the Respondent State should take steps to ensure that its law on freedom of association, in particular the establishment and functioning of political parties, is in conformity with the provisions of the Charter;

- iii) the Respondent State should inform the African Commission on measures adopted to implement these recommendations within 180 days of receipt of this decision.

Adopted at the 8th Extraordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia.

EX.CL/600(XVII)

ANNEX III

COMMUNICATION 333/06 – SANGONET V TANZANIA

Communication 333/2006- Southern Africa Human Rights NGO Network and Others/ Tanzania

Summary of Facts

1. The Secretariat of the African Commission on Human and Peoples' Rights, (the Secretariat) received a Communication on **17 November 2006** from the Southern Africa Human Rights NGO Network-Tanzania and its member organizations (the Complainants).³⁸
2. The Communication is submitted against the United Republic of Tanzania (hereafter referred to as the Respondent State), State Party³⁹ to the African Charter on Human and Peoples' Rights (the African Charter). The Communication is submitted under Article 55 of the African Charter.
3. The Complainants submit that on 22 June 1994, the High Court of Tanzania rendered a decision in the case of ***R v. Mbushuu alias Dominic Mnyaroje and Kalai Sangula, (the Mbushuu' case)*** where it found that the death penalty in Tanzania is unconstitutional on the grounds that the way the sentence is executed (by hanging) violates the right to dignity of a person as protected under Article 13(6)(d) of the Constitution of the United Republic of Tanzania and constitutes an inherently cruel, inhuman and degrading treatment outlawed by Article 13(6)(e) of the same.
4. As a result of the above reasoning, Hon. Justice Mwalusa sentenced the accused persons (***Mbushuu alias Dominic Mnyaroje and Kalai Sangula***) to life imprisonment instead of the compulsory capital punishment for the crime of murder.
5. The Complainants further submit that the Tanzanian Government⁴⁰ appealed the decision of the High Court before the Court of Appeal. They state that on 30 January 1995, the Hon. Justices of the Court of Appeal: Makame, Ramadhan and Lubuva overturned the High Court decision rendered by Justice Mwalusa and found that the death penalty is constitutional because it is saved by claw back clauses provided in the Tanzanian Constitution.
6. The Court of Appeal held that the death penalty is permissible under international human rights instruments, has effective deterrence effect, is accepted by the public, is economically cheaper to execute than to serve a life imprisonment and is compatible with the Constitutions and practices of other States Parties to the

³⁸ The members of the Organisations of SANGONET are; the Legal and Human Rights Centre, the Women's Legal Aid Centre, DOLASED, Women in Law and Development in Africa, the Centre for Human Rights Promotion, the National Organization for Legal Assistance, the Youth Partnership Countrywide and the Children Education Society

³⁹ Ratified on 18 February 1984

⁴⁰ The Appellant in the Mbushuu' case before the matter was brought to the African Commission

African Charter. The Court further held that in the event of a conflict between domestic law and international law, the domestic law prevails.

7. The Complainants refuted each of the grounds of the decision rendered by the Court of Appeal on 30 January 1995.

Article alleged to have been violated

8. The Complainants allege that the decision of the Tanzanian Court of Appeal is a violation of **Article 4** of the African Charter.

Prayers

9. The Complainants request the African Commission to declare that the Court of Appeal's decision violates Article 4 of the African Charter and that the circumstances of death penalty executions in Tanzania by hanging violates other relevant articles and other international norms against torture recognized by the African Commission.

Procedure

10. The Complaint, dated **17 November 2006**, was received at the Secretariat on **25 November 2006**.

11. During the 40th Ordinary Session of the African Commission held in Banjul, The Gambia, from 15 to 29 November 2006, the African Commission considered the Communication and decided to be seized of it.

12. By Note Verbale **ACHPR/LPROT/COMM/333/2006/RWE** dated **21 December 2006**, the Secretariat informed the Respondent State of this decision and requested it to provide, within three months from the date of notification, its submissions on the Admissibility of the Communication.

13. By letter **ACHPR/LPROT/COMM/333/2006/RWE** dated **21 December 2006**, the Secretariat also informed the Complainants of this decision and requested it to forward its submissions on the Admissibility of the Communication within three months.

14. On **8 May 2007**, the Secretariat received a Note Verbale **CHD 87/738/01/04** forwarding submissions on Admissibility from the Respondent State.

15. By Note Verbale **ACHPR/LPROT /COMM/333/2006/SN** dated **18 July 2007**, the Secretariat acknowledged receipt of the Respondent State's submissions on Admissibility and informed the latter of its decision during the 41st Ordinary Session to defer its decision on Admissibility of the case in order to study the Respondent State's submissions on Admissibility.

16. By letter **ACHPR/LPROT /COMM/333/2006/SN** dated **16 July 2007**, the Secretariat transmitted the Respondent State's submissions on Admissibility to the Complainants and informed the latter of the African Commission's decision during the 41st Ordinary Session to defer its decision on Admissibility in order to study the Respondent State's submissions.

17. By letter **ACHPR/LPROT/COMM/333/06/TZ**, dated **11 December 2008**, both parties were informed by the Secretariat that the African Commission deferred its decision on Admissibility to its 45th Ordinary Session in order to allow both parties submit additional arguments on Admissibility.

18. During the 45th Ordinary Session of the African Commission, the Communication was deferred to the 46th Ordinary Session.

19. On **5 March 2009**, the Respondent State submitted additional arguments on Admissibility.

20. By Note Verbale **ACHPR/COMM/333/06/TZ/0.2/148.09**, dated **18 March 2009**, the Secretariat acknowledged receipt of the Respondent State's additional submissions.

21. By letter **ACHPR/COMM/333/06/TZ/0.1/147.09**, dated **18 March 2009**, the Secretariat forwarded the Respondent State's additional submissions on Admissibility to the Complainants, and requested the latter to submit their additional submissions on Admissibility.

22. By letter **ACHPR/COMM/333/06/TZ/0.2/864.09** dated **5 November 2009**, the Secretariat sent a reminder to the Complainant requesting for its additional submissions on Admissibility, including clarifications on specific issues such as the delay in bringing the matter to the African Commission.

23. By letter **ACHPR/COMM/333/06/TZ/0.3/938.09** dated 3 December 2010, the Secretariat informed the Complainants of the African Commission's decision to defer the decision on the Admissibility of the Communication during its 46th Ordinary Session to the 47th Ordinary Session, pending additional information that was requested.

The Law

Admissibility

Submissions on Admissibility

Complainant's submissions on Admissibility

24. The Complainants submit that they have fulfilled all the requirements under Article 56 of the Charter, including the fact that all domestic legal remedies have been exhausted. They indicate that the Tanzanian Court of Appeal is the highest and final court in the country.

25. The Complainants further submit that the case has neither been heard nor decided by any other international or regional body, and call on the African Commission to act on the Complaint with urgency because death penalty convicts or persons awaiting trial on crimes punishable by compulsory death penalty in the country may be subjected to suffer death by hanging.

Respondent State's submissions on Admissibility

26. The Respondent State indicates in its submissions that the list containing the names of the other members who are joint authors of the Communication was not communicated to them.

27. The Respondent State affirms that the Court of Appeal is the highest court of the land, adding that this Court did find that the death penalty is provided for by Article 30(2) (c) of the Constitution and that it is not a claw back clause.

28. The State further asserts that the 14th Constitutional Amendment (the Amendment) expunged some of the so called 'claw back' clauses, and that this Amendment did not oust the legislative powers of the National assembly to enact laws. It also states that the Amendment did not oust the powers of the Court to interpret the Constitution and other enactments of the National Assembly by virtue of the rules of interpretation. According to the Respondent State therefore, the Amendment did not in any way render the judgment of the of the Court of Appeal outdated, adding that Article 30 gives room for the Court to interpret laws of the land as it did.

29. The Respondent State submits that the death penalty is still a lawful punishment in Tanzania, and that the decision of the Court of Appeal will continue to be respected because it is the highest Court in the land. It adds that, even though the State Party is bound by international instruments it has ratified, domestic laws will still prevail to serve specific situations.

Complainants' additional submissions on Admissibility

30. In their additional submissions on Admissibility, the Complainants reiterate the fact that they have fulfilled all the requirements under Article 56 of the African Charter.

31. The Complainants submit that Article 56(1) has been fulfilled because a signed copy of the list of the authors was attached to the Complaint brought before the African Commission.

32. They further submit that the requirement under Article 56(2) has also been met because the Court of Appeals' decision of 30 January 1995 constitutes a violation of Article 4 of the African Charter.

33. With respect to Article 56(3), the Complainants submit that it has been met because the Communication is not written in an insulting language.

34. They state that the Communication is in line with Article 56(4) because it is not based exclusively on news disseminated through the mass media, but rather on Court judgments and on the past and present jurisprudence on the death penalty.

35. The Complainants state further that the requirement under Article 56(5) has been complied with, because they have exhausted all local remedies. They elaborate on this by explaining that they took the matter to the Appeal Court of Tanzania, which is the highest Court in the land, before bringing it to the African Commission.

36. The Complainants further state that they have fulfilled Article 56(6) of the African Charter because the Communication was brought to the African Commission within a reasonable period of time, after the Court of Appeal's decision on the case.

37. Finally, the Complainants aver that the Communication is in line with Article 56(7) because it has not been submitted to any other international body for settlement.

Respondent State's additional submissions on Admissibility

38. The Respondent State made additional submissions on Admissibility addressing the requirements in Article 56(2), 56(5) and 56(6) of the African Charter.

39. The Respondent State refutes the Complainants' submission that they have fulfilled Article 56(2) of the African Charter. According to the Respondent State, the Complainants have not demonstrated the extent to which the Communication is in conformity with the provisions of the African Charter.

40. They state that, apart from citing Article 4 which deals with the right to life, they have not indicated any other provisions in relation to torture which is the basis of their Communication. In the absence of specific provisions related to torture, the Respondent State submits that the Communication is "*wild, vague, and hence incompatible with the provisions of the Charter and it violates Article 56(2).*"

41. With regard to Article 56(5), the Respondent State disputes the fact that local remedies have been exhausted. It submits that the accused persons in the **Mbushuu' case** were charged and convicted of murder, and sentenced to life imprisonment instead of death in the High Court, pursuant to the provisions of Section 196 and 198 of the Penal Code Cap 16 of the laws of Tanzania.

42. The Respondent State submits further that the Appellant in the **Mbushuu' case**, that is, the State, appealed to the Court of Appeal of Tanzania, through Criminal Appeal no 142 of 1994, and the Court of Appeal ruled on a death sentence, instead of life imprisonment, arguing that death sentence is constitutional.

43. Furthermore, the Respondent State submits that the Complainants did not exhaust local remedies available under Article 30(4) of the Constitution of Tanzania and Section 4 of the Basic Rights and Duties Act.⁴¹

44. In contending the Complainants' fulfillment of Article 56(6), the Respondent State submits that this Communication is based on the **Mbushuu' case** decided fifteen years ago, adding that the Complainants have not made any efforts to exhaust local remedies since then.

45. In its final observations, the Respondent State requests that the Communication be found inadmissible by the African Commission based on the aforementioned grounds.

Analysis of the African Commission on Admissibility

46. This Communication is submitted pursuant to Article 55 of the African Charter which allows the African Commission to receive and consider Communications, other than from States Parties. Article 56 of the African Charter provides that the Admissibility of Communications submitted pursuant to Article 55 is subject to seven conditions which must all be met.

47. In the Communication before the African Commission, the Complainants aver that they have complied with all the requirements under Article 56. However, the State disagrees, arguing that, the Complainants have not complied with Article 56(2), 56(5) and 56(6).

48. The African Commission will now proceed to determine whether these sub Articles under Article 56 raised by the Respondent State have indeed not been complied with. Nevertheless, the Commission would also analyze compliance with the, other sub- Articles of Article 56 that are not in contention.

49. In terms of **Article 56(1)** of the Charter, ***“Communications should indicate their authors, even if the latter requests anonymity.”*** In the Communication

⁴¹ Article 30(4) of the Constitution of the United Republic of Tanzania provides that:” *Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article; and the state authority may enact legislation for the purposes of -*

(a) regulating procedure for instituting proceedings pursuant to this Article;
(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article;
(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution.

While Section 4 of the Basic Rights and Duties Act,⁴¹ provides for the right to apply to the High Court for redress. It stipulates that: *“If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.”*

before the African Commission, the Respondent State submits that it was disadvantaged by not seeing the list of the other members who are the joint authors of the Communication. It is important to note that the Complainants did attach a list of the joint authors of the Communication in **Annexure I** of the Complaint to the attention of the African Commission, which was forwarded to the Respondent State. The Communication in the opinion of the African Commission thus clearly shows the name of the authors. In this regard, the requirement of Article 56(1) has been fulfilled.

50. **Article 56(2)** requires that, ***“The Communication be compatible with either the African Charter or the Constitutive Act of the OAU (now the Constitutive Act of the AU).”*** This sub-Article is subject to scrutiny because the Respondent State raised an objection to it. The State argues that the Complainants have only cited Article 4 of the African Charter which deals with the right to life, and that they have not indicated any other provisions in relation to torture which is the basis of their Communication. It goes further to describe the Communication as *“wild, vague and hence not compatible with the provisions of the Charter...”*

51. This Commission notes that, one of its primary considerations under Article 56(2) is whether there has been *prima facie* violation of human rights guaranteed by the African Charter. Furthermore, as was its position in *Mouvement des Refugée Mauritanien au Senegal v Senegal*,⁴² the Commission is only concerned with whether there is preliminary proof that a violation occurred. Therefore, in principle, it is not mandatory for the Complainant to mention specific provisions of the African Charter that have been violated.

52. In the Communication before the African Commission, the Complainants have alleged violation of Article 4 of the African Charter, meaning they have alleged the violation of a right by the Respondent State. The determination whether other rights have been violated or the extent to which they have been violated is not relevant because such an analysis is required only at the Merits stage. Based on this, the African Commission finds that Article 56(2) has been fulfilled.

53. **Article 56(3)** requires that, ***“Communications are not written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union.”*** According to this Commission, looking at the alleged facts of this Communication, there is no evidence of insulting or disparaging language. Thus, Article 56(3) is complied with.

54. **Article 56(4)** requires that, ***“The Communication should not be based exclusively on news disseminated through the mass media.”*** This Communication has not portrayed any indication of information coming from the media before this Commission. The Complainants' submissions have been supported by Court judgments, national laws and reports on which the Complainants relied. In this regard, the African Commission holds that Article 56(4) has been duly complied with.

⁴² Communication 162/97

55. Article 56(5) requires that, “**Communications be sent to the Commission only after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.**” It has become an established principle in international law that a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before it is dealt with at the international level.⁴³ This requirement safeguards the role of domestic courts to decide the matter before it is brought to any international adjudication body.

56. The Respondent State in this Communication is of the view that the Complainants have not complied with this requirement. It argues that the accused persons in the **Mbushuu’ case** were charged and convicted of murder, and sentenced to life imprisonment instead of death pursuant to the provisions of Section 196 and 198 of the Penal Code Cap 16 of the laws of Tanzania.

57. It further argues that the Complainants did not exhaust local remedies available under Article 30(4) of the Constitution of Tanzania and Section 4 of the Basic Rights and Duties Act.

58. According to this Commission, the argument by the Respondent State that the Complainants have not exhausted local remedies because the “*accused persons in the Mbushuu’ case were charged and convicted of murder, and sentenced to life imprisonment in the High Court, instead of death pursuant to the provisions of Section 196 and 198 of the Penal Code Cap 16 of the laws of Tanzania,*” cannot be sustained because the premise of exhausting local remedies according to the practice and purpose of Article 56(5) only requires that judicial domestic avenues should be exploited before a Communication is brought to the Commission. In the present Communication, there is evidence that the matter was considered and decided upon by the Highest Court in the Respondent State prior to its submission to this Commission.

59. This Commission also notes that, the ruling on life imprisonment in the **Mbushuu’ Case** was made in the High Court on the ground that the death penalty in Tanzania is unconstitutional. The Appellant not being satisfied with the decision of the High Court, appealed to the Court of Appeal which found that the death penalty is constitutional because it is saved by claw back clauses provided in the Tanzanian Constitution. In this regard therefore, the Complainants in the present Communication brought the matter before the Commission after the Court of Appeal had pronounced on the death penalty.

60. Concerning the argument that the Complainants have not exhausted local remedies because they did not avail themselves to the remedies provided by Article 30(4) of the Constitution of Tanzania, as well as the Basic Rights and Duties Act, it is imperative for the African Commission to verify the content of these Laws to determine whether remedies provided therein are sufficient and effective remedies.

⁴³ A.A. Cacado Trinidad, “ *The application of the Rule of Exhaustion of local remedies in international law* ” (1983)

61. Article 30(4) of the Constitution of the United Republic of Tanzania⁴⁴ provides that:

“Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article; and the state authority may enact legislation for the purposes of -

(a) regulating procedure for instituting proceedings pursuant to this Article;

(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article;

(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution

62. On the other hand, Section 4 of the Basic Rights and Duties Act,⁴⁵ provides for the right to apply to the High Court for redress. It stipulates that: *“If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.”*

63. Looking at the content of both Article 30(4) of the Tanzanian Constitution and Section 4 of the Basic Rights and Duties Act, they are all geared towards the option of bringing matters to the High Court for redress. This option was exploited because the matter was considered by the High Court before later referred to the Court of Appeal.

64. Furthermore, the ‘remedies’ referred to in Article 56(5) include all judicial remedies that are easily accessible for justice. The Commission in ***Interights and others v Mauritania***,⁴⁶ declared: *‘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 ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.’*⁴⁷

65. In this regard, what is important to the African Commission in determining whether local remedies were exhausted is whether judicial remedies indeed exists, and if so, whether they were explored by the Complainants. On this ground, the Respondent State’s reliance on the provisions of Article 30(4) of the Constitution of Tanzania and Section 4 of the Act is not enough to conclude that the Complainants did not exhaust local remedies.

⁴⁴ The Constitution of Tanzania is available at <http://www.lrct.or.tz/documents/REPUBLIC.pdf>

⁴⁵ The Basic Rights and Duties Enforcement Act (Cap 3 R.E. 2002), available at <http://www.lrct.or.tz/documents/DUTIES.pdf>

⁴⁶ Communication 242/2001

⁴⁷ n above para 27

66. Based on the above reasoning, this Commission holds that local remedies have been exhausted by the Complainants in compliance with Article 56(5) of the African Charter.

67. **Article 56(6)** of the Charter states that, “**Communications received by the Commission will be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter.**” The Respondent State asserts that the Complainants have not complied with this requirement because ‘*this matter was decided fifteen years ago...*’.

68. The African Charter does not specifically state what it means by ‘*reasonable time*’, as opposed to Article 46(1)(b) of the American Convention on Human Rights (the American Convention), which provides for a six months period.⁴⁸ In the absence of this specification, the Commission has always ruled based on the contexts and characteristics of each case.

69. In *Michael Majuru v Zimbabwe*,⁴⁹ for instance, the Communication was submitted to the African Commission twenty-months (22) after the Complainant allegedly fled the Respondent State without approaching the Courts therein. As reasons for delay, he argued without substantiating that he had been undergoing psychotherapy while in South Africa. He further indicated that he did not have the financial means to bring the case before the Commission, and that he was afraid for the safety of members of his family.

70. In the above Communication, the African Commission held that the Communication was not submitted within a reasonable time period envisaged in Article 56(6) because, “*The arguments advanced by the Complainant as impediments for his late submission of the Complaint do not appear convincing.*” It added that, “*Even if the Commission accepts that he fled the country and needed time to settle, or that he was concerned for the safety of his relatives, twenty two (22) months after fleeing the country is clearly beyond a reasonable man’s understanding of reasonable period of time.*”⁵⁰

71. Similarly, in *Darfur Relief and Documentation Centre v Republic of Sudan*,⁵¹ the African Commission held that a period of twenty nine (29) months (2 years and 5 months) between the time when the High Court dismissed the matter and when the Communication was submitted to the African Commission is unreasonable, particularly because the Complainants did not give any compelling reason to explain the delay. It stated that, “*Where there is a good and compelling reason why a*

⁴⁸ See also Article 26 of the European Convention on Human Rights (the European Convention)

⁴⁹ Communication 308/2005

⁵⁰ n above, para 110

⁵¹ Communication 310/2005

*Complainant does not submit his Complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a Complainant an opportunity to be heard. In the present case, there is no sufficient reason given as to why the Communication could not be submitted within a reasonable period.*⁵²

72. However, in *Mr. Obert Chinhamo v Zimbabwe*,⁵³ the Communication was submitted to the African Commission ten months after the Complainant allegedly fled from his country. Due to the circumstances in this case, the Commission decided that the Communication complied with Article 56(6), stating that; *“The Complainant is not residing in the Respondent State and needed time to settle in the new destination, before bringing his Complaint to the Commission. Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the Complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable.”*⁵⁴

73. As portrayed in the facts of the Communication before this Commission, the judgment of the Court of Appeal was delivered on **30 January 1995**, and the Communication was brought to the Commission on **17 November 2006**. Even though the State indicates that the Complainants took fifteen years before bringing the matter to the African Commission, according to the latter’s calculation, it took the Complainants exactly eleven years. The question of whether eleven years falls within the meaning of reasonable time would have to be assessed by this Commission.

74. The Commission underscores the fact that, in the submissions of the Complainants, there is no substantiation as to why it took them so long to bring the matter to the Commission after exhausting local remedies. It is the opinion of this Commission that, delays such as this could be prompted by different circumstances, including attempts to request for Presidential clemency and awaiting response or judicial reviews.

75. This Commission notes that it requested the Complainants to provide additional information to explain the delay, and no response was provided.

76. In the absence of any explanation whatsoever from the Complainants regarding the long period of time that it took before the matter was brought to the African Commission, the latter observes that, given the nature of the present Communication, there has been an unreasonable delay. In view of this, it holds that the Communication was not submitted within a reasonable period of time and therefore does not comply with Article 56(6) of the African Charter.

77. **Article 56(7)** states that, **“The Commission does not deal with cases which have been settled by those States involved in accordance with the principles of**

⁵² n above 78 and 79

⁵³ Communication 307/2005

⁵⁴ n above , paras 88 and 89

the Charter of the United Nations, or the Charter of the OAU or the provisions of the present Charter.” There is no evidence in this Communication that would prompt the Commission to believe that the matter has been settled by any international body. Moreover, this sub-Article has not raised any contention on the part of the Respondent State. Accordingly, the African Commission holds that the requirement under Article 56(7) has been duly fulfilled.

Decision of the African Commission

78. In view of the foregoing, the African Commission decides:

- a. **That this Communication does not comply with Article 56(6) of the African Charter, and therefore declares it inadmissible;**
- b. **To transmit its decision to the parties in accordance with Rule 119(1) of its Rules of Procedure;**
- c. **To Publish this decision in its 28th Activity Report.**

Done at the 47th Ordinary Session, held from 12 to 26 May 2010, in Banjul, The Gambia

EX.CL/600(XVII)

DECISIONS ON THE MERITS

EX.CL/600(XVII)

ANNEX IV

COMMUNICATION 313/05 – KENNETH GOOD V BOTSWANA

Communication 313/05 – Kenneth Good v Republic of Botswana**Rapporteur:****Summary of the Complaint**

1. The Complaint is submitted by INTERIGHTS, Anton Katz and Max du Plessis (Complainants) on behalf of Mr Kenneth Good (victim), against the Republic of Botswana (Respondent State).
2. The Complaint states that Mr Kenneth Good, an Australian national, teaching at the University of Botswana, had his employment terminated after his expulsion from Botswana on 31 May 2005.
3. It is submitted that in February 2005, in his capacity as Professor of Political Studies at the University of Botswana, the victim co-authored an article concerning presidential succession in Botswana. The article criticized the Government, and concluded that Botswana is a poor example of African Presidential succession.
4. The Complainants submit that, on 18 February 2005, the President of Botswana, exercising the powers vested in him by section 7(f) of the Botswana Immigration Act, decided to declare the victim an undesirable inhabitant of, or visitor to, Botswana. The victim was not given reasons for this decision, nor was he given any opportunity to contest it.
5. On 7 March 2005, the victim launched a constitutional challenge in the Botswana High Court. On 31 May 2005, the High Court dismissed the application ruling that Section 7 (f) of the Botswana Immigration Act relates to what the President considers to be in the best interest of Botswana, and Sections 11(6) and 36 of the same Act make the President's declaration unassailable on the merits.
6. On 31 May 2005, the victim was deported from Botswana to South Africa.
7. On 7 June 2005, the victim filed a notice and grounds of appeal in the Court of Appeal of the Republic of Botswana. On 27 July 2005, the Court of Appeal delivered a judgment dismissing the victim's appeal. The Court of Appeal held that the President, in making such declarations, is empowered to act in what he considers to be the best interest of the country, without judicial oversight.
8. The Complainants submit that the Court of Appeal is the highest judicial authority in Botswana. No further right of appeal or challenge lies from the decision of this court.

The Complaint

9. The Complainants allege that the Respondent State has violated Articles 1, 2, 7 (1) (a), 9, 12 (4), and 18 of the African Charter on Human and Peoples' Rights.

The Procedure

10. The Communication was received at the Secretariat of the African Commission on 24 November 2005.
11. During the 38th Ordinary Session held from 21 November to 5 December 2006, the African Commission was seized of the Communication.
12. On 15 December 2005, the Secretariat of the African Commission informed the parties accordingly and requested them to submit arguments on Admissibility. The Secretariat of the African Commission forwarded a copy of the Complaint to the Respondent State.
13. On 13 March 2006, the Secretariat of the African Commission received written submissions on Admissibility from the Complainants.
14. By Note Verbale dated 5 April 2006, the Secretariat forwarded a copy of the Complainants' submission on Admissibility to the Respondent State and reminded the latter to submit its arguments on the same.
15. On 18 April 2006, the Secretariat received an e-mail from one of the lawyers of the alleged victim requesting to be invited to make oral submission at the 39th Ordinary Session.
16. On 6 May 2006, the Secretariat received the submission on Admissibility from the Respondent State.
17. On 10 May 2006, the Secretariat of the African Commission received a letter from the Centre for Human Rights of the University of Pretoria submitting an *amicus curiae* brief.
18. On 20 May 2006, the Secretariat received further submission on Admissibility from the Respondent State.
19. At its 39th Ordinary Session, the African Commission considered the Communication and decided to defer it to its 40th Ordinary Session.
20. By Note Verbale and by letter dated 14 July 2006, the Secretariat notified both parties of the decision of the Commission and informed them that they can make further submission on Admissibility if they so wished.

21. On 3 October 2006, the Secretariat received a fax from the Complainants forwarding a copy of a letter of appeal addressed by the victim to the President of the Republic of Botswana, and the response of the Senior Private Secretary to the President.
22. On 4 October 2006, the Secretariat received the Complainants' response to the Respondent State's further submission on Admissibility.
23. On 7 November 2006, the Secretariat received a letter from the Respondent State requesting the Commission to purge the Complainants' additional submissions from the record because the State was not invited to make additional submission.
24. At its 40th Ordinary Session held in Banjul, the Gambia, from 15 to 29 November 2006, both parties were given audience before the Commission and the State requested to receive copy of the letter sent to the Complainants inviting further arguments, and to be given time to respond to the additional submissions made by the Complainants.
25. The Commission decided to defer consideration of the Communication to its 41st Ordinary Session and instructed the Secretariat to forward a copy of the above letter to the Respondent State.
26. By Note Verbale dated 12 February 2007, the Secretariat forwarded the above letter to the Respondent State and requested the latter to submit its observation on the same.
27. On 25 April 2007, the Secretariat received the response of the Respondent State on the Complainants' further submissions.
28. By Note Verbale dated 30 April 2007, the Secretariat acknowledged receipt of the Respondent State's response.
29. At its 41st Ordinary Session, the African Commission considered the Communication and decided to declare it Admissible.
30. By Note Verbale of 20 June 2007 and letter of the same date, both parties were notified of the Commission's decision.
31. On 2 October 2007 and 10 October 2007, the Secretariat received the Complainants' and Respondent State's submissions on the Merits, respectively.
32. By Note Verbale of 22 October 2007 and letter of the same date, the Secretariat acknowledged receipt of the Complainants' and Respondent State's submissions on the Merits and forwarded each other's submission to the other party.

33. At the 42nd Ordinary Session the Secretariat received the Complainants' response to the Respondent State's submissions on the Merits.
34. During the same 42nd Ordinary Session, the Respondent State raised a preliminary objection on the procedure of the Commission and the Commission decided to defer the Communication to allow the Secretariat prepare a decision on the preliminary objection.
35. By Note Verbale of 19 December 2007 and letter of the same date, the Secretariat informed both parties of the Commission's decision.
36. At its 44th Ordinary Session, the Commission dismissed the Respondent State's preliminary objections and requested that both parties submit within three months, their responses to the submissions of the other party.
37. By Note Verbale of 5 January 2009 and letter of the same date, both parties were informed of the Commission's decision and requested to make further submissions on the Merits within three months.
38. On 3 February 2009, the Respondent State requested for a month extension of time to make further submissions on the Merits.
39. By Note Verbale of 9 February 2009, the Secretariat granted the extension of time requested by the Respondent State.
40. By letter of 10 February 2009, the Complainant was informed of the extension of time granted to the Respondent State.
41. By a Note Verbale dated 27 March 2009, the Secretariat invited the Respondent State to forward its further submissions on the Merits.
42. On 7 November 2009, the Respondent State made a complaint regarding the procedures followed by the Secretariat in inviting the parties to make further submissions on the Merits.
43. On 8 April 2009, the Respondent State made further submissions objecting against the Commission's approach and application of the procedure laid down in Rule 119(2)(3) of Rules Procedure and requested the Commission to review its ruling.
44. By Note Verbale dated 14 April 2009, the Secretariat notified the Respondent State of the Commission's decision to take a decision on the Merits during its 45th Ordinary Session and further invited the State to make its submissions no later than 30 April 2009.
45. By a Note Verbale of 16 April 2009, the Secretariat informed the Respondent State that the latter's concerns and issues will be tabled before the Commission during its 45th Ordinary Session.

46. By a letter and Note Verbale of 7 December 2009, the Complainants and Respondent State were informed of the Commission's decision to defer consideration of the Communication to its 47th Ordinary Session.

The Law

Admissibility

Complainants' submission

47. The Complainants submit that the requirements set in Article 56 of the African Charter have been satisfied, as the author of the Communication has been identified and relevant details of the Communication have been provided to the Commission, including details of those individuals and organisations representing the victim. According to the Complainants, the Communication is compatible with the Constitutive Act of the African Union and with the African Charter. The Communication is presented in a polite and respectful language, and is based on information provided by the victim and on court documents, not on media reports. The Complainants state that the present Communication has not been submitted to any other international human rights body for investigation or settlement.
48. The Complainants claim that on 7 March 2005, the victim launched an application challenging the constitutionality of the Botswana Immigration Act. The application, which challenged the President's decision to expel him from Botswana, was dismissed by the High Court of Botswana in a unanimous judgment. They submit that the High Court in its judgment found that the President's declaration under Section 7(f) of the Immigration Act relates to what the President considers to be in the best interests of Botswana and Sections 11(6) and 36 of the same Act make the President's declaration unassailable on the merits.
49. The Complainants submit further that on 7 June 2005, the victim filed a notice and grounds of appeal to the Court of Appeal, in which he sought an order setting aside both the judgment appealed against and the decision of the President of 18 February 2005. On 27 July 2005, the Court of Appeal delivered a judgment dismissing the victim's appeal. The Court of Appeal held that the President in making such declarations is empowered to act in what he considers to be the best interests of the country, without judicial oversight and that the Parliament which decreed that the President's decisions are not subject to disclosure did not act *ultra vires* in doing so.
50. The Complainants aver that both Courts found that the President, in making his declaration that the victim was an "undesirable inhabitant or visitor to Botswana", is empowered to act in what he considers to be the best interests of the country, without judicial oversight. The Courts ruled that in terms of the Act, the President's decisions are not subject to disclosure or challenge in a court of law and he did not act *ultra vires*.

51. The Complainants submit that the Court of Appeal is the highest judicial authority in Botswana and no further right of appeal or challenge lies from the decision of this Court.
52. As a result of the above, the Complainants argue that all domestic remedies available in the Respondent State have been exhausted for the purpose of Article 56(5). They also submit that the Communication is brought before the Commission within three months of having exhausted such domestic remedies, pursuant to Article 56(6).

Respondent State's Submissions

53. In its submissions, the Respondent State challenges the Commission's existence and its competence to hear the case. Regarding the existence of the Commission, the Respondent State submits that the Commission was established within the Organisation of African Unity (OAU) and that the OAU ceased to exist in July 2001, and no provision was made for the continuance of the work of the Commission in the Constitutive Act of the African Union (AU) that took over from the OAU.
54. The State further submits that Article 5 of the Constitutive Act, which lists the AU Organs, does not mention the African Commission, and that the AU did not make use of the capacity vested in it under Article 9(1) (d) of the Constitutive Act to establish any other organ to bring the Commission back to existence. The Respondent State therefore concludes that the Commission has ceased to exist along with the OAU.
55. However, the Respondent State does not challenge the existence of the African Charter, which it considers a "mere instrument of noble ideals which unfortunately is devoid of any operational structures...".
56. With respect to the Commission's competence *rationae materiae* (subject matter of the Communication), the Respondent State holds that the Communication concerns immigration matters which are not part of the mandate of the Commission spelled out in Article 45 of the Charter. The State submits further that in terms of Article 13 of the Constitutive Act, it is the Executive Council which is responsible for immigration matters.
57. The Respondent State argues that in case the Commission finds itself to be in existence and to have jurisdiction over the matter, the Communication should notwithstanding be declared inadmissible for non-compliance with Article 56 of the African Charter.
58. It is the State's view that the Communication is not compatible with the African Charter. It submits that not all the elements of the Communication have been disclosed to the State, placing the latter "in an untenable position where it does not know the exact nature of the Complaint against it," and that therefore

- the Communication is irregular and/or non-compliant with Rule 104(e) as read with Article 56(2) of the African Charter.
59. The Respondent State also states that Article 23(1) of the African Charter recognises peoples' rights to national and international peace and security, and that Article 12(2) allows States Parties to restrict the right to freedom of movement by means of law for the "protection of national security, law and order..." The State holds that the interpretation of these provisions is that "States must be left alone and allowed to deal with matters of peace and national security". The Respondent State submits that the matter before the Commission involves national security and that the Commission has no competence over it.
 60. The Respondent State further submits that the decision to expel the victim was taken by the President in accordance with the law as required under Article 12(4) of the African Charter.
 61. The Respondent State argues that the victim's expulsion was confirmed by the courts and that the State has the obligation under Article 26 of the Charter to guarantee the independence of the judiciary and cannot interfere with their rulings.
 62. The Respondent State also states that the victim's appeal to courts in Botswana was dismissed with costs, which he has not yet paid, and that by instituting proceedings before the Commission he is just trying to escape his obligation in Botswana. The State concludes that the Communication is frivolous and vexatious, and that it should be rejected and held inadmissible.
 63. The Respondent State further submits that the victim did not avail himself of the possibility offered to him to resort to the President to review the decision expelling him. It is therefore the State's submission that local remedies have not been exhausted.
 64. For all the aforementioned reasons, the Respondent State prays the Commission to declare the Communication inadmissible.

Response of the Complainants to the Respondent State's submission on Admissibility

65. The Complainants submit that the fact that the OAU ceased to exist does not affect the existence of the Commission, and that the latter continues to exist *de facto* and *de jure*. *De facto*, the work of the Commission was not hindered or suspended as a result of the coming into force of the AU Constitutive Act: it continued considering communications; holding sessions; undertaking visits to States Parties, including the Respondent State, which continues to collaborate with it. *De jure*, the AU Assembly, by its decision, ruled that the Commission "shall henceforth operate within the framework of the African Union" (Ass./AU/Dec.1 (1)).

66. The Complainants argue that the African Charter established the Commission and the fact that the African Charter is still in force, as the Respondent State did acknowledge, is tantamount to recognizing the existence of the African Commission.
67. With respect to the disclosure of documents to the State, the Complainants argue that the Communication is not based on media reports but on the information provided by the victim and on court documents, and that only two judgments have been enclosed because they are the only ones relevant at the particular stage of the proceedings and from the point of view of exhaustion of domestic remedies.
68. The Complainants also challenge the argument of the Respondent State that the Commission does not have jurisdiction over immigration matters. They submit that that Article 45(2) mandates the Commission to protect human rights generally, without leaving out the rights of immigrants or people facing deportation, noting that Article 12 of the Charter makes clear reference to migration.
69. The Complainants finally submit that the other points of the State's submission relate to the merits and should not be considered at this stage of the procedure, adding that the Communication meets all the admissibility requirements and should be declared Admissible.

Respondent State's reaction to the Complainant's response to its submissions

70. In an oral submission during the 40th Ordinary Session of the Commission, and by letter dated 22 March 2007, the Respondent State submitted that the additional submission on Admissibility by the Complainants should be purged from the record of proceedings because the invitation to make additional submission was a misuse of the procedure under Rule 119 of the Commission's Rules of Procedure. It is the Respondent State's view that no reason was given for inviting the Complainants to submit and that the letter was signed by a Finance and Administration Officer (FAO), who is not a member of the Commission, and in inviting the Complainants to submit, the FAO unlawfully participated in the deliberations or decisions of the Commission.
71. The Respondent State goes on to reiterate its statement that the Commission is an emanation of the Charter, which established it to work within the OAU. The dissolution of the OAU, the State submits, deprived the Commission of the legitimacy and authority as mechanism for the settling of disputes. According to the Respondent State, in the absence of an amendment to Article 30 of the African Charter to enable the Commission to operate within the AU, and without an AU decision integrating the Commission as an organ of the AU, the African Commission lacks legal basis to continue performing its mandate under the African Charter.

Decision of the Commission on the Respondent State's challenge of its existence and competence

72. Considering that the Respondent State contests the existence of the African Commission and its jurisdiction to hear the matter complained of, the Commission will deal with those two points before dealing with the Admissibility of the Communication.
73. Regarding the existence of the Commission, the Respondent State submits that the Commission was established within the OAU, and that the OAU ceased to exist in July 2001 and no provision was made for the continuance of the work of the Commission in the Constitutive Act of the African Union that took over from the OAU.
74. According to the Respondent State, Article 5 of the Constitutive Act, which lists the AU Organs, does not mention the African Commission, and the AU did not make use of the capacity vested in it under Article 9(1)(d) of the Constitutive Act to establish any other organ to bring the Commission back to existence. The Respondent State therefore concludes that the Commission has ceased to exist along with the OAU.
75. In terms of Article 30 of the African Charter, "An African Commission on Human and Peoples' Rights, ... shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa". It is the Commission's view that having been established by the African Charter, the termination of a treaty other than the Charter cannot affect its existence.
76. The Commission would like to emphasize that although it was established by the African Charter and not a direct emanation of the OAU Charter, it was operating within the framework of the OAU, the latter being the main political organisation on the continent. As an organisation working within the framework of the OAU, the Commission relied on the OAU for its funding and its staffing,⁵⁵ and for the execution of its decisions against Members States found to be in violation of the Charter.⁵⁶ With the coming into force of the Constitutive Act, all the "assets and liabilities" of the OAU "... and all matters relating thereto," including relevant institutions established within the OAU, were devolved to the AU.⁵⁷ That is why, the Heads of State and Government of the AU, at their first Ordinary Session held in Durban, South Africa, from 8 to 10 July 2002, accepted to take over the obligations the OAU used to bear *vis-à-vis* the African Commission. In its decision on the Interim Period, the Assembly of the African Union decided that "the African Commission on Human and Peoples' Rights and the African Committee of Experts on Rights

⁵⁵ Arts 41 & 44 of the African Charter on Human and Peoples' Rights adopted on 1981.

⁵⁶ Art 58 of the African Charter

⁵⁷ Constitutive Act of the African Union adopted on 11 July 2000, Art 33(1).

- and Welfare of the Child shall henceforth operate within the framework of the African Union.”⁵⁸
77. As a matter of fact, the AU assumed towards the Commission the same obligations as previously borne by the OAU. The AU appoints the 11 Members of the Commission, provides staff to the Secretariat, funds the day-to-day work of the Commission, and adopts the reports submitted by the Commission. Moreover, Member States of the AU (which are also States Parties to the African Charter), including the Respondent State, continue to cooperate with the African Commission, by submitting their reports under Article 62 of the Charter, by hosting sessions and missions of the Commission, and by actively participating in the communication procedures when complaints are brought against them before the Commission.
 78. The Commission takes note of the fact that, although it challenges the existence of the Commission as a monitoring body, the Respondent State does not contest the existence of the Charter itself. The Commission observes that, unlike some other international human rights systems where the substantive rights and their monitoring bodies are dealt within two complementary but different instruments, in the African system, the same instrument, the African Charter, makes provisions for substantive rights and organises their monitoring mechanism.⁵⁹ Under the Charter, therefore, States Parties are not given the option of recognising the substantive rights without accepting the jurisdiction of the African Commission, which was established to promote and protect those rights.
 79. The Commission concludes that the termination of the OAU Charter and subsequent dissolution of the OAU does not affect its existence. The Commission is still in existence and performs its activities within the framework of the AU.
 80. Regarding the jurisdiction of the Commission over immigration matters, the Commission is of the view that there is no provision in the African Charter or in the Constitutive Act excluding the jurisdiction of the African Commission over such matters. The jurisdiction of the Commission is founded by Article 45 of the African Charter which reads: “The functions of the Commission shall be [to]: 2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.”
 81. This provision should be read together with the relevant substantive provisions of the Charter to find out whether, under its protection mandate, the Commission has jurisdiction over a given matter. Regarding specifically immigration matters, Article 12 of the Charter states that:

⁵⁸ Decision on the Interim Period, Ass/AU/Dec.1 (I), para 2(xi)

⁵⁹ Part 1 of the African Charter is dedicated to “Rights and duties” and Part 2, to “Measures of safeguard”.

1. *“Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.*
 2. *Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.*
 3. *Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.*
 4. *A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.*
 5. *The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”*
82. It appears from the provision of Article 45(2), read together with Article 12, that the Commission has jurisdiction when some human rights related to immigration are involved. The mandate of the Commission in that case is to make sure that, immigration policies and practices do not infringe upon those rights. Hence, the Commission finds that it has jurisdiction over immigration matters.
83. The Commission is of the view that the competence given to it over immigration matters under Articles 45(2) and 12 of the Charter, does not overlap with the mandate of the Executive Council, under Article 13(1)(j) of the Constitutive Act, over the same matters because the two bodies do not perform the same kind of activity. While the Commission is an international quasi-judicial institution established to promote and protect the rights enshrined in the African Charter, the Executive Council is a political organ, which “coordinate[s] and take[s] decisions on policies in areas of common interest to the member states [of the African Union], including...nationality, residency and immigration matters”.⁶⁰
84. Having dealt with the preliminary objections raised by the Respondent State regarding the existence and jurisdiction of the Commission, the latter will now proceed to make a determination on the Admissibility or otherwise of this Communication.

⁶⁰ Art 13(1)(j) of the Constitutive Act of the African Union (the Commission’s emphasis).

The Commission's analysis on Admissibility

85. The Admissibility of Communications submitted before the African Commission in accordance with Article 55 is governed by the requirements of Article 56 of the African Charter. In terms of Article 56: “communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:
1. Indicate their authors even if the latter requests anonymity,
 2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity,
 4. Are not based exclusively on news disseminated through the mass media,
 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, and
 7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.”
86. The African Commission is of the view that this Communication establishes a *prima facie* violation of the provisions of the African Charter, and is compatible with both the Constitutive Act of the African Union and the African Charter. The African Commission also does not believe that there has been any use of a disparaging or insulting language against the Government of the Republic of Botswana or any of its institutions or the African Union.
87. Regarding the disclosure of documents, the Commission finds that the documents submitted by the Complainants in support of the claim sufficiently prove that the Communication is not based on fiction or on news disseminated by the mass media. The Commission concurs, therefore, that the condition of Article 56(4) has been met. The Commission also notes that all the documents submitted by the Complainants have been disclosed to the Respondent State.
88. The Commission recalls its established jurisprudence whereby the exhaustion of local remedies referred to in Article 56(5) ‘entails remedy sought from the courts of a judicial nature.’⁶¹ Such a judicial remedy shall be effective and shall

⁶¹ Communication 221/98 - *Alfred B. Cudjoe v Ghana* (1999) para 14.

- not be subordinated to the discretionary power of public authorities.⁶² The Commission has also affirmed on several occasions that it is not necessary, for the sake of meeting the condition of Article 56(5), to seek 'remedies from a source which does not operate impartially and have no obligation to decide according to legal principles.'⁶³
89. In the present Communication, the victim challenged the decision expelling him from Botswana before the domestic courts. His application before the High Court of Botswana was dismissed, as was a further appeal that he filed with the Court of Appeal, the highest judicial authority in Botswana. The Commission finds therefore that all local remedies have been exhausted. The Commission is of the view that the presidential review referred to by the Respondent State is not of a judicial nature and is subject to the discretionary power of the President, the very authority that ordered the expulsion of the victim. The Commission considers that such a remedy is not effective and the victim is not obliged to utilise it.
90. The Commission further finds that the other arguments⁶⁴ submitted by the State against the Admissibility of the Communication are based on substantive rights protected under the Charter, including the rights, the violation of which is complained of by the applicant, to such an extent that dealing with them at this stage of the procedure would be pushing the Commission to jump the gun to consider the Communication on the Merits. The Commission therefore will not pronounce on them but would rather deal with them at the appropriate stage.
91. From the above submissions, this Commission is of the view that the present Communication sufficiently complies with the requirements under Article 56, relating to the Admissibility of Communications before the African Commission and thus decides to declare the Communication Admissible.

The Merits

Respondent State's preliminary objection to the Commission's procedure

92. At the 42nd Ordinary Session of the Commission, the Respondent State raised a preliminary objection regarding the Commission's procedure in the handling of Complaints/Communications. The main thrust of the State's objection is that the Commission's procedure relating to the handling of Communications was not followed with regards to the present Communication. According to the State, Rule 119 of the Commission's Rules of Procedure was not respected,

⁶² Communication 48/90 - *Amnesty International v Sudan*, 50/91 *Comité Loosli Bachelard v Sudan*, 52/91 *Lawyers Committee for Human Rights v Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa v Sudan* (1999), para 31.

⁶³ Communication 87/93 - *The Constitutional Rights Project (In respect of Zamani Lakwot and 6 others) v Nigeria* (1995) para 8.

⁶⁴ Particularly the arguments raised by the Respondent State regarding the fact that the President made the decision in accordance with Article 12(4) of the Charter and that the expulsion order was confirmed by Botswana High Court and Court of Appeal and hence the State has the obligation not to interfere with the independence of the judiciary under Article 26 of the Charter, are arguments that go into the Merits of the case.

- and as a result, both parties to the Communication, the Respondent State and the Complainants, made submissions to the Commission at almost the same time, making it difficult to respond to issues raised by either party.
93. The Respondent State submits that the Commission had asked both parties to submit their arguments on the Merits, giving both parties the same deadline. Both parties sent their arguments to the Secretariat of the Commission at almost the same time, and the Commission then forwarded the submissions of either party to the other for comments, if any.
94. The Respondent State contends that this procedure deprives it from properly addressing the issues raised by the Complainants as it was not availed a copy of the Complainants' submission prior to the Respondent State making its own submission. In the words of the Respondent State 'it prejudices Botswana greatly in that the applicant has effectively been afforded an undue opportunity to strengthen his case, to the extent that the submissions filed by him raise very many new matters of fact and law which our arguments, as is to be expected, do not deal with'. The Respondent State concluded that the Complainants' supplementary submissions on the Merits be purged off the record.
95. Referring to Rule 119 of the African Commission's Rules of Procedure, the State maintains that it was supposed to have submitted first and the Complainants given the opportunity to reply within a time fixed by the Commission, in accordance with Rule 119 (3).
96. The Commission will thus, first deal with the preliminary issue raised by the Respondent State before proceeding to make a determination on the Merits of the Communication.

African Commission's decision on the preliminary objection

97. In the present Communication, after declaring the case Admissible at the Commission's 41st Ordinary Session, the Secretariat, by Note Verbale of 20 June 2007, and letter of the same date, informed both parties and requested them to submit their arguments on the Merits within three months from the date of notification. On 5 October 2007, the Secretariat received the Complainants' submissions on the Merits of the Communication. On 12 October 2007, the Secretariat received the Respondent State's submissions on the Merits. On 22 October 2007, the Secretariat forwarded the submissions of the Respondent State to the Complainants, and the Complainants to the Respondent State.
98. The purpose of requiring parties to make submissions to the Commission is so that they appreciate the concerns of each other and try to address them as best as they can. That is why the Commission adopted Rules of Procedure governing, among other things, the receipt and consideration of Communications.

99. Rule 119 of the Commission's Rules of Procedure seek to guide the Commission regarding the procedure to adopt after a Communication has been declared Admissible. In terms of Rule 119 (1) 'if the Commission decides that a Communication is admissible...its decision and text of the relevant documents shall as soon as possible, be submitted to the State Party concerned...The author of the communication shall also be informed of the Commission's decision...'. Rule 119 (2) provides further that the State Party ... shall within the ensuing three months, submit in writing to the Commission, ...measures it was able to take to remedy the situation'.
100. From the above two paragraphs of Rule 119, it is the view of the Commission that when a Communication is declared Admissible, both parties must be notified of the decision. While the African Charter obliges the Commission to submit its decisions and other relevant texts relating to its decision on Admissibility to the State Party, it simply requires the Commission to inform the author of the Communication. This presupposes that the Respondent State is the one that is expected to make submissions on the 'merits', to, in the words of the Charter, provide 'explanations or statements elucidating the issue under consideration and indicating, if possible, measures it was able to take to remedy the situation'.
101. This interpretation is supported when one turns to Rule 119 (3) which provides that 'all explanations or statements submitted by a State Party pursuant to the present Rule shall be communicated... to the author of the communication, who may submit in writing additional information and observations within a time limit fixed by the Commission.'
102. It is clear from the above, that after declaring a Communication admissible, both parties are informed of the decision, but the Respondent State is further requested to make submissions on the matter being considered. After the State would have submitted, then the submission is availed to the author of the Communication for his/her comments. The Respondent State seems to be satisfied that the Note Verbale of 20 June inviting it to make submissions on the Merits 'was the correct step'.
103. However, the Respondent State contends that if the Complainants were also invited to make submissions on the merits 'that was a defective step and clearly the Commission will be guilty of breaking its own procedural rules'.
104. The procedure of letting one party submit first and inviting the other to respond will give both parties the opportunity to address the issues or concerns of the other. This exchange of submissions between the State and the author of the Communication can continue until the Commission is satisfied that it has had enough information to make a decision on the matter.

105. The African Commission thus concurs with the Respondent State that when parties are asked to submit at the same time, it does not give both of them the opportunity to respond to issues that are raised by the other party.
106. This notwithstanding, the practice of the Commission is clear. Where it receives submissions from one party, it sends the same to the other party for their comments. Thus, even if the parties make submissions at the same time, the other party is not prejudiced in any way because they are still given an opportunity to respond to the submissions before the Commission can make a determination. This was the situation with respect to the present Communication.
107. The Secretariat received the State's submissions on 12 October 2007 and sent same to the Complainants on 22 October 2007. Thus, the Respondent State was sent the Complainant's submissions and the Complainants were sent the State's submissions, and both parties were entitled to send comments, if any.
108. Thus, even though Rule 119 was not followed to the letter, the Respondent State has not indicated how it was prejudiced by this lapse, to the advantage of the Complainants. The Respondent State has been given an equal opportunity to respond to the submissions of the Complainants just as the Complainants have been given an opportunity to respond to the State's submissions.
109. The Commission accordingly takes note of the fact that Rule 119 of its Rules of Procedure was not followed to the letter, and undertakes to ensure that it is complied with in the future. It holds that since the Respondent State has been given time to respond to the Complainants' submission, its argument that the Complainants' submissions on the matter be purged from the record cannot stand. The African Commission accordingly requests both parties to submit their responses, within three months, on the arguments made by either party.

Submissions on the Merits

Complainants' submissions on the Merits

110. The Complainants allege that the existence and application of the Botswana Immigration Act has violated Articles 1, 2, 7(1) (a), 9, 12(4) and 18 of the African Charter.

Alleged Violation of Article 1

111. With respect to the alleged violation of Article 1 of the African Charter, Complainants submit that the Charter was adopted and acceded to voluntarily by African States and that once ratified, States Parties to the Charter are legally bound by its provisions, adding that States wishing not to be bound ought to have refrained from ratifying.

112. The Complainants refer to Article 31 of the *Vienna Convention on the Law of Treaties* which states that “a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The Complainants also make reference to **Legal Resources Foundation v Zambia**⁶⁵ where the Commission stated that the African Charter must be interpreted holistically and all clauses must reinforce each other. The African Charter must also be interpreted, in light of international norms and consistently with the approach of the other regional and international human rights bodies.
113. The Complainants assert that the fact that the African Charter has not been incorporated into Botswana domestic law may preclude persons in Botswana from relying on the provisions of the Charter before local courts but does not affect recourse to the Commission under the African Charter. States are bound by their ratification of the African Charter whether monist or dualist and even where it revokes the domestic effect of the Charter.⁶⁶ Consequently, they argue, all the provisions of the African Charter addressed below indicate the Respondent State’s failure to respect the African Charter and to ensure its full implementation in violation of Article 1 of the same.

Alleged Violation of Articles 7(1)(a) & 12(4)

114. The Complainants allege that the victim was deprived by law from accessing information relating to the reasons for his being declared a threat to national security, which in turn denied judicial authorities the right to review the President’s decisions. Together, these denials, according to the Complainants, amount to a clear violation of the right to appeal to competent judicial organs, a situation that affects the right to be heard. In this regard, they contend that the right to be heard entails the right to challenge in a court of law, decisions that affect the individual’s fundamental rights.⁶⁷
115. Depending on Sections 7(f), 11(6) and 36 of the Botswana Immigration Act the Complainants aver that the courts that determined the victim’s application and appeal prior to and following his expulsion, found that he had no right to any information regarding the President’s decision, and that the courts had no power to question the reason for his expulsion and that there was no legal limit to the unfettered discretion of the President.
116. According to the Complainants, the victim was not afforded any meaningful opportunity to challenge his expulsion either by way of hearing before the expulsion order was made, or by way of appeal after the order was made. He was not provided with the reasons for his expulsion and was accordingly not afforded an opportunity to challenge those reasons or provide evidence which might contradict them. He was neither given any remedy in respect of the

⁶⁵ Communication 211/98 – *Legal Resources Foundation v Zambia* (2001) para 70.

⁶⁶ Communication 129/94 – *Civil Liberties Organization v Nigeria* (1998) paras 12 & 16.

⁶⁷ Communications 147/97 & 149/96 - *Jawara v The Gambia* para 74; Communication 151/96 - *Civil Liberties Organization v Nigeria* para 17.

- violations of his rights. These decisions and the underlying provisions of Sections 11(6) and 36 of the Immigration Act, according to the Complainants, are inconsistent with basic principles of due process enshrined in Article 7 of the African Charter.
117. The Complainants aver that any decision passed “in accordance with the law” as provided under Article 12(4) of the African Charter should fulfil the following three requirements: one, it should be provided in a clear and accessible law to offer predictability and to guard against arbitrariness; two, it “...must be made by a court or an administrative authority on the basis of a law affording protection against arbitrary expulsion through the establishment of corresponding procedural guarantees”⁶⁸. In relation with this they refer to the Commission’s decision in **Modise v Botswana**⁶⁹ where the Commission stated that “in accordance with law” requires not only strict conformity with national law, but also with the principles of the African Charter and other international norms. Third, he contends that the procedural guarantees under Article 12(4) enshrine the right to meaningful judicial oversight of administrative decisions.
118. With regard to the issue of national security, the Complainants submit that while the victim’s case raises no genuine issue of “national security”, it is noted that, even where such legitimate concerns do arise, they do not provide a basis to set aside the rights protected in the African Charter. They argue that while legitimate security concerns can be taken into account in interpreting the African Charter, they cannot erode the essence of the rights protected, including the right protected under Article 12(4). The Complainants refer to **Commission Nationale des Droits de l’Homme et des Libertes v Chad**⁷⁰ where the Commission stated that the African Charter does not allow States Parties to derogate from their treaty obligations even during emergency situations. They also refer to **Amnesty International v Zambia**⁷¹ where the Commission found a violation of Article 12(4) where the national court did not consider Zambia’s obligations under the African Charter and failed to rule on the ground that the Complainant was likely to ‘endanger peace and good order in Zambia’. According to the Commission, ‘there was no judicial inquiry on the basis in law and in terms of administrative justice for relying on this ‘opinion’ of the Minister of Home Affairs for the action taken’.
119. The Complainants contend that the President did not give reasons for the victim’s deportation, neither did he explain or justify his decision and considerations of national security. The President, according to the Complainants, applied a law which afforded him an apparently limitless power to make a declaration which has the effect of causing an individual to become “a prohibited immigrant”. This power is attended by a blanket denial of

⁶⁸ Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) 226.

⁶⁹ Communication 97/93 – *John K Modise v Botswana* (2000) para 83.

⁷⁰ Communication 74/92 – *Commission Nationale des Droits de l’Homme et des Libertes v Chad* (1995) para 21.

⁷¹ Communication 212/98 – *Amnesty International v Zambia* (1999) para 33

information as to the basis for its exercise. A law of this breadth and potentially all encompassing scope, the Complainants argue, lacks the clarity and precision required of 'law'. They further state that its terms and the lack of procedural oversight render it a recipe for arbitrariness, as demonstrated by the current case.

120. The High Court and Court of Appeal, the Complainants submit, both supported the view that this exercise of Presidential power is not subject to any judicial review based on Sections 7(f), 11(6) and 36 of the Act. Accordingly, 'national security' issues such as terrorist attacks globally do not bear even the remotest relation to the victim's case and this is a clear example of arbitrariness disguised as national security, and of national security being invoked in an attempt to preclude all scrutiny and to circumvent the Respondent State's human rights obligations.
121. The Complainants therefore claim that Articles 7(1) and 12(4) of the Charter were violated by denying the victim the opportunity to be heard in respect of the decision to expel him, either prior to or after his expulsion.

Alleged Violation of Article 9

122. The Complainants submit that the comments of the victim in the article "Presidential Succession in Botswana: No Model for Africa", were opinions expressed in the course of his functions as Professor of Political Science at the University of Botswana, that these comments were academic in nature and related to the functions of government in a democratic society. Such critique, they argue, was an inherent aspect of the exercise of the victim's functions as an academic in the field, who was not only entitled but effectively compelled by his discipline to be prepared, where appropriate, to write critically about government issues. As political speech, related to his academic functions, it was speech deserving of protection in line with the norms of an open and democratic society, any restriction of which could only be justified in the most exceptional circumstances.
123. The Complainants further submit that although considerable emphasis has been placed by the Respondent State on national security as a justification for restricting the victim's rights, his expulsion was patently not related to any national security threat but to the suppression of political analysis and criticism. They submit that the measured academic papers of the victim did not contain ideas that incited violence, or amount to hate speech that may have necessitated some restriction of his freedom of expression. According to the Complainants, the measures were clearly aimed at preventing the victim or others like him, from expressing critical political views and/or were punitive in nature and that his expulsion did not pursue any legitimate aim.
124. The Complainants aver that the complete absence of any reasons given to the victim, the Court or – thus far – the Commission, also makes it impossible to conduct a necessity and proportionality analysis of measures adopted, and

leads inevitably to the conclusion that the interference cannot be justified within the law.

125. They also allege that the Respondent State has failed to show the nature of the alleged national security threat posed, or to proffer arguments as to why the deportation could be justified as proportionate in severity and intensity to the publication of an academic paper. Had there been any such security issue, such that the curtailment of freedom of speech may have pursued a legitimate aim, the Complainants submit, there would have been an alternative, less onerous and more proportionate means of protecting those interests. The deportation can, according to them, in such circumstances, never be justified as necessary or proportionate.
126. The Complainants further submit that Section 36(2) of the Botswana Immigration Act⁷² prevented the victim from receiving information as to the grounds on which he was declared a prohibited immigrant or visitor to Botswana. The denial of such information, according to them, violated his right to receive information, in particular the reasons underpinning his expulsion which directly contradicts the requirements of Article 9(1).

Alleged Violation of Article 18

127. The Complainants submit with respect to Article 18 that the expulsion of the victim has a drastic impact on the victim's family life and daughter, as the family home in Botswana was his only home established for 15 years. He was forced to separate from his daughter Clara, then 17 year old minor, who was not in a position to follow him given the critical stage of her studies. This separation, according to the Complainants, gravely affected her as she was very close to her father, who obviously could not return to visit her.
128. By reiterating Botswana's obligation to protect the family, the Complainants argue that any interference with the right to family can only be justified by a complete absence of any real pressing social need to expel the victim from Botswana, and the Respondent State has not shown that the victim's expulsion could be justified by a pressing need to protect public order or national security.
129. The Complainants recall that the victim had been a law abiding resident for 15 years and had played an important role in bringing up his daughter. Despite this fact, there is no indication that the impact of the expulsion order on him or his daughter and their family life was in any way taken into account, still less minimized, by authorities when they deported him. On the contrary, the Respondent State denied him an opportunity to finalise arrangements for his daughter before being expelled, as he was arrested immediately after the High Court's decision and expelled later that day. The hasty way of his deportation,

⁷² This provision reads as "No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court".

in the circumstances of the case, according to the Complainant, amounted to a gratuitous interference with his right to family life.

Alleged Violation of Article 2

130. The Complainants claim that the crux of the case lies in the fact that the victim held and expressed political views that were critical of the political establishment in the Respondent State, and specifically of Presidential Succession. They submit that had it not been for the nature of his political opinions, his rights under the Charter would not have been violated, adding that his political views singled him out for discriminatory treatment at the hands of the authorities.
131. They aver that the victim did not hold a position where he had access to sensitive material of potentially damaging nature to national security and he was not required to adopt a politically neutral position as, perhaps a civil servant may have been, and even in such cases, it has been held that such differential treatment is generally not acceptable.⁷³
132. The Complainants in conclusion urge the Commission to adopt strict scrutiny of discrimination on the grounds of political opinion, given that pluralism and diversity are fundamental ingredients of any democratic society. They further urge the Commission to demand very weighty reasons to be given to justify different treatment on the basis of political opinion, by taking into consideration that no reasons have been provided by the Respondent State in this matter.
133. The Commission notes that the arguments raised in the *amicus curiae* brief submitted by the Centre for Human Rights of the University of Pretoria are already reflected in the submissions of the Complainants.

Respondent State's Submissions on the Merits

134. The Respondent State submits that the victim at no stage during the proceedings at the High Court of Botswana or before the African Commission alleged bad faith on the part of the Government of Botswana, but merely attacks the process by which he was declared a prohibited immigrant.
135. The State contends that the essence of the Complainants' argument is the failure of the Government of Botswana to abide by its treaty obligations, which taken to its logical end, implies bad faith on the part of the government. Though not disputing the commitment of the Charter to human rights, the Respondent State contends that this does not imply a blanket application of the principle of *pacta sunt servanda* under international law as provided in Article 26 of the Vienna Convention of the Law of Treaties which provides that '*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*'.

⁷³ Concluding Observations on Germany (1997) UN doc. CCPR/C/79Add.73 para 17.

136. According to the Respondent State, the exception to this principle is that no automatic duty attaches to parties, more specifically Botswana, to carry out all the provisions of the Charter. They aver that when States concluding an agreement do not have in mind the creation of legal obligations, but aim only to declare some common intent, the principle of *pacta sunt servanda* does not apply.
137. In support of its argument, the Respondent State submits that a close scrutiny of paragraphs 3, 4 and 10 of the preamble to the African Charter reveal that parties did not intend creating legal obligations in drawing up the Charter.
138. The Respondent State further states that Botswana is a sovereign state guided by principles of democracy and has since independence striven to protect, maintain and promote human rights values, a reflection of which is mirrored in Section 3 of its Constitution. It argues further that the Charter has no force of law in Botswana as its provisions do not form part of the domestic law until they are passed into law by Parliament. According the Respondent State, as a sovereign State it is up to Botswana as well as other parties to the African Charter, to determine the nature of its domestication policy. In doing so, it submits, Botswana is guided by attitudes of its citizens to the quality of fundamental rights and freedoms as contained in Section 3 of the Constitution which they are not dissatisfied with.
139. The Respondent State further contends that for the legislative, executive and judicial organs of a State Party, a treaty is infrequently assessed in the hierarchy of legal norms applicable in the domestic legal order and as a consequence, treaties are sometimes deemed inapplicable if they conflict with the constitutional provisions of a state. Thus, in Botswana, treaties do not confer enforceable rights on individuals until passed into law by Parliament. However, they may be used as an aid to construction of laws including the Constitution.
140. Accordingly, the Respondent State submits that it does not automatically follow that a party to a treaty which fails to observe its provisions acts in bad faith. The Respondent State rejects the proposition that the Government of Botswana acted in bad faith in respect of the present Communication for the following reasons:
141. First, the right to life, liberty, fair and expeditious trial and the freedom of conscience are provided for in Sections 4 to 16 of the Constitution of Botswana. The State argues that the advent of the African Charter neither added nor subtracted from the existing legal arrangements in Botswana with respect to the fundamental rights and freedoms the Complainants claim Botswana has failed to domesticate. The State further states that these fundamental rights and freedoms are indistinguishable from the articles allegedly violated by Botswana under the Charter and that the victim has

- benefited from these provisions for the 15 uninterrupted years during which he was present in Botswana.
142. Second, the State submits that the victim's conduct as evident by the court papers precludes him from seriously alleging bad faith. The court papers, the Respondent State submits, indicate that one leg of the victim's legal challenge sought a declaration that his rights under Sections 3, 5, 7, 11 and 12 of the Constitution of Botswana had been contravened as a consequence of his being declared a prohibited immigrant. Accordingly, the State submits that if the victim in so doing recognises, that the aforementioned sections do confer on him these rights and freedoms, then he is being disingenuous by asserting in the same breath that the Botswana Government failed to give effect to the same fundamental rights and freedoms he claims does not exist.
143. Third, the Respondent State submits that while the victim indicated before the courts in Botswana that he does not allege bad faith on the part of the Government of Botswana in declaring him a prohibited immigrant, but merely queries the process by which the decision was reached, by invoking Articles 1, 2, 7,9,12, 15 and 18 of the African Charter and alleging that Botswana is bound to observe and apply these provisions, the Complainants place on him (the victim) the burden of proving that Botswana had acted in bad faith by failing to observe these provisions, which it has failed to discharge satisfactorily.
144. With respect to alleged violations of Article 12(4), the Respondent State contends that the requirement that the expulsion of non – nationals from the territory of a State Party must be done 'according to law' refers to the domestic law of Botswana. In support of this assertion, the State explains that the Botswana Immigration Act of 1966 came into effect on the same day as the Constitution, i.e. on 30 September 1966, an indication, the State contends, that the framers of the Constitution had knowledge of the provisions of the Act. The evidence of this awareness lies in the fact that Section 14(1) of the Constitution provides for freedom of persons within Botswana to move freely, enter and reside, as well as immunity from expulsion from Botswana.
145. The Respondent State adds that Section 14(3) provides that nothing done under the authority of any law, that is to say, the domestic law of Botswana, shall be held to be inconsistent or in contravention of the provisions to the extent that such law makes provision for the imposition of restrictions of freedom of movement on any person who is not a citizen of Botswana. Thus, the State asserts that 'authority of the law', in the present circumstance, refers to the Botswana Immigration Act and that therefore, the 'protection of law' referred to in Section 3 of the Constitution, is subject to such limitations contained in the domestic law of Botswana which is not inconsistent with Article 12(4) of the Charter.
146. These, the Respondent State claims, are those limitations that are necessary in the public interest as well as those contained in Section 11(6) and 36 of the

- Immigration Act. According to the State, public interest includes the peace and stability of the country and the well being of the people, and national security means the security of the people of Botswana.
147. The State submits that the preclusion of a right of appeal inevitably requires the need to debate the information and grounds upon which the President formed his decision to declare a person a prohibited immigrant, implies that such information and grounds are not to be disclosed. The consequent prohibition of courts from inquiring into the adequacy of those grounds also implies a non-disclosure of those grounds. According to the State, it is not in the public interest to disclose the grounds or information for declaring a person a prohibited immigrant, more so, where the President's decision is based on national security or is made in the national interest and that his reason for such decisions should neither be open to public disclosure nor subject to scrutiny by courts.
148. In support of its position the Respondent State cites the United Kingdom as an example of a country in the "so-called civilised world" supporting the ouster of jurisdiction of courts on immigration issues. They refer to two decisions of the English Courts to this effect, viz: **R (Farrakhan) v Secretary of State for Home Department**⁷⁴ and **Secretary of State for Home Department v Rehman**,⁷⁵ which according to State, support the position that decisions on issues of national security should be entrusted to the Executive and not the judiciary.
149. The State concludes by stating that executive action under Section 7(f) of the Botswana Immigration Act rests in the President who is elected by voters and that the Botswana Parliament has enacted that information and grounds upon which the President has taken a decision are protected from disclosure.

Complainant's response to the Respondent State's Submissions on the Merits

150. The Complainants submit in response to the State's submission that it is misplaced for the State to focus on bad faith as a criteria for determining a State Party's compliance with the African Charter. According to the Complainants, what is in issue for determination by the Commission, is whether Botswana has fulfilled its international obligations, not whether it acted in bad faith.
151. The Complainants state that the Government of Botswana ratified the Charter on 17 July 1986 and by doing so, unreservedly agreed to implement its provisions and since then, it has taken no action to relieve itself of any of its obligations under the Charter either by withdrawal from it or by entering reservations. Quoting the decision of the Commission in **International Pen**

⁷⁴ [2002]4 ALL ER 289

⁷⁵ [2002] 1 ALL ER 122.

- (On behalf of Saro-Wiwa) v Nigeria**⁷⁶ the Complainants add that any State which did not wish to abide by the provisions of the Charter ought to have refrained from ratifying it.
152. The fact that Botswana as a dualist country is yet to incorporate the Charter into its domestic law, according to the Complainants, may preclude persons within Botswana from relying on it in domestic courts but does not affect their right to recourse to the Commission under the African Charter. A state, whether dualist or monist, according to the Complainants, is bound by the ratification of the Charter even where it revokes the domestic effect of the Charter.⁷⁷
153. Contrary to the Respondent State's claim that the rule of law is based on fundamental rights and freedoms as set out in its Constitution and that "treaties are sometimes deemed inapplicable if they conflict with Constitutional provisions of the State", the Complainants assert that principles of international law dictates that the Respondent State cannot invoke the provisions of its domestic law as justification for its failure to perform a treaty obligation.⁷⁸ Accordingly, the Complainants aver that what the Commission needs to consider is not whether the Charter is applicable in Botswana, but whether the rights enshrined in the Charter are respected domestically i.e. whether law and practice in Botswana conform to the obligations under the Charter. The responsibility of the Commission is to examine the compatibility of a State law and practice with the Charter.⁷⁹
154. The Complainants argue that limitations to the victim's right to fair trial, whereby he was prevented from hearing before the expulsion order or appealing the expulsion order, is an inappropriate attempt to circumvent the rule of law and protection of fair trial rights. They submit that critical academic comments on matters of the political governance of a State is an essential element of, and not a threat to democracy and security. The Complainants add that even if the case did in fact raise national security issues, the Respondent State's assertion that executive decisions about national security are outside the scope of domestic or regional judicial review lacks support in the African regional human rights system. They contend further that although legitimate security concerns ought to be taken into account in interpreting the Charter, it must not erode the essence of the rights protected by the Charter including article 12(4). They further state that the jurisprudence of the Commission has been to the effect that the rights contained in the Charter are non-derogable, thus even threat of war, international or national, political instability or any

⁷⁶ Communications 137/94, 139/94, 154/96 and 161/97 - *International PEN and Others (on behalf of Ken Saro-Wiwa Jr) v Nigeria* (1998) para 116.

⁷⁷ Communication 129/94 - *Civil Liberties Organization v Nigeria* (1995) para 12 & 16.

⁷⁸ Art 27 Vienna Convention on the Law of Treaties 1969 states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This rule is without prejudice to Art 46, Treaty Series, vol 1155, 331.

⁷⁹ Communication 211/98 - *Legal Resource Foundation v Zambia* (2001) para 68.

- other kind of emergency, cannot be invoked to justify any derogation from the right to fair trial.⁸⁰
155. The Complainants submit that the State selectively and wrongly relies on decisions of the English Courts in support of its assertion that national security matters are not decisions for the courts, adding that subsequent decisions to those cited by the Respondent State, for example **A(FC) & Others v Secretary of State**⁸¹ and **Secretary of State for Home Department v JJ and FC and Others**⁸² have found that the British Government's response to national security issues, especially its response to terrorism amounted to a violation of human rights. They add that contrary to the conclusions drawn by the Respondent State that the judiciary must turn a blind eye to executive decisions on national security issues, these recent cases of the British House of Lords, emphasize the increased importance of the courts in such instances. They cite the decision of the Supreme Court of Canada in **Charkaoui v Canada**⁸³ where it was held that the principle of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process. Therefore, they assert that while domestic law and practice may vary from State to State, the Respondent State's arguments as to the practice of national courts cannot withstand scrutiny.
156. With regards the Respondent State's contention that the refusal to disclose the grounds relating to the desirability of a person's presence on national security grounds is based on the public interest, the Complainants submit that were the present case based on genuine national security issues, there are several measures which could have been taken to guarantee the right to fair hearing without necessarily precluding all judicial oversight. The Complainants argue that less intrusive measures as private sessions, provisions of a "judicial peep", redaction, limited access as a means of protecting sensitive information and evidence are often used, and could have been used by the Government of Botswana in the instant case.
157. By refusing to consider the basis of the President's decision and invoking national security as a ground for non-disclosure of information, which led to the victim's expulsion, the Complainants aver that the Government unlawfully divested the courts of any role in the judicial process.
158. The Complainants conclude by stating that national security may not be used to shield State action from the necessary scrutiny and accountability. Whilst conceding that extreme security measures may be necessary in extra ordinary circumstances, the test of determining whether such measures are warranted must be subject to meaningful judicial oversight to protect the fundamental right of due process of the individual concerned and the rule of law.

⁸⁰ Amnesty International v Zambia, para 33.

⁸¹ [2004] UKHL 56, para42, 80.

⁸² [2007] UKHL 45 para 27,105.

⁸³ [2007] 1 S.C.R 350,

The Commission's decision on the Merits

159. In this Communication the African Commission is called upon to determine whether the expulsion of the victim by the Respondent State following the President's invocation of the powers invested in him in a domestic legislation – the Botswana Immigration Act – is a violation of the victim's rights guaranteed under the African Charter, in particular, the rights guaranteed under Articles 1, 2, 7(1)(a), 9, 12(4) and 18 as alleged by the Complainants. The Commission will accordingly proceed to analyse each of the Articles of the Charter alleged by the Complainants to have been violated by the State.

Alleged Violation of Article 7(1)(a)

160. The Complainants submit that the decision of the President to expel the victim from the country relying on Sections 7(f), 11(6) and 36(a) of the Botswana Immigration Act, and the decisions of both the High Court and the Court of Appeal that the President's action was not subject to review violated the basic principles of due process of law enshrined under Article 7 of the African Charter, in particular Article 7(1)(a).

161. Article 7(1)(a) of the Charter provides that “every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”.

162. In terms of Article 7(1)(a) anyone who feels that his or her rights have been violated is entitled to take the case before appropriate national organs, including the courts. In doing so the position or status of the victim or that of the alleged perpetrator is of no relevance. That is to say, any person whose rights have been violated, including by persons acting in their official capacity, should have an effective remedy by a competent judicial organ, and the right to have one's cause heard is to be enjoyed without discrimination of any kind.

163. States Parties to the African Charter thus have the duty to ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status. Thus, non-nationals are entitled to the enjoyment of this right just as do nationals.

164. In **Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe**⁸⁴ the Commission held that the right to have one's cause heard also requires that the matter has been brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is

⁸⁴ Communication 284/2003; See Communication 294/2004 - *Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic Of Zimbabwe*, paras 103 - 108; and Communications 279/03 – *Sudan Human Rights Organisation v The Sudan*; 296/05 – *Centre on Housing Rights and Evictions v The Sudan*, para 180-185.

- competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person...⁸⁵.
165. In the present Communication, the victim has not been convicted by a Court of law, but has been expelled from the Respondent State by an order of an executive organ – the President of the Republic – relying on a domestic legislation which gives him powers to declare a person as a prohibited immigrant without giving any reason.
166. In terms of Sections 7(f) of the Botswana Immigration Act “any person who, in consequence of information received from any source deemed by the President to be reliable, is declared by the President to be an undesirable inhabitant of or visitor to Botswana, shall be a prohibited immigrant.” Section 11(6) of the same Act provides further that: “No appeal shall lie ... against any notice that the person is a prohibited immigrant by reason of any declaration by the President under Section 7(f) and no court shall question the adequacy of the grounds for any such declaration”, and Section 36(a) provides that “No person shall have the right to be heard before or after a decision is made by the President in relation to that person under this Act. (b) No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court.”
167. Further to the expulsion order, the victim took his case to the Botswana High Court and the Court of Appeal. Both courts rejected his application on the ground that Sections 16(6) and 36(a) of the Botswana Immigration Act prevent them from reviewing the decision of the President.
168. Can it be argued that the victim’s right to have his cause heard by a competent national organ was violated?
169. The right to be heard requires that the Complainant has unfettered access to a tribunal of competent jurisdiction to hear his case. It also requires that the matter be brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person. Where authorities put obstacles on the way which prevent victims from accessing the competent tribunals or which oust the jurisdiction of judicial organs to hear alleged violations of human rights, they would be denying victims of human rights violations the right to have their causes heard.
170. In *Recontre Africaine pour la Defense des Droits de l'Homme v Republic of Zambia*,⁸⁶ the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, denied victims the opportunity to establish the legality of their expulsions in the courts. Similarly, in **Zimbabwe**

⁸⁵ Id, para 173.

⁸⁶ *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia*.

- Human Rights NGO Forum v Zimbabwe**⁸⁷, the African Commission noted that the protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. The Commission added that ‘If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard.’
171. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man⁸⁸ provides in Article XVIII that every person has the right to "resort to the courts to ensure respect for [their] legal rights," and to have access to a "simple, brief procedure whereby the courts" will protect him or her "from acts of the authority that ... violate any fundamental constitutional rights....".
172. In the present Communication, the victim was not prevented from accessing the Courts. As a matter of fact both the High Court and the Court of Appeal of the Respondent State heard his case but ruled that the Botswana Immigration Act, in particular, Sections 11(6) and 36(a) thereto, does not allow the Courts to review the decision of the President. In other words, the Act ousts the jurisdiction of the Courts to entertain the matter.
173. This Commission is of the view that an ouster clause, be it through a military decree or an Act of Parliament has the same effect of preventing national judicial organs from entertaining alleged human rights violations, thus denying victims of human rights abuses the right to have their causes heard. In **Constitutional Rights Project v Nigeria**,⁸⁹ the Commission held that ‘while punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of [the Charter], to foreclose any avenue of appeal to competent national organs ... clearly violates Article 7(1)(a) of the African Charter, and increases the risk that even severe violations may go unredressed’.
174. The Respondent State argues that the limitations under Sections 11(6) and 36 of the Immigration Act are necessary in the public interest, and public interest, according to the State, includes ensuring peace, stability and the well-being of the Botswana people and the country's national security. The State concludes that it would therefore not be in the public interest to disclose or debate before a court of law the information and grounds upon which the President formed his decision. Accordingly, the reasons for the President's decision should

⁸⁷ Communication 245/2002 - *Zimbabwe Human Rights NGO Forum v Zimbabwe* .

⁸⁸ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁸⁹ Communication 87/93 – *Constitutional Rights Project v Nigeria*

- neither be open to public disclosure nor be the subject of scrutiny by the courts.
175. Can a victim's right to have his cause heard be limited or derogated upon for 'public interest'? The answer to this is NO. The right to a fair trial, which includes the right to have one's cause heard, to be informed of reasons and to seek appropriate remedy, is an absolute right that cannot be derogated from in any circumstance.⁹⁰ This position is reiterated by the Commission in its 'Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa' where it has made it very clear that no circumstances whatsoever, not even cases of public emergency, justify any derogations from the right to fair trial.⁹¹
176. In **Amnesty International v Zambia**⁹² where the Complainant, among others, was deported from Zambia because he was considered by the authorities to be 'a danger to peace and good order ...' and was denied access to courts, the Commission held that the Zambian Government by denying the Complainant of the right to appeal his deportation order has deprived him of a right to fair hearing which contravenes Article 7(1)(a) of the Charter and international human rights laws.
177. Where a government has reason to believe that a citizen or a non-national legally within its territory poses a threat to national security, it should bring evidence before the courts against the person. Not doing so may lead to the possibility of abuse where individuals can be detained or expelled on mere suspicion of being security threats.
178. In **Constitutional Rights Project v Nigeria**,⁹³ the Commission stated that 'while [it] is sympathetic to genuine attempts to maintain public peace, it must note that all too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of the government to operate without such checks as the judiciary can usually perform'. This is especially true with respect to the present Communication where there is a law which gives too broad power to the executive and prohibits courts from checking the use of such broad powers. The Commission in its decisions has time and again stressed on the need of judicial oversight over executive decisions particularly on issues of deportation. For instance, the Commission has found a violation of Article 7(1) of the Charter when the Rwandan Government expelled refugees in Rwanda

⁹⁰ African Commission on Human and Peoples' Rights (ACHPR) Principles and Guidelines on the Rights to Fair Trial and Legal Assistance in Africa (DOC/OS(XXX)247

⁹¹ Id, R.

⁹² Amnesty International v Zambia, para 61.

⁹³ Communication 143/95, 150/96 – *Constitutional Rights Project and Another v Nigeria* (1999) para 33.

- without giving them the opportunity to be heard by the national judicial authorities.⁹⁴
179. In the present Communication, after the order from the President to expel the victim, the latter challenged the said order in the High Court and Court of Appeal. Both Courts declined to examine the merits of the case citing Sections 11(6) and 36(a) of the Botswana Immigration Act which prohibits them from doing so. The refusal of the Courts to review the President's decision foreclosed any avenue available to the victim to seek remedy. Thus, while the victim was able to access judicial organs to have his cause heard, the ouster of the jurisdiction of the organs made that access illusory as the organs have been prevented by law from entertaining the victim's grievance. It therefore means that as far as the victim's case is concerned, there is no competent national judicial organ within the Respondent State, as a tribunal which is competent in law to hear a case that has been given that power by law and has jurisdiction over the subject matter and the person. In the present case, the High Court and the Court of Appeal have not been given that power and consequently do not have jurisdiction over the subject matter.
180. The Commission is of the view that Sections 11(6) and 36(a) of the Botswana Immigration Act which prohibit a review of the President's decision absolves all judicial organs of competence in the matter thus depriving victims whose rights are threatened or actually violated by the President's decision from being heard by the judicial organs to protect their rights. This kind of arrangement does not only violate Article 7(1)(a) of the African Charter but also threatens the independence of the judiciary guaranteed under Article 26.

Alleged Violation of Article 9

181. The Complainants allege violation of Article 9 of the African Charter arguing that the comments expressed by the victim in the article he published, that is, "Presidential Succession in Botswana: No Model for Africa", were opinions expressed in the course of his functions as Professor of Political Science at the University of Botswana, and these comments were academic in nature and related to the functions of government in a democratic society. They submit that such critique was an inherent aspect of the exercise of his functions as an academic in the field, who was not only entitled but effectively compelled by his discipline to be prepared, where appropriate, to write critically about government issues. As political speech, related to his academic functions, it was speech deserving of particular protection in line with the legal authorities referred to above, and restriction of which could only be justified in the most exceptional circumstances. The Complainants submits that the expulsion of the victim was not based on security concerns but rather to suppress his political analysis and criticism. The Complainants aver further that the complete absence of any reasons given to the victim, the Court or – thus far –

⁹⁴ Communication 27/89, 46/91, 49/91, 99/93 – *Organization Mondiale Contre La Torture and Others v Rwanda* (1996) para 35.

- the Commission, also makes it impossible to conduct a necessity and proportionality analysis of measures adopted, and leads inevitably to the conclusion that the interference cannot be justified within the law.
182. The Complainants also submits that Section 36(a) of the Botswana Immigration Act⁹⁵ prevented the victim from receiving information as to the grounds on which he was declared a prohibited immigrant or visitor to Botswana. The denial of such information according to the Complainants violates the right to receive information which contravenes the requirements of Article 9(1).
183. The Respondent State in its submissions did not address the alleged violation of Article 9.
184. The Commission will accordingly proceed to analyse the submission of the Complainants to ascertain whether Article 9 of the Charter has indeed been violated.
185. Article 9 of the African Charter states that: ‘1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law’. Thus, under this provision there are two rights protected: the right to information and freedom of expression; and the Complainants allege the violation of both rights.
186. The right to information, which also forms part of freedom expression, is a widely recognized right in international and regional human rights law. Article 19 of Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) protect freedom of expression and hence the right to information. In these two instruments freedom of expression is defined to include one’s right to hold opinions, to seek, receive and impart information and ideas without interference or restrictions of any kind through any media. The same approach is adopted by the three major regional human rights instruments.⁹⁶
187. So, there seems to be an international consensus among states on the content of the right to freedom of expression. This consensus similarly extends to the need to restrict the right to freedom of expression to protect the rights or reputation of others, for national security, public order, health or morals. Freedom of expression is not therefore an absolute right, it may be restricted for the reasons mentioned above but such restrictions should be necessary and have to be clearly provided by law. The Commission made it clear in its ‘Declaration of Principles on Freedom of Expression in Africa’ that ‘any

⁹⁵ This provision reads as “No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court”.

⁹⁶ See Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 9 of the African Charter on Human and Peoples’ Rights (ACHPR), and Article 13 of the American Convention on Human Rights.

- restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society'.⁹⁷
188. Though in the African Charter the grounds of limitation to freedom of expression are not expressly provided as in the other international and regional human rights treaties, the phrase 'within the law' under Article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation. In **Malawi African Association and Others v Mauritania**,⁹⁸ the Commission stated that 'the expression 'within the law' must be interpreted in reference to international norms' which, among others, can provide grounds of limitation on freedom of expression.
189. It should as well be noted that 'the only legitimate reasons for limitations of the rights and freedoms recognized in the African Charter are found in Article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.⁹⁹ Hence it can be said that national security or public interest are recognized as justifiable grounds to limit freedom of expression under the African Charter.
190. In the present Communication, could it be said that by expelling the victim for allegedly publishing an academic article critical of the government, and by refusing to give reasons for his expulsion violate Article 9 of the Charter? Freedom of expression under the Charter has two main arms – the right to receive information and the right to express and disseminate opinion. The Complainants submit that the State has violated both arms.
191. With respect to the first arm, the Complainants argue that Section 36(a) of the Botswana Immigration Act deprived the victim from getting the information and/or reasons on the grounds on which he was expelled from the country, and deny courts of the power to seek such information on his case. Section 36(a) of the Act states that "No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court". The Respondent State argues that the non-disclosure of such information or reason before courts or any other organ is necessary in order not to endanger the national security of the country.
192. The information referred to under Section 36(a) of the Act is what the victim was seeking to be able to prepare his defence and seek appropriate remedy in Court to protect his rights. Without such information the victim would be

⁹⁷ African Commission on Human and Peoples' Rights (ACHPR), Declaration of Principles on Freedom of Expression in Africa 2002.

⁹⁸ Communication 54/91, 61/91, 98/93, 164/97, 210/98 – *Malawi African Association and Others v Mauritania* (2000) para 102

⁹⁹ Communication 140/94,141/94, 145/95 – *Constitutional Rights Project and Other v Nigeria* (1999) para 41.

- working on mere speculation. It is because of that speculation that the victim sought the intervention of the Courts to review the decision of the President and seek reasons for his expulsion. Unfortunately, for the victim, Section 36(a) also prohibits the disclosure of such information in any court.
193. The right to receive information, especially where that information is relevant in a trial for the vindication of a right, cannot be withheld for any reason. Withholding such information from a victim could compromise court proceedings and put at risk the right of the victim. In a criminal trial, the right to receive information is as important as the right to be informed of the reasons of one's arrest and detention within a reasonable period of time. The information as well as the reasons are necessary to enable the accused prepare their defence. It makes a mockery of justice and the rule of law for a person legally admitted to a country to all of a sudden be told to leave against his will and he/she is not given reasons for the expulsion.
194. The right to be informed of the reasons of the actions taken against anyone is recognised universally. It forms part of the right to fair trial and as such is one of the rights which have been distinctly categorized by the Commission as a right that cannot be derogated from at any time and whatsoever the circumstances might be.¹⁰⁰ This in effect means even if there is a state of emergency in a country that threatens the security of a nation, a person's right to be informed of the charges, in this case, the grounds of his expulsion, cannot be suspended/derogated from. This notion is reaffirmed in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information which states that "Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law including, but not limited to the right to be promptly informed of the charges and supporting evidences against him/her".¹⁰¹ In **Amnesty International v Zambia**¹⁰² the Commission held that the fact that the Complainants were not provided with any reasons for their deportation order except the general allegation that their presence in the Zambia was likely 'to endanger peace and good order' means that the right to receive information as guaranteed under Article 9(1) of the Charter was denied to them.
195. In the present Communication, the victim was refused information regarding the reasons for his expulsion, and attempts to get this information through the Courts also proved futile. The African Commission is of the view that Section 36(a) of the Botswana Immigration Act is incompatible with Article 9(1) of the African Charter, and the inability of the victim to receive the information sought because of the restrictions under the Act resulted in a violation of his right under Article 9(1) of the Charter.

¹⁰⁰ ACHPR, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, C(b)(iii) & R.

¹⁰¹ Article 19, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996) Principle 20.

¹⁰² Amnesty International v Zambia, para 41.

196. The second arm of Article 9 of the African Charter deals with the right to express and disseminate one's opinion. The Complainants claim that the scholarly article of the victim entitled "Presidential Succession in Botswana: No Model for Africa" is the main reason for his expulsion. This, the Complainants allege, is a violation of the victim's right to freedom of expression in general and political and academic freedom in particular. The Respondent State made no submissions on this particular assertion by the Complainants. As a result, the Commission will analyse the allegation of the Complainants based on the information at its disposal.
197. The African Commission underscored the place of political expression in freedom of expression in **Amnesty International v Zambia**¹⁰³ when it stated that freedom of expression is a fundamental human right, essential to an individual personal development, political consciousness and participation in the public affairs of a country. The European Court of Human Rights has similarly stressed the importance of freedom of expression and further indicated the degree of tolerance expected for the respect and protection of this right. In **Handyside v. the United Kingdom**, the Court opined that freedom of expression "constitutes one of the essential foundations of such a (democratic) society, one of the basic working conditions for its progress and for the development of every man. [...] It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."¹⁰⁴
198. A higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials. In this regard the European Court has held that politicians may be subject to stronger public criticisms than private citizens.¹⁰⁵ The African Commission has also indicated in its Declaration of Principles on Freedom of Expression in Africa that 'public figures shall be required to tolerate a greater degree of criticism'.¹⁰⁶
199. In the opinion of the Commission the article that was published by the victim is a purely academic work which criticizes the political system, particularly presidential succession in Botswana. There is nothing in the article that has the potential to cause instability, unrest or any kind of violence in the country. It is not defamatory, disparaging or inflammatory. The opinions and views expressed in the article are just critical comments that are expected from an academician of the field; but even if the government, for one reason or

¹⁰³ Amnesty International v Zambia, para 54.

¹⁰⁴ (5493/72) [1976] EHRC 5 (7 December 1976) para 49.

¹⁰⁵ Lingens v. Austria (9815/82) [1986] ACHR 7 (8 July 1986) para 28 and Oberschlick v. Austria (11662/85) [1991] ECHR 30 (23 May 1991)

¹⁰⁶ ACHPR, Declaration of Principles on Freedom of Expression (2002) XII(1)

- another, considers the comments to be offensive, they are the type that can and should be tolerated. In an open and democratic society like Botswana, dissenting views must be allowed to flourish, even if they emanate from non-nationals.
200. The lack of any tangible response from the State on how the article poses a threat to the State or Government leaves the Commission with no choice but to concur with the Complainants that the said article posed no national security threat and the action of the Respondent State was unnecessary, disproportionate and incompatible with the practices of democratic societies, international human rights norms and the African Charter in particular. The expulsion of a non-national legally resident in a country, for simply expressing their views, especially within the course of their profession, is a flagrant violation of Article 9(2) of the Charter.

Alleged violation of Article 12(4)

201. The Complainants submit that the expulsion of the victim constitutes a violation of Article 12(4) of the African Charter. Article 12(4) provides that 'A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law'. According to the Complainants, the victim was legally resident in the Respondent State and the manner in which he was expelled does not meet the standards set in the Charter. The Respondent State on the other hand defends its actions by stating that the expulsion of the victim was done 'in accordance with the law' as required under Article 12(4). According to the Respondent State the phrase 'in accordance with the law' in Article 12(4) means in accordance with the domestic law of Botswana and according to Section 14(3) of the Constitution of Botswana nothing done under the authority of any law, that is, the domestic law of Botswana, shall be held to be inconsistent with or in contravention of the section, to the extent that such law makes provision for the imposition of restriction on freedom of movement (which according to the State, includes freedom from expulsion from the country) of any person who is not a citizen of Botswana.
202. The Respondent State further argues that the authority of the law refers to the Botswana Immigration Act and the 'protection of the law' as it appears in Section 3¹⁰⁷ and is subject to such limitations as contained in the domestic law of Botswana which is thus not inconsistent with Article 12(4) of the Charter.

¹⁰⁷ Section 3 of the Botswana Constitution provides that: Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his her race, place of origin, political opinions, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest to each and all of the following, namely: - a) life, liberty, security of the person and the protection of the law; b) freedom of conscience, of expression and of assembly and association; and c) protection for the privacy of his or her home and other property and from deprivation of property without compensation;the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to those limitations of that protection as are

203. In addressing this issue the first point that has to be dwelled on is, what does the phrase “in accordance with the law” under Article 12(4) of the Charter refers to? It refers to the domestic laws of States Parties to the African Charter. Under this provision each and every State Party has the power to expel non-nationals who are legally admitted into their territory. However, in doing so the Charter imposes an obligation on States Parties to have laws which regulate such matters and expects them to follow it strictly. This contributes towards making the process predictable and also helps to avoid abuse of power.
204. Botswana accordingly has a law in place which regulates immigration matters including the deportation of non-nationals who are legally admitted into its territory. To this extent therefore Botswana has met its obligations under Article 12(4) of the Charter. But the mere existence of the law by itself is not sufficient; the law has to be in line with not only the other provisions of the Charter but also other international human rights agreements to which Botswana is a party. In other words, Botswana has the obligation to make sure that the law(in this case the Botswana Immigration Act) does not violate the rights and freedoms protected under the African Charter or any other international instrument to which Botswana is a signatory.
205. In this regard, the Commission in **Modise v Botswana**¹⁰⁸ ruled that ‘while the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards’. International human rights norms and standards require states to provide non-nationals with the necessary forum to exercise their right to be heard before deporting them. In line with this requirement the African Commission in **Union Inter Africaine des Droits de l’Homme and Others v Angola**¹⁰⁹ recognized the challenges that are faced by African countries that might push them to resort to extreme measures like deportation in order to protect their nationals and economies from non-nationals. The Commission however stated that, whatever the circumstances might be such measures should not be taken at the expense of human rights. The Commission further stated that ‘it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law’.

contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

¹⁰⁸ Communication 97/93 - *John K. Modise v Botswana* (2000) para 84.

¹⁰⁹ Communication 159/96 - *African Commission Union Inter Africaine des Droits de l’Homme and Others v Angola* (1997) paras 16 & 20.

206. In the same vein, the Commission in *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*¹¹⁰ ruled the deportation of individuals including their arbitrary detention and deprivation of the right to be heard a flagrant violation of the Charter.
207. Similarly, in the present case, the deportation of the victim without being provided with a chance to be heard is justifiable neither on the basis of domestic laws nor with the pretext of national security.
208. Based on the above analysis the Commission is of the view that the existence and application of Sections 11(6) and 36 of the Botswana Immigration Act has violated Articles 7(1) and 12(4) of the African Charter.

Alleged Violation of Article 18

209. The Complainants state that the expulsion of the victim had a drastic impact on his family life and daughter as the family home in Botswana was his only home established for 15 years. He was forced to separate from his daughter Clara, then 17 years old, who was not in a position to follow him given the critical stage of her studies. This separation, he submits, gravely affected her as she was very close to her father, who obviously could not return to visit her. They submit further that the victim was denied an opportunity to finalise arrangements for his daughter before being expelled, as he was arrested immediately after the High Court's decision and expelled later that day. The hasty way of his deportation, in the circumstances of the case, the Complainants conclude amounted to a gratuitous interference with his right to family life.
210. In its submission, the Respondent State does not address this allegations made by the Complainants.
211. Article 18 of the African Charter provides that: '1. The family shall be the natural unit of society. It shall be protected by the State which shall take care of its physical health and moral. 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community'.
212. Article 18 of the Charter imposes a positive obligation on the State towards the family. The State has the obligation to assist the family towards meeting its needs and interests and to protect the same institution from abuse of any kind by its own officials and organs and by third parties. In exercising the positive obligations, the State exercises a negative obligation which is to refrain from violating the rights and interests of the family.
213. In the present Communication, the sudden deportation of the victim with no justification, knowing fully that he will be separated from his minor daughter

¹¹⁰ Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia, para 31.

- who was living with him runs counter to the protection States are required to give to the family under Article 18. There is nothing to justify the deportation, there is nothing to show that the Respondent State took measures to provide a safety net to the daughter after the deportation of the victim, and the hasty manner in which the deportation was carried out means adequate arrangements could not be made for the victim's daughter. The victim was given only 56 hours to make his own arrangements for his departure. For a person who has legally stayed in the country for 15 years, 56 hours is clearly inadequate to make sufficient family arrangements, especially for a female minor who has no other relative in the country.
214. This attitude of ignoring the interest of the family during the deportation process was condemned by the Commission in **Modise v Botswana**¹¹¹ where the Commission found a violation of Article 18(1) of the Charter as the deportation order deprived the Complainant of his family, and his family, of his support. In **Amnesty International v Zambia**¹¹², the Commission held that the forcible deportation of political activists and expulsion of foreigners was in violation of the duties to protect and assist the family, as it forcibly broke up the family unit.
215. Based on the above, the Commission is of the view that the deportation order and the way it was executed violated Article 18(1) and (2) of the Charter.

Alleged Violation of Article 2

216. The Complainants claim that the victim was expelled simply because he held and expressed political views that were critical of the political establishment in the Respondent State, and specifically of Presidential Succession. They submit that but for the nature of his political opinions, his rights under the Charter would not have been violated, insisting that it is his political views that singled him out for discriminatory treatment at the hands of the authorities. The Complainants urge the Commission to adopt strict scrutiny of discrimination on the grounds of political opinion, given that pluralism and diversity are fundamental ingredients of any democratic society.
217. Article 2 of the African Charter provides that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'.
218. The principle of non-discrimination is a fundamental principle in international human rights law. All international and regional human rights instruments and almost all countries' constitutions contain provisions prohibiting discrimination.

¹¹¹ Modise v Botswana, para 93.

¹¹² Amnesty International v Zambia, paras 58 – 59.

- The principle of non-discrimination guarantees that those in the same circumstances are dealt with equally in law and practice.
219. The test to establish whether there has been discrimination has been well settled. A violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed. These requirements have been expressly set out by international human rights supervisory bodies, including the European Court of Human Rights¹¹³, the Inter-American Court of Human Rights¹¹⁴ and the Human Rights Committee¹¹⁵.
220. In the present Communication, the Complainants claim that the victim was singled out for expulsion simply because of his political opinion. The Commission has reaffirmed the protection extended under the Charter to the principle of non-discrimination particularly on the basis of political opinion in **Amnesty International v Zambia**¹¹⁶ where it held that Article 2 imposes ‘an obligation on the ... Government to secure the right protected in the African Charter to all persons within its jurisdiction irrespective of political or any other opinion’. This was reiterated in the Commission’s decision in **Recontre Africaine pour la Defense des Droits de l’Homme v Zambia**.¹¹⁷
221. Thus, discrimination on the bases of political opinion, on which the allegations of the Complainants is based, is one prohibited ground of discrimination under the Charter. The Complainants claim that the political views of the victim, which were critical of the political establishment in the Respondent State, singled him out for discriminatory treatment at the hands of the authorities.
222. To determine whether the way the victim was treated by Botswana authorities was discriminatory or not, the allegation has to be weighed against the three tests set above: – was there equal treatment? If not, was the differential treatment justifiable? Was the aim of the difference in treatment proportionate to the aim sought and means employed? These three benchmarks are cumulative requirements and hence the non-compliance with any of the three requirements makes a treatment discriminatory.
223. Here it should be reiterated that difference in political opinion and to be able to express it openly without fear of any kind is one of the pillars of democracy and hence should be protected and should not form the basis for different treatment. In the present case had the victim not expressed a political opinion which criticized the Government, he would not have been deported from the

¹¹³ Marckx v Belgium (6833/74) [1979] ECHR 2 (13 June 1979)

¹¹⁴ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para 57.

¹¹⁵ General Comment No. 18, Non-Discrimination CCPR (1989) para 13.

¹¹⁶ Amnesty International v Zambia, para 52.

¹¹⁷ Recontre Africaine pour la Defense des Droits de l’Homme v Zambia, paras 21 & 22.

- country. Had he written an article which supports presidential succession in Botswana, he would not have been subjected to the treatment he received from the authorities and courts. Therefore, it could be concluded that the only reason why the victim was expelled was because he had a different political opinion on the way presidential succession should take place in Botswana. Apparently he is treated differently from people who support the way presidential succession is taking place in Botswana. Therefore, it is the view of the Commission that the victim was treated differently because of his political opinion.
224. Was there any justification for the Respondent State in treating the victim differently? National security seems to be the only response that is given by the State. The Commission subscribes to the principle of justifiable and positive discrimination, including different treatment of persons for national security reasons. However, in the present Communication, the State has not demonstrated how the action of the victim became a national security threat and how his action could be a threat. If the aim sought cannot be identified and justified, as it seems to be the case in the present Communication, then it means that the means employed was not proportional.
225. The Commission therefore concludes that the action of the Respondent State violated the principle of non-discrimination under Article 2 of the African Charter.

Alleged Violation of Article 1

226. Article 1 of the African Charter requires Member States to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative or other measures to give effect to them.
227. The Complainants submit that the violation of the Charter illustrates the Respondent State's failure to respect the Charter and to ensure its full implementation. The Respondent State on its part contests this interpretation and submits that the Charter does not impose any binding duty on States Parties thereto, as the drafters of the Charter did not intend it to be a binding document; and the Charter has no force of law in Botswana and its provisions do not form part of the domestic law of Botswana until they are passed into law by Parliament.
228. The African Charter is a legally binding agreement signed and ratified by 53 African States, and this makes it a treaty as defined under international law, and thus it is regulated by the rules of international law.¹¹⁸ According to the rules of international law, a State can express its consent to be bound by a treaty by ratification. Consent to be bound here means agreeing (committing oneself) to respect, protect and fulfil the provisions of a treaty.

¹¹⁸ See the 1969 Vienna Convention on the Law of Treaties.

229. Article 2(1)(b) of the Vienna Convention on the Law of Treaties reads: "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.¹¹⁹ Ratification is therefore a formal commitment in addition to the signature, normally required by multilateral treaties. This is an action by a state, normally conducted once necessary domestic legislation or executive action has been completed. This can also be the case in a situation whereby the state endorses a preceding signature and signifies its intention to comply with the specific provisions and obligations of the treaty. In the period between signature and ratification, a state is provided with an opportunity to reconsider its obligations under the treaty concerned. After ratification a state is formally bound by the substantive provisions of the treaty. At the AU, ratification is completed by a formal exchange or deposit of the treaty with the Chairperson of the African Union Commission, and in case of the UN, with the Secretary General of the UN.
230. A State is also allowed under international law to make reservations not to be bound with one or more provisions of a treaty unless the reservation is prohibited by the treaty or the treaty specifically prohibits the reservation that is intended to be made by the State or the reservation goes against the very purpose and object of the treaty.¹²⁰
231. The Respondent State is one of the few African countries which have shown its commitment to the Charter by ratifying it in 1986. In ratifying the Charter the Respondent State did not and has still not made reservations of any kind. Therefore, it has the obligation to respect, protect and fulfil all the provisions of the Charter without any exceptions. During ratification, if its intention was not to be bound by the Charter as a whole then it should have refrained from ratifying the Charter or it should have withdrawn following the proper procedures. Or if it wanted not to be bound by certain provisions of the Charter it should have formally made its reservations during ratification. But in the absence of any of these the legal presumption is that it is bound by the Charter and hence is expected to comply with the provisions of the same.
232. In **International Pen and Others v Nigeria**¹²¹ the African Commission restated this point when it observed that 'the African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A State not wishing to abide by the Africa Charter might have refrained from ratification'. The Commission is of the opinion that Botswana is no exception to this rule and hence it is bound by the provisions of the African Charter. The State's argument that the drafters of the Charter did not intend the latter to be a binding document cannot stand, because had African leaders not intended the Charter to be legally binding,

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Communications 137/94, 139/94, 154/96 & 161/97 - *International Pen and Others v Nigeria* (1998) para 116.

- they could have adopted a declaration which under international law is generally not a legally binding document.
233. The Respondent State makes reference to certain paragraphs of the preamble of the Charter to support its argument that the Charter was not meant to be binding. In the first place, it should be noted that preambles are generally not considered as a substantive part of legal texts and by no means can be given the same weight as the provisions of a Charter. If the need arises to interpret such it should be done in light of the object and purpose of the treaty. The Commission has also stressed the point that the Charter should be interpreted as a coherent whole with each provision being interpreted in light of other provisions.¹²² It would be wrong therefore to single out the preamble of the Charter and try to give the meaning it was never intended to have in the Charter as a whole.
234. Therefore, the Commission finds that the Charter is a binding document and Botswana, as a State Party thereto, has an obligation to comply with its provisions.
235. The Respondent State also argues that the Charter has no force of law in Botswana as the later is a dualist State.
236. The fact that a State is monist or dualist cannot be used as an excuse for not complying with its treaty obligations. On the question of when or whether international human rights instruments should be implemented at domestic level, there has for a long time been raging debates in the application of international laws within domestic context. Of the two theories on when international law should apply, Botswana subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law, except where it is in conflict with domestic law.
237. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state Courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states that “it is within the proper nature of the judicial process and well established functions for national Courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law”¹²³.

¹²² Legal Resource Foundation v Zambia, para 70.

¹²³ Bangalore Principles on the Domestic Application of International Human Rights Norms, Judicial Colloquium held from 24 – 26 February 1988, Bangalore, India, Principle 7.

238. That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. In *Sarah Longwe v. International Hotels*, Justice Musumali of the Zambian High Court stated that "... ratification of such (instruments) by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this Court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute"¹²⁴.
239. It is also a well established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations.¹²⁵ In **Legal Resource Foundation v Zambia**¹²⁶ the Commission reiterated this point when it held that 'international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on State Parties'.
240. The Commission was established to make sure that the acts of the executive, legislative and judicial branches of States Parties are compatible with the provisions of the Charter. Therefore, the fact that the provisions of the Charter are not domesticated into the laws of Botswana does not bar the Commission from assessing the compatibility of Botswana laws and executive actions with the provisions of the Charter.
241. In **Jawara v The Gambia**¹²⁷ the Commission was categorical when it stated that if a State Party fails to recognise the provisions of the African Charter, there is no doubt that it is in violation of Article 1 of the same. Article 1 of the African Charter thus imposes a general obligation on all States Parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights. As such, any finding of violation of those rights constitutes violation of Article 1.
242. The Commission however has no power to rule on the Constitutionality or otherwise of the laws, executive actions or judicial decisions of States Parties and thus is not going to make any pronouncement on the constitutionality of the provisions of the Botswana Immigration Act or any of the actions of the authorities.

Decision of the Commission

243. For the above reasons, the Commission finds that Botswana has violated Articles 1, 2, 7(1)(a), 9, 12(4) and 18(1) & (2) of the African Charter.
244. **The Commission recommends:**

¹²⁴ Sara H. Longwe v International Hotels (Zambia) 1993 4LRC 221

¹²⁵ Art 27 of Vienna Convention on the Law of Treaties

¹²⁶ Legal Resources Foundation v Zambia, para 60

¹²⁷ Jawara v The Gambia, para 46.

- (i) that the Respondent State provides adequate compensation to the victim for the loss and cost he has incurred as a result of the violations. The compensation should include but not be limited to remuneration and benefits he lost as a result of his expulsion, and legal costs he incurred during litigation in domestic courts and before the African Commission. The manner and mode of payment of compensation shall be made in accordance with the pertinent laws of the Respondent State; and
- (ii) The Respondent State should take steps to ensure that Sections 7(f), 11(6) and 36 of the Botswana Immigration Act and its practices conform to international human rights standards, in particular, the African Charter.

Done in Banjul, The Gambia, at the 47th Ordinary Session of the African Commission on Human and Peoples' Rights held from 12 - 26 May 2010.

EX.CL/600(XVII)

ANNEX V

**COMMUNICATION 279/03 – SUDAN HUMAN RIGHTS V THE
SUDAN AND 296/05 – CENTRE ON HOUSING RIGHTS AND
EVICTIONS V THE SUDAN**

**Communications 279/03 – Sudan Human Rights Organisation & The Sudan
296/05 – Centre on Housing Rights and Evictions/The Sudan.**

Summary of facts:

1. The first Communication, the **Sudan Human Rights Organisation et al/The Sudan (the SHRO Case)** is submitted by the Sudan Human Rights Organisation (London), the Sudan Human Rights Organisation (*Canada*), the Darfur Diaspora Association, the Sudanese Women Union in Canada and the Massaleit Diaspora Association (hereinafter called the Complainants).
2. The Complainants allege gross, massive and systematic violations of human rights by the Republic of Sudan (herein after called Respondent State) against the indigenous Black African tribes in the Darfur region (Western Sudan); in particular, members of the Fur, Marsalit and Zaghawa tribes.
3. The Complainants allege that violations being committed in the Darfur region include large-scale killings, the forced displacement of populations, the destruction of public facilities, properties and disruption of life through bombing by military fighter jets in densely populated areas.
4. The Complainants allege that the Darfur region has been under a state of emergency since the government of General Omar Al-Bashir seized power in 1989. They allege further that this situation has given security and paramilitary forces a free hand to arrest, detain, torture and carry out extra-judicial executions of suspected insurgents.
5. The Complainants also allege that nomadic tribal gangs of Arab origin, alleged to be members of the militias known as the *Murhaleen* and the *Janjaweed* are supported by the Respondent State.
6. The Complainants allege further that an armed group known as the Sudan Liberation Movement/Army issued a political declaration on 13 March 2003 and clashed with Respondent State's Armed Forces. The Respondent State launched a succession of human rights violations against suspected insurgents, using methods such as extra-judicial executions, torture, rape of women and girls, arbitrary arrests and detentions.
7. The Complainants also contend that hundreds of people from the aforementioned indigenous African tribes have been summarily executed by the Respondent State's security forces and by allied militia, adding that detainees are usually tried by special military courts with little regard to international standards or legal protection.
8. The Complainants allege that the abovesaid actions of the Respondent State violate Articles **2, 3, 4, 5, 6, 7 (1), 9, 12 (1, 2 and 3), and 13 (1 and 2)** of the African Charter on Human and Peoples' Rights.

9. The second Communication, **Centre for Housing Rights and Evictions/The Sudan (the COHRE Case)**, is submitted by an NGO based in Washington D.C. (the Complainant) against the Republic of Sudan (the Respondent State). The Communication is based on almost similar allegations as in the **SHRO Case**.

10. The Complainant states that Darfur is the largest region in the Respondent State, divided into south, west and north administrative zones and covers an area of about 256,000 square kilometers in size and has an estimated population of five million (5,000,000) persons. That in February 2003 fighting intensified in the Darfur region following the emergence of two armed groups, the Sudan Liberation Army (SLA) and the Justice Equality Movement (JEM), which come primarily from the Fur, Zaghawa and Masaalit tribes. The two armed groups' political demand essentially is for the Respondent State to address the marginalisation and underdevelopment of the region.

11. The Complainant alleges that in response to the emergence of these groups and the armed rebellion, the Respondent State formed, armed and sponsored an Arab militia force known as the Janjaweed to help suppress the rebellion.

12. The Complainant alleges further that the Respondent State is involved at the highest level in the recruitment, arming and sponsoring of the Janjaweed militia. The Complainant cites a Directive dated 13 February 2004, from the office of the Sub-locality in North Darfur directing all Security units within the locality to allow the activities of the Janjaweed under the command of Sheikh Musa Hilal to secure its "vital needs." The Complainant also claims that military helicopters from the Respondent State provide arms and supplies of food to the Janjaweed.

13. The Complainant alleges that in addition to attacking rebel targets, the Respondent State's campaign has targeted the civilian population, adding that villages, markets, and water wells have been raided and bombed by helicopter gunships and Antonov airplanes.

14. The Complainant claims that residents of hundreds of villages have been forcibly evicted, their homes and other structures totally or partially burned and destroyed. That thousands of civilians in Darfur have been killed in deliberate and indiscriminate attacks and more than a million people have been displaced.

Complaint and prayers

15. The Complainant in the **COHRE Case** alleges that the Respondent State has violated Articles **4, 5, 6, 7, 12 (1), 14, 16, 18 (1)** and **22** of the African Charter. It requests the African Commission to hold the Respondent State liable for the human rights violations in the Darfur region.

16. The Complainant also urges the African Commission to place the violations described in the Communication, before the Assembly of Heads of State and Government of the African Union for consideration under Article 58 of the African

Charter; that the African Commission, should undertake an in-depth study of the situation in Darfur and make a factual report with findings and recommendations as mandated in Article 58 (2) of the African Charter; and that the African Commission should adopt Provisional Measures in view of the urgency required in this Communication.

Procedure

17. **The SHRO Case** was received by post at the Secretariat of the African Commission (the Secretariat) on 18 September 2003.

18. On 10 October 2003, the Secretariat acknowledged receipt of the Complaint and indicated that it would be considered on seizure by the African Commission during its 34th Ordinary Session held from 6 – 20 November 2003, in Banjul, The Gambia.

19. During its 34th Ordinary Session, the African Commission examined the Communication and decided to be seized of it.

20. On 2 December 2003, the Secretariat notified the Respondent State of this decision, sent a copy of the complaint, and requested it to send its arguments on admissibility within three months.

21. This decision was also conveyed to the Complainants by letter dated 02 December 2003.

22. On 29 March 2004, the Respondent State informed the Secretariat that due to various reasons, it would not be able to present its submissions on admissibility and promised to send the said observations at the earliest time possible.

23. During its 35th Ordinary Session which was held in Banjul, The Gambia in May/June 2004, the African Commission deferred consideration on the admissibility of the Communication to its 36th Ordinary Session at the Respondent State's request.

24. In the meantime, during the 35th Ordinary Session the Complainants delivered to the Secretariat documents containing supplementary information relevant to the complaint.

25. On 6 July 2004, the Secretariat informed both parties about its decision to defer the Communication and reminded the Respondent State to submit its arguments on admissibility. At the same time, the Secretariat conveyed the Complainants' supplementary submissions to the Respondent State, and also notified the Complainants about the Respondent State's request for a deferral of consideration on the admissibility.

26. Seizing the opportunity of a Commission's fact finding mission to the Respondent State, the Secretariat sent another set of the Communication documents to the Respondent State..

27. During its 36th Ordinary Session, held from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission considered the Complaint and decided to defer its decision on admissibility to its 37th Ordinary Session. The Respondent State had submitted its arguments on admissibility during the said Session.
28. On 2 December 2004, the Secretariat of the African Commission acknowledged receipt of the Respondent State's submissions.
29. On 23 December 2004, the Secretariat informed the parties about the African Commission's decision.
30. During its 37th Ordinary Session, which took place from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission considered the complaint and, upon request from the Complainants, deferred its decision on admissibility to its 38th Ordinary Session.
31. During the 38th Ordinary Session held from 21 November to 5 December 2006, the African Commission considered the case and decided to postpone its consideration to the 39th Ordinary Session.
32. On 16 December 2005, the Secretariat of the African Commission notified this decision to the parties. The Complainants were requested to submit their rejoinder to the Respondent State's arguments.
33. During its 39th Ordinary Session held from 11 – 25 May 2006, in Banjul, The Gambia, the Commission considered the Communication and declared it admissible. It further decided to consolidate the Communication with the **COHRE Case**.
34. By Note Verbale of 14 July 2006 and by letter of the same date, both parties were notified of the Commission's decision and requested to submit their arguments on the merits within two months.
35. The **COHRE Case** was received at the Secretariat of the African Commission by e-mail on 6 January 2005.
36. On 11 January 2005, the Secretariat wrote to the Complainant acknowledging receipt of the complaint and informing it that it will be considered on seizure at the Commission's 37th Ordinary Session.
37. At its 37th Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the Communication and decided to be seized thereof.
38. On 24 May 2005, the Secretariat sent a copy of the Communication to the Respondent State, notified it of the decision of the Commission, and requested it to send its arguments on admissibility within three months of the notification. By letter of

the same date, the Complainant was notified of the decision and asked to submit its arguments on admissibility within three months of notification.

39. By letter of 15 June 2005, the Complainant submitted its arguments on admissibility.

40. On 7 July 2005, the Secretariat acknowledged receipt of the Complainant's submission on admissibility and transmitted them to the Respondent State and requested the latter to submit its arguments before 24 August 2005.

41. By Note Verbale dated 2 September 2005, the Respondent State was reminded to send its arguments on admissibility.

42. On 9 November 2005, the Secretariat received a Note Verbale from the Respondent State submitting its argument on admissibility.

43. By Note Verbale of 11 November, 2005, the Secretariat acknowledged receipt of the Respondent State's submission.

44. At its 38th Ordinary Session held from 21 November to 5 December 2005, the African Commission deferred consideration on the admissibility of the Communication to its 39th Ordinary Session.

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

46. By letter of 9 March 2006, the Secretariat forwarded the arguments on admissibility of the State to the Complainant.

47. On 20 March 2006, the Secretariat received a supplementary submission on admissibility from the Complainant in response to the State's submission.

48. By letter of 27 March 2006, the Secretariat acknowledged receipt of the Complainant's supplementary submissions on admissibility.

49. By Note Verbale of 27 March 2006, the Secretariat transmitted the Complainant's supplementary submission on admissibility to the Respondent State and requested the latter to respond before 15 April 2006.

50. At its 39th Ordinary Session held from 11 – 25 May 2006, the African Commission considered the Communication and declared it admissible. The Commission decided to consolidate the Communication with the **SHRO Case**.

51. By Note Verbale dated 29 May 2006 and by letter of the same date, both parties were notified of the Commission's decision and requested to make submissions on the merits before 29 August 2006.

52. On 23 August 2006, the Secretariat received the Complainant's submissions on the merits of the Communication. On 1 October 2006, the Secretariat acknowledged receipt of the Complainant's submissions.

53. On 8 October 2006, the Secretariat forwarded the Complainant's submissions to the Respondent State and reminded the latter to make its submissions on the merits before 31 October 2006.

54. At its 40th Ordinary Session held in Banjul, The Gambia, from 15 – 29 November 2006, the African Commission considered the Communication and deferred it to its 41st Ordinary Session pending the Respondent State's response.

55. By Note Verbale of 4 January 2007 and by letter of the same date, both parties were notified of the Commission's decision.

56. By Note Verbale of 11 April 2007, the Secretariat reminded the Respondent State to submit its arguments on the merits.

57. On 25 May 2007, during the 41st Ordinary Session, the Secretariat received the State's submissions on the merits.

58. At its 41st Ordinary Session held in Accra, Ghana, the Commission considered the Communication and deferred it to its 42nd Ordinary Session to allow the Secretariat to translate the submissions and prepare a draft decision.

59. By Note Verbale of 10 July 2007 and letter of the same date both parties were notified of the Commission's decision.

60. At its 42nd Ordinary Session held from 15 – 28 November 2007, in Brazzaville, Congo, the Commission considered the Communication and deferred it to its 43rd Ordinary Session because the Respondent State made additional submissions on the matter during the Session.

61. At its 43rd Ordinary Session held in Ezulwini, the Kingdom of Swaziland, the Commission deferred the Communication to its 44th Ordinary Session to allow the Secretariat to prepare a draft decision

62. At its 44th Ordinary Session Abuja, Nigeria, the Commission considered the Communication and deferred further consideration to the 45th Ordinary Session due to time constraints.

Submissions on admissibility

The SHRO Case

Complainants' submissions on admissibility

63. The Complainants submit that acts of violence were committed in a discriminatory manner against populations of Black African origin, in the Darfur region, namely the *Fur, Massaleit and Zaggawa tribes*.

64. They add that the Respondent State is “governed by a military regime, which does not attach the required importance to normal procedures under the Rule of law or respect for the country’s institutions,” hence citizens, groups and organizations cannot bring issues of human rights violations before independent and impartial Courts, because of the “inevitable harassment, threats, intimidations and disruption of normal life by State security agents”.

65. The Complainants submit that the Respondent State continues to hold Mr. Hassan El Turabi, leader of the political party *National Popular Congress*, in detention, in spite of the rulings by the Constitutional Court which gave instructions for his release. That the Darfur region has been placed under a state of emergency since the 1989 coup d’état, and that the situation is deteriorating very rapidly and in a highly dangerous manner in a country which is multi-denominational, multi-cultural and multi-ethnic.

The COHRE Case

66. The Complainant avers that the Respondent State has committed serious and massive violation of human rights. The Complainant argues that the violations are ongoing since 2003. It argues that the Communication has been submitted to the African Commission within a reasonable period of time.

67. The Complainant argues further that the victims of forced evictions and other accompanying human rights violations in the Darfur Region cannot avail themselves of local remedies due to several reasons, including the fact that (i) the victims are increasingly being displaced into remote regions or across international frontiers (ii) the Respondent State has not created a climate of safety necessary for victims to avail themselves of local remedies, and (iii) the Respondent State is well aware of the series of serious and massive human rights violations occurring in Darfur and has taken little or no steps to remedy those violations. Consequently, these impediments render local remedies unavailable to the victims.

68. The Complainant therefore urges that the Communication be declared admissible because domestic remedies are not available.

Respondent State’s submissions on admissibility

69. The Respondent State denies all the allegations advanced by the Complainants in the **SHRO Case**. The Respondent State submits that the conflict in the Darfur region is a result of its geographical location. It argues that the instability in neighbouring countries has negative repercussions on the Respondent State.

70. The Respondent State admits that the conflict in Southern Sudan, which lasted for years had affected all the regions of the country at varying degrees. It states that South Darfur, which borders Southern Sudan, has been affected by armed operations

and the massive exodus of the population running away from the fighting. That the three Darfur regions have also been affected by the situation in Chad, Central African Republic and the Democratic Republic of Congo through the introduction of arms from these countries and the influx of hundreds of tribes with kinship links in the Respondent State.

71. The Respondent State submits that armed conflicts in neighbouring States have contributed to the emergence of armed rebel groups which carry out plunder and theft. The Respondent State submits further that it has taken measures to restore stability, bring criminals to courts in accordance with the law and returned stolen property.

72. The Respondent State argues further that the Complainants have not exhausted local remedies. It states that there hasn't been any report/complaint to the police, the Courts, or the National Council or to the Human Rights Consultative Council. It submits further that the complaint does not conform to Articles 56(2) and (4) of the African Charter, because it is based on erroneous or imaginary facts which have nothing to do with the Respondent State.

73. The Respondent State claims that the Communication has been overtaken by events since several of the claims were addressed by the President of the Respondent State on 9 March 2004, when he granted general amnesty to those who surrendered their arms. That the Respondent State signed peace agreements at Abeche and N'djamena; launched the reconstruction of infrastructure destroyed by the rebels; allowed international aid organizations to intervene on the ground; and allowed the return of internally displaced persons. It created an independent Commission of Inquiry on the human rights violations, and convened a meeting for all Darfurians to discuss the restoration of peace in the region. In the light of the foregoing, the Respondent State denies all the allegations and declares them 'false and against the spirit of Article 56 of the African Charter'.

74. With respect to the **COHRE Case**, the Respondent State advances two main arguments: first, that local remedies have not been exhausted and secondly, that the Communication has been settled by other international mechanisms.

75. The Respondent State argues that the Complainant failed to resort to existing legal, judicial or administrative means within the Respondent State to address the allegations. It argues further that under its law, the protection of human rights is regulated by three main legislative norms: (a) International and regional human rights as ratified by the Respondent State (considered to be an integral part of the Constitution), (b) the Constitution, and (c) State Legislation.

76. It submits that the Constitutional Court was established in 1998 and has jurisdiction to hear cases relating to the protection of human rights, guaranteed in the Constitution and other international instruments ratified. The Supreme Court, the Courts of Appeal, the General Courts and the Tribunals of 1st, 2nd and 3rd Appeals all have jurisdictions, depending on the location, to deal with specific issues. That the

President of the Supreme Court can establish specialized courts to deal with specific situations and to hear cases on human rights violations in the three regions of Darfur.

77. The Respondent State argues that it had introduced legal and judicial procedures to punish perpetrators of alleged human rights abuses in Darfur. These mechanisms include: the National Commission of Enquiry on the violation of Human Rights in Darfur under the Chairmanship of the former Vice-President of the Supreme Court, comprised of human rights lawyers and activists. It adds further that the National Commission submitted its report to the President of the Republic in January 2005. Three Committees were established based on the recommendations of the report: namely, the Judiciary Committee of Enquiry to investigate violations, Committee for Compensation and Committee for the Settlement of priority cases of property ownership.

78. Therefore, the Respondent State submits that the Communication does not comply with Article 56 (5) of the African Charter.

79. The Respondent State submits further that the Communication was submitted after being settled by UN Mechanisms. It argues that the United Nations and the UN Security Council adopted resolutions 1590, 1591 and 1592 concerning the situation in Darfur, which are currently being implemented. In April 2005 the Commission on Human Rights of the UN Economic, Social and Cultural Council, also adopted a resolution concerning the human rights violations in Sudan. As a result, the Respondent State submits that a Special Rapporteur was assigned to look into the human rights situation. She recently visited Sudan, specifically the Darfur region.

80. The Respondent State argues therefore that, the Communication is inadmissible under Article 56 (7) of the African Charter.

Complainant's supplementary submission in response to Respondent State's submission on admissibility

81. In a supplementary brief on admissibility the Complainant submits that, taken together, the forced evictions and accompanying human rights violations amount to serious and massive violations of human rights protected by the African Charter.

82. Complainant cites a 2006 Report by the UN Special Rapporteur on the human rights situation in Sudan which found that "the human rights situation worsened from July 2005...and a comprehensive strategy responding to transitional justice has yet to be developed in the Sudan." The report adds that the cases prosecuted before the Special Criminal Court on the events in Darfur "did not reflect the major crimes committed during the height of the Darfur crisis" and "only one of the cases involved charges brought against a high-ranking official, and he was acquitted."

83. Consequently, the Complainant argues that, the domestic remedies, cited by the Respondent State, are not effective, nor sufficient, since they offer little prospect of success. They are incapable of redressing the complaints.

84. The Complainant submit that the Special Criminal Tribunals “may just be a tactic by the Sudanese government to avoid prosecution by the International Criminal Court.” That such tribunals are “doomed to failure” because they lack “serious legal reforms ensuring independence of the judiciary.” Hence, the Complainant submit, the Respondent State has failed to bring “...an end to the current climate of intimidation,” thereby casting doubts about the effectiveness of domestic remedies.

85. It submits that even though the peace talks are likely to result in what could be considered injunctive relief by halting further human rights violations, they do not provide adequate remedies for the human rights violations.

86. The Complainant adds that the UN Human Rights Commission, in its resolution 2005/82, found that these domestic remedies are ineffective and insufficient in preventing, halting or remedying the forced evictions and accompanying human rights violations in Darfur.

87. Consequently, it cannot be said that these claims have “been settled” as required by Article 56(7) of the African Charter.

88. The Complainant concludes that the present Communication satisfies the requirements of Article 56 of the African Charter.

African Commission’s decision on admissibility

89. Admissibility of Communications under the African Charter is governed by the conditions set out in Article 56. The Complainants argue that the Communication complies with all the requirements under Article 56 of the Charter. The Respondent State argues that the Communications be declared inadmissible for not meeting the requirements of Article 56 (2), (4), (5) and (7) of the African Charter.

90. Article 56(2) requires Communications to be compatible with the Constitutive Act or the African Charter. The Respondent State did not explain how the Communication is incompatible with either instrument. The mere submission of a Communication by a Complainant cannot be deemed an incompatibility under Article 56(2) of the African Charter.

91. Bringing Communications against State Parties to the African Charter is a means of protecting human and peoples’ rights. States Parties to the African Charter are duty bound to respect their obligations under both the Constitutive Act and the African Charter. Article 3(h) of the Constitutive Act enjoins African States to promote and protect human and peoples’ rights in accordance with the African Charter. The African Commission does not consider the filing of complaints before it, an incompatibility with the Constitutive Act or the African Charter. It therefore finds that Article 56(2) has been complied with.

92. Article 56(4) stipulates that Communications should not be based exclusively on news disseminated through the mass media. The present Communications are supported by UN Reports as well as reports and Press releases of international

human rights organizations. These Communications are not based exclusively on mass media reports. The Darfur crisis has attracted wide international media attention. It would be impractical to separate allegations contained in the Communications from the media reports on the conflict and the alleged violations.

93. In its decision declaring **Sir Dawda Jawara v The Gambia (the Jawara Case)**¹²⁸ admissible, the Commission stated that “[w]hile it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media.There is no doubt that the media remains the most important, if not the only source of information. It is common knowledge that information on human rights violation is always gotten from the media....The issue therefore should not be whether the information was gotten from the media, but whether the information is correct....” The African Commission therefore finds further that the Communications comply with Article 56(4).

94. With respect to Article 56 (5), the Respondent State argues that no attempt was made to approach various internal remedies. The Complainants, on the other hand, argue that Article 56(5) does not apply to the Communications due to the «serious, massive and systematic» nature of the alleged violations by the Respondent State. They submit that such violations are incapable of being remedied by domestic remedies.

95. Article 56 (5) of the African Charter provides that Communications relating to human and peoples’ rights referred to in Article 55 received by the African Commission shall be considered if they “are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged”.

96. The issue to be resolved is whether the local remedies were capable of addressing the violations alleged by the Complainants.

97. The African Commission has previously decided on the question of remedies with respect to cases of serious or massive violations of human rights. In the **Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah/ Zaire**, the Commission stated that: “[i]n the light of its duty to ensure the protection of human and peoples’ rights...the Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complaint [s] to seize the domestic courts in the case of each individual complaint. 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 number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable’.¹²⁹

¹²⁸ See Communication 147/96, 13th Annual Activity Report, 1999-2000.

¹²⁹ Communications 25/89, 47/90, 56/91 100/93, (4 International Human Rights Law Report 89, 92), (1997).

98. The Respondent State argues that the remedies were not only available, but effective and sufficient, and that the Complainant didn't bother to access them to seek justice for the victims. The Complainants cite several reports which indicate various cases of intimidation, displacement, harassment, sexual and other kinds of violence, which according to the Complainant may not be dealt with appropriately through local remedies.

99. The African Commission has often stated that a local remedy must be available, effective and sufficient. All three criteria must be present for the local remedy envisaged in Article 56 (5) to be considered worthy of pursuing. In the **Jawara Case**¹³⁰ the African Commission held that a remedy is considered available if the petitioner can pursue it without impediment. It is deemed effective if it offers a prospect of success. It is found sufficient if it is capable of redressing the complaint.

100. In the present Communication, the scale and nature of the alleged abuses, the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient. This Commission has held in **Malawi African Association and Others v. Mauritania**¹³¹ that it "*does not believe that the condition that internal remedies must have been exhausted can be applied literally to those cases in which it is neither practicable nor desirable for the Complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims. Due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable ...*"¹³².

101. Such is the case with the situation in the Darfur region, where tens of thousands of people have allegedly been forcibly evicted and their properties destroyed. It is impracticable and undesirable to expect these victims to exhaust the remedies claimed by the State to be available.

102. The African Commission, considering that the alleged violations *prima facie* constitute "serious and massive violations," finds that under the prevailing situation in the Darfur, it would be impractical to expect the complainants to avail themselves of domestic remedies, which, are in any event, ineffective. Had the domestic remedies been available and effective, the Respondent State would have prosecuted and punished the perpetrators of the alleged violations, which it has not done. The Commission finds that there were no remedies and therefore the criteria under Article 56(5) does not apply to the complainants.

¹³⁰ See Footnote 2 above for reference..

¹³¹ Communications 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, (2000).

¹³² See also Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah / Zaire, African Comm. Hum. & Peoples' Rights. Communication No. 25/89, 47/90, 56/91, 100/93 cited above.

103. The Respondent State argued that the violations have been settled by other international mechanisms and cites Article 56(7) of the Charter.

104. The African Commission wishes to state that a matter shall be considered settled within the context of Article 56 (7) of the African Charter, if it was settled by any of the UN human rights treaty bodies or any other international adjudication mechanism, with a human rights mandate. The Respondent State must demonstrate to the Commission the nature of remedies or relief granted by the international mechanism, such as to render the complaints *res judicata*, and the African Commission's intervention unnecessary.

105. The African Commission, while recognizing the important role played by the United Nations Security Council, the Human Rights Council, (and its predecessor, the Commission on Human Rights,) and other UN organs and agencies on the Darfur crisis, is of the firm view that these organs are not the mechanisms envisaged under Article 56(7). The mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations.

106. In the opinion of this Commission, the content of the current complaints were not submitted to any such bodies, by the Complainants, or any other individual or institution.

107. For these reasons, the African Commission declares both Communications **admissible**.

Submissions on the merits

108. It should be noted that in spite of several reminders, neither the Complainants nor the Respondent State submitted in respect of the **SHRO Case**.

109. The other Complainant, COHRE, and the Respondent State made submissions on the merits with respect to the **COHRE Case**. The Commission will consider their submissions. Rule 120 of the Rules of Procedure of the African Commission states that "*[i]f the communication is admissible, the Commission shall consider it in the light of all the information that the individual and the State Party concerned has submitted in writing; it shall make known its observation on this issue.....*"

Complainant's submissions on the merits

110. The Complainant submits that since February 2003, following the emergence of an armed conflict in the Darfur region, the Respondent State has engaged in and continues to forcibly evict thousands of Black indigenous tribes, inhabitants of the Darfur from their homes, communities and villages. The alleged forced evictions and accompanying human rights abuses recorded in this Communication constitute a violation of the rights guaranteed under the African Charter to which the Respondent State is a party.

111. It is submitted that the Respondent State failed to respect and protect the human rights of the Darfur people. Regarding the obligation to respect, it is submitted that government forces attacked villages, injuring and killing civilians, raping women and girls, and destroying homes. The State also failed to prevent the Janjaweed militiamen from killing, assaulting and raping villagers, hence failing in its obligation to protect the civilian population of Darfur. The Communication also alleges that at times the Janjaweed and government forces conducted joint attacks on villages.

112. The Complainant argues further that attacks by militias prevented Darfurians from farming land, collecting fireweed for cooking, and collecting grass to feed livestock, which constitute a violation of their right to adequate food.

113. The Complainant submits that the forced eviction and the accompanying human rights abuses in the Darfur region tantamount to violations of the right to life, and the right to security of the person respectively protected under Articles 4 and 6 of the Charter, as thousands of people were killed, injured, and raped.

114. The Complainant submits further that attacks carried out by the Respondent State and the Janjaweed have forced thousands of people to flee their homes and habitual places of residence. According to the Complainant, those actions constitute a violation of the right to freedom of residence under Article 12(1) of the Charter.

115. The Complainant states that the forced evictions and destruction of housing and property in the Darfur region violated the right to property enshrined in Article 14 of the Charter. It is the Complainant's view that those attacks cannot be compared to a lawful dispossession as they have not been carried out "in accordance with the provisions of appropriate law..." and did not contribute to public need nor was it in the general interest of the community.

116. The Communication recalls the decision of the Commission in the case of **Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria (the SERAC Case)**¹³³ where the Commission found, *inter alia*, that forced evictions by government forces and private security forces is an infringement of Article 14 and the right to an adequate housing which is implicitly guaranteed by Articles 14, 16 and 18(1) of the Charter.

117. Regarding the right to adequate housing, the Complainant urges the Commission to draw inspiration from other international human rights law standards. It submits that the right to adequate housing is well-defined under international human rights law, including the Universal Declaration of Human Rights (Article 25(1)), and the International Covenant on Economic, Social and Cultural Rights (Article 11(1)), and other international human rights instruments.

118. The Complainant also submits that the Committee on Economic, Social and Cultural Rights gave a precise content to the right to housing in its General Comment

¹³³

Communication 155/1996.

No. 4 adopted on 12 December 1991, concerning the State's obligation to respect, protect and fulfil security of tenure. In its General Comment No. 7, the Committee defines and proscribes the practice of forced evictions.

119. The Complainant recalls that in General Comment No. 4, the Committee on Economic, Social Cultural Rights held that “many of the measures required to promote the right to housing would only require the abstention by the [Respondent State] from certain practices”. Furthermore, in General Comment No.7, it is affirmed that: “The State itself *must* refrain from forced evictions and *ensure* that the law is enforced against its agents *or third parties* who carry out forced evictions.”

120. The Complainant further invites the Commission to find the State in violation of Article 7 as it failed to “adequately investigate and prosecute” the authors of the forced evictions and destruction of housing.

121. The Complainant submits that the African Commission relied on international law to define the right to adequate housing implied by Articles 14, 16 and 18(1) of the Charter, in its decision on the **SERAC Case**.

122. The Complainant also relies on the jurisprudence of the European Court of Human Rights in **Akdivar and Others v. Turkey**¹³⁴, where, in a situation similar to the one prevailing in the Darfur, that is, destruction of housing in the context of a conflict between the government and rebel forces, the European Court of Human Rights ruled that Turkey was responsible for violations perpetrated by both its own forces and the rebel forces because it has the duty to both respect and protect human rights.

123. The Complainant submits that forced evictions and destruction of housing constitute cruel or inhuman treatment prohibited by Article 5 of the Charter, which is consistent with international human rights standards. It quotes the Concluding Observations on Israel in 2001 where the Committee Against Torture (CAT) found that forced evictions and destruction of housing cause “indescribable suffering to the population”. Regarding forced evictions and destruction of housing carried out by non-state actors, the Communication relies on the jurisprudence of the CAT in **Hijrizi v. Yugoslavia**¹³⁵ where the Committee ruled that the State is responsible for failing to protect the victims from such a violation of their human rights not to be subject to cruel, inhuman and degrading treatment or punishment under Article 16 of the Convention Against Torture.

124. The Complainant also submits that forced evictions and accompanying human rights violations constitute violations by the Respondent State of the right to adequate food and the right to water implicitly guaranteed under Articles 4, 16 and 22 of the Charter as informed by standards and principles of international human rights law.

¹³⁴ No. 21893/93, 1996-IV, no. 15.

¹³⁵ Communication No. 161/2000: UN Doc. CAT/C/29/D/161/2000 (2 December 2002).

125. The Complainant relies on the Committee on Economic, Social and Cultural Rights General Comment No. 12 of 1999, which obligates States to respect, protect and fulfil the right to adequate food, and General Comment No. 15 of 2003, where the Committee declares that “the human rights to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal domestic uses”.

126. The Complainant invites the Commission to develop further its reasoning in the **SERAC Case** by holding that the right to water is also guaranteed by reading together Articles 4, 16, and 22, of the African Charter. It urges the Commission to find that the Respondent State has violated that right by “being complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region.

Respondent State’s submissions on the merits

127. The Respondent State avers that it is addressing the alleged human rights violations through the framework of implementation of the Darfur Peace Agreement (DPA) adopted on 5 May 2006, containing a number of remedies on the situation in Darfur, including addressing the content of the present Communication. As a result of the Agreement, the Respondent State indicates that, it has taken a number of measures to implement the DPA and at the same time deal with the issues raised by the Complainant.

128. The Respondent State submits that following the signing of the Peace Agreement with the Major Armed Movements in Darfur, the signatory partners began to implement all the components of the Agreement (that is, power sharing, wealth sharing, the security arrangements, and the Darfur/Darfur Dialogue). Consequently, Presidential and States decrees and decisions to establish Commissions, development funds, appointing their heads and members, were issued in accordance with the provisions of the Darfur Peace Agreement.

129. The Respondent State submits further that , all the major organs stipulated in the Agreement were duly established, notably the Darfur Interim Authority. These organs have since begun to discharge their duties, since April 2007. In addition, the Respondent State argues that the official positions allocated to Darfurians in all the Organs, Commissions and Committees to a large extent have been occupied by them. The State added that a total of 87 posts have been filled and 16 posts, at lower levels, are yet to be filled.

130. The Respondent State further indicates that with regard to the core aspect of wealth sharing, specialized mechanisms and committees, such as the Darfur Fund for Re-construction and Development and the Compensation Fund for the War Victims, as well as the Rehabilitation Commission have been formed.

131. Regarding the establishment of the Darfur Joint Assessment Mission (DJAM) responsible for defining the development needs and services in Darfur, comprising the Government and the Movements representatives’, donors and specialized International Agencies), the State submits that Committees have conducted land surveys in Darfur with a view to defining the needs, adding that the process of data

analysis and statistics in preparation for the anticipated International Conference on Development and Re-construction of Darfur sponsored by Holland, is also being undertaken.

132. With respect to the security and military arrangements, the Respondent State submits that work was underway in earnest involving the Government and the Movements, as well as the AU Mission to consolidate the cease fire to which the concerned parties are committed, as well as to make the other security arrangements, notably the specification of military positions, re-integration and demobilization work. The Respondent State added that it has presented disarmament plan regarding the Janjaweed/Militias to the African Union in July 2006. The Respondent State added that a Joint Committee formed by the African Union and the Government was assigned to look into the implementation of the plan in accordance with the provision of the Darfur Peace Agreement.

133. The Respondent State submits further that the commitment of the parties to the Darfur Peace and Cease-fire Agreement has brought about a considerable improvement in the security situation, adding that the State of insecurity has now been confined to some pockets of North Darfur (only 6 localities in North Darfur out of a total of 34 localities which make up the three States of Darfur).

134. The Respondent State argues that it has improved the humanitarian situation and facilitated the flow of relief aid to internally displaced persons. Its fast track policy adopted in 2004, aims at removing all the administrative and procedural restrictions to the flow of relief. As such the level of coverage of relief supplies is 98% access by the needy leaving a balance of (2%) which was not covered due to insecurity in certain localities of North Darfur.

135. With respect to the voluntary repatriation of the refugees, the Respondent State indicates that it has embarked on the rehabilitation of a great number of the villages in Darfur by providing basic services such as water, health, education and housing, aimed at encouraging the return of internally displaced persons , (hereinafter, IDPs) and refugees to their villages and cities. Such efforts have resulted in the return of more than 100,000 IDPs and refugees to their villages in the 3 States of Darfur. The number includes returnees to 70 villages, in West Darfur, 22 villages in South Darfur and 10 villages in North Darfur, The State adds that, a number of major roads have been re-opened in order to facilitate the return of the refugees and the IDPs, including the Nyala-Quraidha-Bram Road, the Nyala-Labdu Road, the Nyala-Mohajiria Road, the Nyala-Dhuain Road and the Kalbas-Eljinaina Road.

136. The Respondent State submits that, following the signing of the Peace Agreement, a great number of the IDPs have begun to exercise pasturing and farming activities. In this regard, the Respondent State notes that, it has assisted in distributing agricultural inputs to the IDPs and those affected by the war. In the same context the efforts of social reconciliation have contributed to confidence building which, in turn, helped in the return of a high percentage of IDPs and the refugees to their villages.

137. The State avers that it has made contributions to humanitarian programmes in Darfur in 2006, to the tune of (\$110,889,000 US Dollars) as follows:-

	<u>US Dollars</u>
1) Food	42, 409, 000
2) Water	23, 015, 000
3) Health	36, 465, 000
4) Shelter	<u>9, 000, 000</u>
Total:	110, 889, 000

138. The Respondent State believes that “.....the implementation of the Darfur Peace Agreementcould indeed help in addressing all the humanitarian issues regarding the situation in Darfur, including the Communication under reference. As stated in our previous memorandum..., the Sudanese government shall not be held responsible for the subject of the Communication but it will bear its consequences by virtue of the responsibility it has towards its citizens. The Sudanese Government shall in this regard, be enlightening the esteemed African Commission on all the developments regarding the Communication under reference”.

African Commission’s decision on the Merits

139. The Respondent State made a general denial of the allegations and stated that due to its geographical location, the security situation in the surrounding countries had a destabilising influence on the domestic situation in the country.

140. The Respondent State submits that further consideration of this Communication is no longer relevant. It argues that several issues raised have been addressed by the President of the Republic. The State notes that on 9 March 2004, a general amnesty was granted to combatants who surrendered their arms, that the signing of the first peace agreement at Abeche and N’djamena, and the Abuja May 2006 Agreement, the launching of the reconstruction of infrastructure destroyed by the rebels to allow international aid organizations’ assistance, the return of internally displaced persons, the creation of an independent Commission of Inquiry on the human rights violations, and the convening of a meeting for all Darfurians to discuss the restoration of peace, have all contributed to addressing the crisis in the Darfur.

141. The State notes that the commitment of the parties to the Darfur Peace and Cease-fire Agreement has brought about a considerable improvement in the security situation, adding that the State of insecurity has now been confined to some pockets of North Darfur.

142. From the above submissions, the Respondent State doesn’t seem to be contesting the allegations made by the Complainants. Rather the State notes that following the signing of the Darfur Peace Agreement, measures have been put in

place by the parties to the Agreement to ensure a resolution of the crisis in Darfur, and consequently address the grievances raised in the present Communication.

143 Could it be said that by not contesting the allegations, the State has conceded to violating the provisions cited by the Complainants, that is, Articles 4, 5, 6, 7, 9, 12 (1), 14, 16, 18 (1) and 22?

144. It must be noted that the Respondent State has not conceded to the violations either. It simply informs the Commission that the grievances highlighted in the Communications will be addressed by the political developments initiated, in particular, the Signing of the Darfur Peace Agreement. The African Commission will therefore have to address each and every allegation made by the Complainants to ascertain their veracity.

Alleged violation of Articles 4 and 5

145. With respect to allegations of violation of Articles 4 and 5 of the African Charter, the Complainants allege large-scale and indiscriminate killings, torture, poisoning of wells, rape, forced evictions and displacement, destruction of property, etc.

146. Article 4 of the Charter protects the right to life and provides that “*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right*”. The right to life is the supreme right of the human being. It is basic to all human rights and without it all other rights are without meaning. The term ‘life’ itself has been given a relatively broad interpretation by courts internationally, to include the right to dignity and the right to livelihood.

147. It is the duty of the State to protect human life against unwarranted or arbitrary actions by public authorities as well as by private persons. The duty of the State to protect the right to life has been interpreted broadly to include prohibition of arbitrary killing by agents of the State and to strictly control and limit the circumstances in which a person may be deprived of life by state authorities. These include the necessity to conduct effective official investigations when individuals have been killed as a result of the use of force by agents of the State, to secure the right to life by making effective provisions in criminal law to deter the commission of offences against the person, to establish law-enforcement machinery for the prevention, suppression, investigation and penalisation of breaches of criminal law. In addition to the foregoing, the State is duty bound to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.¹³⁶ In **Article 19 v Eritrea**¹³⁷ this Commission noted that ‘arbitrariness is not to be equated with against the law but must be interpreted more broadly to

¹³⁶ See European Court judgments in *McCann v. United Kingdom* (1995) 21 EHRR 97 and *Tanrikulu v. Turkey* (1999) 30 EHRR 950.

¹³⁷ Communication 275/2003.

include elements of inappropriateness, injustice, lack of predictability and due process...’.

148. States as well as non-state actors, have been known to violate the right to life, but the State has duo legal obligations, to respect the right to life, by not violating that right itself, as well as to protect the right to life, by protecting persons within its jurisdiction from non-state actors. In **Zimbabwe Human Rights NGO Forum/Zimbabwe**¹³⁸, the Commission noted that an act by a private individual or [non-state actor] and therefore not directly imputable to a State, can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence on the part of the State to prevent the violation or for not taking the necessary steps to provide the victims with reparation.¹³⁹

149. In the present Communication, the State claims it has investigated some of the allegations of extra-judicial and summary executions. The Complainant submits that no effective official investigations were carried out to address cases of extra-judicial or summary executions.

150. To effectively discharge itself from responsibility, it is not enough to investigate. In **Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan**¹⁴⁰ the African Commission held that “investigations into extra-judicial executions must be carried out by entirely independent individuals, provided with the necessary resources, and their findings must be made public and prosecutions initiated in accordance with the information uncovered. In **Jordan v United Kingdom**¹⁴¹ the European Court of Human Rights held that, “an effective official investigation must be carried out with promptness and reasonable expedition. The investigation must be carried out for the purpose of securing the effective implementation of domestic laws, which protect the right to life. The investigation or the result thereof must be open to public scrutiny in order to secure accountability. For an investigation into a summary execution carried out by a

¹³⁸ Communication 245/2002.

¹³⁹ In human rights jurisprudence this standard was first articulated by a regional court, the Inter- American Court of Human Rights, in looking at the obligations of the State of Honduras under the American Convention on Human Rights - *Velasquez-Rodriguez*, ser. C., No.4, 9 Hum. Rts.I.J. 212 (1988). The standard of *due diligence* has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity.

¹⁴⁰ Communications 48/90, 50/91, 52/91, 89/93.

¹⁴¹ Application no. 24746/94 ((2003) 37 EHRR 2), Judgment of 4/8/2001.

State agent to be effective, it may generally be regarded as necessary for the person responsible for the carrying out of the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence”.

In the present Communication, the State claims to have investigated the alleged abuses, put in place mechanisms to prevent further abuses and to provide remedies to victims. The question is – were all these initiatives done in accordance with international standards? Did they meet the test of effective official investigations under international human rights law?

151. The Fact-finding Report of the African Commission to the Darfur Region of Sudan¹⁴² states that some women IDPs who were interviewed during the mission stated that “.....their villages were attacked by government forces, supported by men riding horses and camels. The attacks resulted in several deaths and injury of people. Some of these women who sustained injuries, showed their wounds to the Commission. The women furthermore stated that during the attacks, a number of cases of rape were committed, some of the raped women became pregnant. Complaints were lodged at the police but were yet to be investigated. They declared that the attackers came back at night to intimidate the villagers who had not fled, accusing them of supporting the opposition. Everyone had to run away from the villages.

The women indicated that they were traumatized by the violent nature of the attacks and said that they would not want to return to the villages as long as their security is not assured. They lamented lack of water and a school in the camp. The mission visited the police station to verify complaints and the level of progress made on the reported cases of rape and other offences, but the mission was unable to have access to the files as the officer in charge of the said cases was absent at the time. At one of its meetings in El Geneina, the mission was informed by the authorities of West Darfur State that even though cases of rapes were reported to the police, investigations could not be conducted because the victims could not identify their attackers. Therefore the files were closed for lack of identification of the perpetrators.”

152. UN and Reports of International Human Rights Organisations attest to the fact that the Respondent State has fallen short of its responsibility. For instance, in her 2006 Report, the UN Special Rapporteur on the human rights situation in The Sudan noted that, “the human rights situation worsened from July 2005...and a comprehensive strategy responding to transitional justice has yet to be developed in the Sudan.” She added that the cases prosecuted before the Special Criminal Court on the events in Darfur “did not reflect the major crimes committed during the height

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The African Commission conducted a Fact Finding Mission to the Darfur Region of Sudan between 8-18 July 2004. The Report of the Mission was adopted by the African Commission during the 3rd Extraordinary Session, held in Pretoria, South Africa, and was published in its Activity Report presented to the AU Executive Council. See paras 86, 87, and 88, at page 20 **EX.CL/364(XI)Annex III.**

of the crisis in Darfur”..... “only one of the cases involved charges brought against a high-ranking official, and he was acquitted.”

153. The Special Rapporteur also found that “the Government has taken other justice initiatives, but they too have fallen short of producing accountability”¹⁴³ noting that “national laws ... effectively protect Sudanese law enforcement officials from criminal prosecution [and that these laws] contribute to a climate of impunity in the Sudan.” The fact that the abuses have persisted and are ongoing since the submission of the Communications clearly demonstrates a weakness in the judicial system and lack of effectiveness to guarantee effective investigations and suppression of the said violations. In the opinion of the African Commission, lack of effective investigations in cases of arbitrary killings and extra-judicial executions amount to a violation of Article 4 of the African Charter.

154. Regarding the allegation of Article 5, the Complainants simply make a generalized allegation of human rights violations, adding that ‘methods used included extra-judicial executions, *torture*, rape of women and girls and arbitrary arrests and detentions, evictions and burning of houses and property, etc. Article 5 of the Charter provides that *[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited*’.

155. Article 5 of the African Charter is aimed at the protection of both the dignity of the human person, and the physical and mental integrity of the individual. The African Charter does not define the meaning of the words, or the phrase “torture or degrading treatment or punishment..” However, Article 1 of the United Nations Convention Against Torture¹⁴⁴ defines, the term ‘torture’ to mean “...*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*”

156. Torture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It is a tool for discriminatory treatment of persons or groups of person who are subjected to the torture by the State or non-state actors at the time of exercising control over such person or persons. The purpose of torture is to control populations by destroying individuals, their leaders and frightening entire communities.

¹⁴³ Id. para 48.

¹⁴⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

157. The Complainant has submitted that the various incidences of armed attacks by the military forces of the Respondent State, using military helicopters and the Janjawid militia, on the civilian population, forced eviction of the population from their homes and villages, destruction of their properties, houses, water wells, food crops and livestock, and social infrastructure, the rape of women and girls and displacement internally and outside national borders of the Respondent State, constitute violation of the various cited articles of the African Charter, one of which is Article 5. The totality of the aforesaid violations amount to both psychological and physical torture, degrading and inhuman treatment, involving intimidation, coercion and violence.

158. In **Media Rights Agenda v Nigeria**¹⁴⁵, the Commission stated that the term ‘cruel, inhuman and degrading punishment or treatment’ is to be interpreted so as to extend the widest possible protection against abuse, whether physical or mental. In **John Modise v Botswana**¹⁴⁶, the Commission elaborated further and noted that ‘exposing victims to personal sufferings and indignity violates the right to human dignity. It went on to state that ‘personal suffering and indignity can take many forms, and will depend on the particular circumstances of each Communication brought before the African Commission’.

159. Based on the above reasoning, the African Commission agrees with the UN Committee Against Torture in **Hijrizi v. Yugoslavia**¹⁴⁷ that forced evictions and destruction of housing carried out by non-state actors amounts to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights. **Hijrizi v. Yugoslavia** involved the forced eviction and destruction of the Bozova Glavica settlement in the city of Danilovgrad by private residents who lived nearby. The settlement was destroyed by non-Roman residents under the watchful eye of the Police Department, which failed to provide protection to the Romani and their property, resulting in the entire settlement being leveled and all properties belonging to its Roma residents completely destroyed. Several days later the debris of Bozova Glavica was completely cleared away by municipal construction equipment, leaving no trace of the community.

160. The Committee Against Torture found that the Police Department did not take any appropriate steps to protect the residents of Bazova Glavica, thus implying acquiescence and that the burning and destruction of their homes constituted acts of cruel, inhuman or degrading treatment or punishment within the meaning of Article 16 of the Convention Against Torture or other Cruel, Inhuman Degrading Treatment or Punishment.¹⁴⁸ Consequently, the Committee held that the Government of Serbia

¹⁴⁵ Communication 2245/1998.

¹⁴⁶ Communication 97/1993.

¹⁴⁷ Communication No. 161/2000: UN Doc. CAT/C/29/D/161/2000 (2 December 2002).

¹⁴⁸ Article 16 of the Convention Against Torture states in part that “...Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1,

and Montenegro had violated Article 16 of CAT by not protecting the rights of the residents of Bozova Glavica.

161. In a similar case dealing with allegations that the applicants' property had been destroyed by Turkish security forces, the European Court of Human Rights arrived at the same conclusion, that the destruction of homes and property was cruel and inhuman treatment. In **Selçuk and Asker v Turkey**¹⁴⁹, the complainants were both Turkish citizens of Kurdish origin living in the village of Islamköy. In the morning of 16 June 1993, a large force of gendarmes arrived in Islamköy and set fire to the houses and other properties of the said complainants.

162. The Court held that "even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment." The Court concluded that the treatment suffered by the applicants in this case was so severe as to constitute a violation of Article 3¹⁵⁰, adding that '...bearing in mind in particular the manner in which the applicants' homes were destroyed ... and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3."

163. Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities are entitled to without discrimination. It is an inherent right which every State is obliged to respect and protect by all means possible.¹⁵¹

164. In the present Communication, the Respondent State and its agents, the Janjawid militia, actively participated in the forced eviction of the civilian population from their homes and villages. It failed to protect the victims against the said violations. The Respondent State, while fighting the armed groups, targeted the civilian population, as part of its counter insurgency strategy. In the opinion of the Commission this kind of treatment was cruel and inhuman and threatened the very essence of human dignity.

165. The African Commission wishes to remind States Parties to the African Charter to respect human and peoples' rights at all times including in times of armed conflict. This was emphasised in **Constitutional Rights Project, et al/Nigeria** in which this Commission stated that:

when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

¹⁴⁹ European Court of Human Rights, Case of Selçuk and Asker v. Turkey, Judgment of 24 April 1998, Reports 1998-II, p. 900, paras. 27-30.

¹⁵⁰ Article 3 of the European Convention provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

¹⁵¹ See Purohit & Moore v The Gambia, Communication 241/2001.

“[I]n contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitation on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitation of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

166. The forced eviction of the civilian population cannot be considered permissible under Article 27(2) of the African Charter. Could the Respondent State legitimately argue that it forcefully evicted the Darfur civilian population from their homes, villages and other places of habitual residence, on grounds of collective security, or any other such grounds or justification, if any? For such reasons to be justifiable, the Darfurian population should have benefited from the collective security envisage under Article 27(2). To the contrary, the complaint has demonstrated that after eviction, the security of the IDP camps was not guaranteed. The deployment of peacekeeping forces from outside the country is proof that the Respondent State failed in its obligation to guarantee security to the IDPs and the civilian population in Darfur.

167. In its decision in the ***Commission Nationale des Droits de l’Homme et Libertes/Chad***¹⁵², the Commission reiterated its position that; “[t]he African Charter , unlike other human rights instruments does not allow for states to derogate from their treaty obligations during emergency situations. Thus, even with a civil war in Chad [derogation] cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.”

168. In view of the above, the African Commission finds that the Respondent State did not act diligently to protect the civilian population in Darfur against the violations perpetrated by its forces, or by third parties. It failed in its duty to provide immediate remedies to victims. The Commission therefore finds that the Respondent State violated Articles 4 and 5 of the African Charter.

Alleged violation of Articles 6 and 7

169. The Complainant alleges arbitrary arrests and detentions of hundreds of Darfurians. It argues that the Respondent State has legal obligations pursuant to Article 6 of the African Charter to respect the right to liberty as well as to protect the right to security of the person, by protecting persons within its jurisdiction from non-state actors such as the Janjaweed militia.

170. Article 6 of the African Charter provides that **“every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”**. Article 6 of the

¹⁵² Communication No 74/92, 9th Annual Activity Report, 1995-1996 at paragraph 21.

Charter has two arms – the right to liberty and the right to security of the person.

171. The Complainant alleges that Article 6 has been violated. This presupposes that the victims of the Darfur conflict, have through the actions and omissions of the Respondent State, been subjected to among other violations, the loss of their right to liberty, arbitrary arrest and detention. Personal liberty is a fundamental condition, which everyone should generally enjoy. Its deprivation is something that is likely to have a direct and adverse effect on the enjoyment of other rights, ranging from the right to family and private life, through the right to freedom of assembly, association and expression, to the right to freedom of movement.

172. A simple understanding of the right to liberty is to define it as the right to be free. Liberty thus denotes freedom from restraint – the ability to do as one pleases, provided it is done in accordance with established law. In the **Purohit and Moore/The Gambia Case**,¹⁵³ the Commission held that prohibition against arbitrariness requires that deprivation of liberty ‘shall be under the authority and supervision of persons procedurally and substantively competent to certify it’.

173. The second arm of Article 6 deals with the right to security of the person. This second arm, even though closely associated with the first arm, the right to liberty, is different from the latter.

174. Security of the person can be seen as an expansion of rights based on prohibitions of [torture](#) and [cruel and unusual punishment](#). The right to security of person guards against less lethal conduct, and can be used in regard to prisoners' rights.¹⁵⁴ The right to security of the person includes, inter *alia*, national and individual security. National security examines how the State protects the physical integrity of its citizens from external threats, such as invasion, terrorism, and bio-security risks to human health.

175. Individual security on the other hand can be looked at in two angles - public and private security. By public security, the law examines how the State protects the physical integrity of its citizens from abuse by official authorities, and by private security, the law examines how the State protects the physical integrity of its citizens from abuse by other citizens (third parties or non-state actors).

176. The Complainant submits with respect to the present Communication that the forced eviction, destruction of housing and property and accompanying human rights abuses amounted to a violation of Article 6 of the African Charter. The majority of the thousands of displaced civilians who were forcibly evicted from their homes and villages have not returned, in spite of the measures taken by the Respondent State.

¹⁵³ Communication 241/01 published in the 16th Activity Report.

¹⁵⁴ Rhona K.M. Smith, *Textbook on International Human Rights*, second edition, Oxford University Press, 2005, p. 245.

By its own account, the Respondent State admitted that only 100,000 IDPs¹⁵⁵ have returned to their villages. It submitted further that insecurity prevails in only 6 of the 34 Darfur localities. The numbers of needy IDPs camped in various relief centres remains high, notwithstanding the said improvements.

177. The Commission observes that IDPs and refugees can only return when security and safety is guaranteed and the Respondent State provides the protection in the areas of return. Voluntary return under situation of forced displacement must be in safety and dignity. The Commission believes that the right to liberty complements the right to freedom of movement under Article 12. If the IDPs or the refugees are not able to move freely to their homes, because of insecurity, or because their homes have been destroyed, then their liberty and freedom is proscribed. Life in an IDP or refugee camp cannot be synonymous with the liberty enjoyed by a free person in normal society. The 2004 Mission of the African Commission to Darfur found that male IDPs could not venture outside the camps for fear of being killed. Women and girls who ventured outside the camps to fetch water and firewood were raped by the Janjawid militia.

178. Cases of sexual and gender based violence against women and girls in and outside IDP camps have been a common feature of the Darfur conflict. The right to liberty and the security of the person, for women and girls, and other victims of the Darfur conflict has remained an illusion. The deployment of the African Union Mission in Sudan (AMIS) forces, could not guarantee the implementation of the Abuja Darfur Peace Agreement. The United Nations had to supplement the AU with the United Nations/African Union Mission to Darfur hybrid forces, (UNAMID) to provide protection to the civilian population.

179. In the present Communication, the Respondent State, in spite all the information regarding the physical abuse the victims were enduring, has not demonstrated that it took appropriate measures to protect the physical integrity of its citizens from abuse either by official authorities or other citizens/third parties. By failing to take steps to protect the victims, the Respondent State violated Article 6 of the African Charter.

180. The Complainant argues that the victims' right guaranteed under Article 7 (1) of the African Charter has been violated due to the failure by the Respondent State to investigate and prosecute its agents and the third parties responsible for the abuses. **Article 7 (1) of the Charter** provides that '**Every individual shall have the right to have his cause heard. This comprises a) The right to an appeal to competent national organs against acts 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; and d) The right to be tried within a reasonable time by an impartial court or tribunal**'.

The figures given by UN and Non Governmental Humanitarian agencies operating in Darfur indicate that the number of IDPs have for the most part during the Darfur conflict ranged between 1,500,000 and 2,500,000.

181. The right to be heard requires that the complainants have unfettered access to a tribunal of competent jurisdiction to hear their case. A tribunal is competent having been given that power by law, it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law. Where the competent authorities put obstacles on the way which prevent victims from accessing the competent tribunals, they would be held liable.

182. Given the generalized fear perpetrated by constant bombing, violence, burning of houses and evictions, victims were forced to leave their normal places of residence. Under these circumstances, it would be an affront to common sense and justice to expect the victims to bring their plights to the courts of the Respondent State.

183. In *Recontre Africaine pour la Defense des Droits de l'Homme/Republic of Zambia*,¹⁵⁶ the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, deny victims the opportunity to establish the legality of these actions in the courts. Similarly, in *Zimbabwe Human Rights NGO Forum/Zimbabwe*¹⁵⁷, the African Commission noted that the protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. The Commission added that "If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard."

184. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man¹⁵⁸ provides in Article XVIII that every person has the right to "resort to the courts to ensure respect for [their] legal rights," and to have access to a "simple, brief procedure whereby the courts" will protect him or her "from acts of the authority that ... violate any fundamental constitutional rights....".

185. In the present Communication, the forced evictions, burning of houses, bombardments and violence perpetrated against the victims made access to competent national organs illusory and impractical. To this extent, the Respondent State is found to have violated Article 7 of the African Charter.

Alleged violation of Article 12 (1)

¹⁵⁶ Communication 71/1992.

¹⁵⁷ Communication 245/2002.

¹⁵⁸ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

186. The Complainant alleges that the forced evictions constitute a violation of the right to freedom of movement and residence as guaranteed in Article 12 (1) of the African Charter on Human and Peoples' Rights. The Complainant argues that the forceful displacement of thousands upon thousands of persons from their chosen and established places of residence clearly contravenes the right to residence.

187. Freedom of movement is a fundamental human right to all individuals within States. Freedom of movement is a right which is stipulated in international human rights instruments, and the [constitutions](#) of numerous [States](#). It asserts that a [citizen](#) of a [State](#), generally has the right to leave that State, and return at any time. Also (of equal or greater importance in this context) to travel to, reside in, and/or work in, any part of the State the citizen wishes, without interference from the State. Free movement is crucial for the protection and promotion of human rights and fundamental freedoms.

188. Freedom of movement and residence are two sides of the same coin. States therefore have a duty to ensure that the exercise of these rights is not subjected to arbitrary restrictions. Restrictions on the enjoyment of these rights should be proportionate and necessary to respond to a specific public need or pursue a legitimate aim.

Under international law, it is the duty of States to take all measures to avoid conditions which might lead to displacement and thus impact the enjoyment of freedom of movement and residence. Principle 5 of the Guiding Principles on Internal Displacement¹⁵⁹ requires States to adhere to international law so as to prevent or avoid situations that might lead to displacement.

189. The right to protection from displacement is derived from the right to freedom of movement and choice of residence contemplated in the African Charter and other international instruments. Displacement by force, and without legitimate or legal basis, as is the case in the present Communication, is a denial of the right to freedom of movement and choice of residence.

190. The Complainant submitted that thousands of civilian were forcibly evicted from their homes to make-shift camps for internally displaced persons or fled to neighbouring countries as refugees. People in the Darfur region cannot move freely for fear of being killed by gunmen allegedly supported by the Respondent State. The Respondent State failed to prevent forced evictions or to take urgent steps to ensure displaced persons return to their homes. The Commission therefore finds that the Respondent State has violated Article 12 (1) of the African Charter.

Alleged violation of Article 14

191. The Complainants also alleged violation of Article 14 of the Charter which provides that *'[t]he 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'*.

¹⁵⁹ OCHA/Brookings Institution on Internal Displacement, 1999 and Implementing the Collaborative Response to Situations of Internal Displacement, IASC, 2004.

192. The right to property is a traditional fundamental right in democratic and liberal societies. It is guaranteed in international human rights instruments as well as national constitutions, and has been established by the jurisprudence of the African Commission.¹⁶⁰ The role of the State is to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.

193. The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.

194. However, in the situation described by the present Communication, the State has not taken and does not want to take possession of the victims' property. The property has been destroyed by its military forces and armed groups, acting on their own, or believed to be supported by the Respondent State. Could it be said that the victims have been deprived of their right to property? The answer to this is yes, and this is supported by international jurisprudence.

195. In **Dogan and others v Turkey**¹⁶¹, the applicants allege that State security forces forcibly evicted them from their village, given the disturbances in the region at that time, and also destroyed their property.

196. The applicants complained to the European Court of Human Rights about their forced eviction from their homes and the Turkish authorities' refusal to allow them to return. They relied on among other provisions, Article 1 (obligation to respect human rights), Article 6 (right to a fair hearing), Article 8 (right to respect for family life and home), and, Article 1 of Protocol No. 1 (protection of property).

197. The Court also recalled that the state of emergency at the time of the events complained of was characterised by violent confrontations between the security forces and members of the PKK which forced many people to flee their homes. The Turkish authorities had also evicted the inhabitants of a number of settlements to ensure the safety of the population in the region. In numerous similar cases the Court had found that security forces had deliberately destroyed the homes and property of applicants, depriving them of their livelihoods and forcing them to leave their villages.

¹⁶⁰ See Communications 71/92 - Rencontre Africaine pour la Défense des Droits de l'Homme/Zambia, Communication 292/2004 - Institute for Human Rights and Development in Africa/Republic of Angola, and Communication 159/1996 - Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola.

¹⁶¹ Applications nos. 8803-8811/02, 8813/02 and 8815-8819/02) 29 June 2004.

198. The Court recognised that armed clashes, generalised violence and human rights violations, specifically within the context of the PKK insurgency, compelled the authorities to take extraordinary measures to maintain security in the state of emergency region. Those measures involved, among others, the restriction of access to several villages, including Boydaş, as well as the evacuation of some villages.

199. The Court noted that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ancestors or lived in houses owned by their fathers and cultivated their fathers' land. They also had unchallenged rights over the common lands in the village and earned their living from breeding livestock and tree-felling. Those economic resources and the revenue the applicants derived from them, according to the Court, qualified as "possessions" for the purposes of Article 1 of Protocol No. 1.

200. The Court found that the applicants had had to bear an individual and excessive burden which had upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions. The Court made a finding that Article 1 of Protocol No. 1 had been violated¹⁶².

201. The victims in the present Communication, have been forced out of their normal places of residence by government military forces and militia forces believed to be supported by the Respondent State. Their homes and other possessions destroyed. The African Commission recognises that the Darfur Region has been engulfed in armed conflict and there has been widespread violence resulting in serious human rights violations. It is the primary duty and responsibility of the Respondent State to establish conditions, as well as provide the means, to ensure the protection of both life and property, during peace time and in times of disturbances and armed conflicts. The Respondent State also has the responsibility to ensure that persons who are in harms way, as it seems the victims were, are resettled in safety and with dignity in another part of the country.

202. In **Akdivar and Others v. Turkey case**¹⁶³, a situation similar to the one prevailing in the Darfur, involving the destruction of housing in the context of a conflict between the government and rebel forces, the European Court of Human Rights held that the State is responsible for violations perpetrated by both its own forces and the rebel forces because it has the duty to respect and protect human rights.

203. The United Nations Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005 endorsed a set of guidelines, known as the Pinhero Principles, and recommended them to UN agencies, the international community, including States and civil society, as a guide to address the legal and technical issues concerning housing, and property restitution when the rights thereof

¹⁶² Protocol to the Convention (European) for the Protection of Human Rights and Fundamental Freedoms, UNTS, Vol 213 No I-2889.

¹⁶³ No. 21893/93, 1996-IV, no. 15.

are violated. Principle 5 addresses the right to protection from displacement. Paragraphs 5.3 and 5.4 of the Principles state the following;

“ States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of lands as a punitive measure or as a means or methods of war.

“ States shall take steps to ensure that no one is subjected to displacement by either State or non State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement”

204. The African Commission is aware that the Pinhero Principles are guidelines and do not have any force of law. They however reflect the emerging principles in international human rights jurisprudence. When these principles are read together with decisions of regional bodies, such as the cited European Court decisions, the African Commission finds great persuasive value in the said principles, albeit as a guide to interpret the right to property under Article 14 of the African Charter.

205. In the present Communication, the Respondent State has failed to show that it refrained from the eviction, or demolition of victims' houses and other property. It did not take steps to protect the victims from the constant attacks and bombings, and the rampaging attacks by the Janjaweed militia. It doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14. The Commission therefore finds the Respondent State in violation of Article 14.

Alleged violation of Article 16

206. The Complainant also alleges violation of Article 16 of the African Charter. Article 16 provides that, *'[e]very individual shall have the right to enjoy the best attainable state of physical and mental health... States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'*.

207. The Complainant submits that the Respondent State was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region.

208. In recent years, there have been considerable developments in international law with respect to the normative definition of the right to health, which includes both health care and healthy conditions. The right to health has been enshrined in numerous international and regional human rights instruments, including the African Charter.

209. In its **General Comment No. 14** on the right to health adopted in 2000, the UN Committee on Economic, Social and Cultural Rights sets out that, *'the right to*

health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and portable water, an adequate supply of safe food, nutrition, and housing...'. In terms of the General Comment, the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on States – to respect, fulfil and protect the right. In terms of the duty to protect, the State must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.

210. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. According to **General Comment 14**, *'states should also refrain from unlawfully polluting air, water and soil, ... during armed conflicts in violation of international humanitarian law... States should also ensure that third parties do not limit people's access to health-related information and services, and the failure to enact or enforce laws to prevent the pollution of water...[violates the right to health]'*.

211. In its decision on **Free Legal Assistance Group and Others v. Zaire**¹⁶⁴ the Commission held that the failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine ... constitutes a violation of Article 16.

212. In the present Communication, the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter.

Alleged violation of Article 18 (1)

213. With respect to the alleged violation of Article 18 (1), the Complainants argue that the destruction of homes and evictions of the victims constituted a violation of this sub-paragraph of Article 18. Article 18 (1) recognizes that *'[t]he family shall be the natural unit and basis of society'*. It goes further to place a positive obligation on States, stating that *'[t]he family shall be protected by the State which shall take care of its physical health and moral'*. This provision thus establishes a prohibition on arbitrary or unlawful interference with the family.

214. In its **General Comment No. 19**, the Human Rights Committee stated that *'ensuring the protection provided for under article 23 of the Covenant requires that States parties should adopt legislative, administrative or other measures...'*. Ensuring protection of the family also requires that States refrain from any action that will affect the family unit, including arbitrary separation of family members and involuntary displacement of families. In the **Dogan case**, the European Court of Human Rights also held that the refusal of access to the applicants' homes and livelihood constituted a serious and unjustified interference with the right to respect for family life and home. The Court concluded that there had been a violation of Article 8 of the European Convention, which protects the right to family, similar to Article 18 (1) of the African Charter.

¹⁶⁴

Communications 25/89, 47/90, 56/91 and 100/93.

215. In *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola*¹⁶⁵, the Commission found that massive forced expulsion [whether in peace time or war time] of population has a negative effect on the enjoyment of the right to family. In that Communication, it was alleged that between April and September 1996, the Angolan government rounded up and expelled West African nationals from its territory. These expulsions were preceded by acts of brutality committed against Senegalese, Malian, Gambian, Mauritanian and other nationals. The victims lost their belongings, and in some cases, families were separated. The African Commission held that mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations "constitute a special violation of human rights". The Commission added that "by deporting the victims, thus separating some of them from their families, the Defendant State had violated and violates Article [18 (1) of the Charter].

216. The Respondent State and its agents, the Janjaweed militia forcefully evicted the victims from their homes, some family members were killed, others fled to different places, inside and outside the territory of the Respondent State. This kind of scenario threatens the very foundation of the family and renders the enjoyment of the right to family life difficult. By not ensuring protection to the victims, thus allowing its forces or third parties to infringe on the rights of the victims, the Respondent State is held to have violated Article 18 (1) of the African Charter.

Alleged violation of Article 22

217. The Complainant alleges violation of Article 22 (1) of the Charter. Article 22 (1) provides that *'[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2). States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'*

218. The right to economic, social and cultural development envisaged in Article 22 is a collective right endowed on a people. To determine violation under this article, the Commission will first have to determine whether the victims constitute a "people" within the context of the African Charter.

219. The population in the Darfur Region, alleges the Complainant, is made up of three major tribes, namely the Zaghawa, the Fur, and the Marsalit. These tribes are described as being "people of black African origin". The Respondent State is the largest state in Africa. Part of its population is of Arab stock. A common feature shared between the people of Darfur and the population of the other parts of the Respondent State, except for Southern Sudan, is that they predominantly subscribe to the Islam religion and culture.

¹⁶⁵

Communications 159/1996.

220. By attempting to interpret the content of a “peoples’ right,” the Commission is conscious that jurisprudence in that area is still very fluid. It believes, however, that in defining the content of the peoples’ right, or the definition of “a people,” it is making a contribution to Africa’s acceptance of its diversity. An important aspect of this process of defining “a people” is the characteristics, which a particular people may use to identify themselves, through the principle of self identification, or be used by other people to identify them. These characteristics, include the language, religion, culture, the territory they occupy in a state, common history, ethno - anthropological factors, to mention but a few. In States with mixed racial composition, race becomes a determinant of groups of “peoples”, just as ethnic identity can also be a factor. In some cases groups of “a people” might be a majority or a minority in a particular State. Such criteria should only help to identify such groups or sub groups in the larger context of a States’ wholesome population.

221. It is unfortunate that Africa tends to deny the existence of the concept of a “people” because of its tragic history of racial and ethnic bigotry by the dominant racial groups during the colonial and apartheid rule. The Commission believes that racial and ethnic diversity on the continent contributes to the rich cultural diversity which is a cause for celebration. Diversity should not be seen as a source of conflict. It is in that regard that the Commission was able to articulate the rights of indigenous people and communities in Africa. Article 19 of the African Charter recognizes the right of all people to equality, to enjoy same rights, and that nothing shall justify a domination of a people by another.

222. There is a school of thought, however, which believes that the “right of a people” in Africa can be asserted only vis-à-vis external aggression, oppression or colonization. The Commission holds a different view, that the African Charter was enacted by African States to protect human and peoples’ rights of the African peoples against both external and internal abuse.

223. In this regard it protects the rights of every individual and peoples of every race, ethnicity, religion and other social origins. Articles 2 and 19 of the Charter are very explicit on that score. In addressing the violations committed against the people of Darfur, the Commission finds that the people of Darfur in their collective are “a people,” as described under Article 19. They do not deserve to be dominated by a people of another race in the same state. Their claim for equal treatment arose from the alleged underdevelopment and marginalization. The response by the Respondent State, while fighting the armed conflict, targeted the civilian population, instead of the combatants. This in a way was a form of collective punishment, which is prohibited by international law. It is in that respect that the Commission views the alleged violation of Article 22.

224. The Complainant alleged that the violations were committed by government forces, and by an Arab militia, the Janjaweed, against victims of black African tribes. The attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and pursuit of other activities. Instead of deploying its resources to address the marginalisation in the Darfur, which

was the main cause of the conflict, the Respondent State instead unleashed a punitive military campaign which constituted a massive violation of not only the economic social and cultural rights, but other individual rights of the Darfurian people. Based on the analysis hereinabove, concerning the nature and magnitude of the violations, the Commission finds that the Respondent State is in violation of Article 22 of the Africa Charter.

225. In Conclusion, the Commission would like to address the Complainant's prayer that the Commission draws the attention of the Assembly of the Africa Union to the serious and massive violations of human and peoples' rights in the Darfur, so that the Assembly may request an in-depth study of the situation. The Commission wishes to state that it undertook a fact finding mission to the Darfur *suo motu*, in July 2004. Its findings and recommendations were sent to the Respondent State and the African Union. The Commission has continued to monitor the human rights situation in the Darfur through its country and thematic rapporteurs and has presented reports on the same to each Ordinary Session of the Commission, which are in turn presented to the Assembly of the African Union.

226. The African Union has deployed its peacekeepers together with the United Nations under the UNAMID hybrid force. In the Commission view, these measures constitute what would most likely ensue, if an in-depth study were undertaken under Article 58. The request by the Complainant would have been appropriate had no action been taken by the African Commission or the organs of the African Union.

227. The African Commission concludes further that Article 1 of the African Charter imposes a general obligation on all States parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights. As such any finding of violation of those rights constitutes violation of Article 1.

228. Based on the above reasoning, the African Commission holds that the Respondent State, the Republic of The Sudan, has violated Articles 1, 4, 5, 6, 7(1), 12(1) and (2), 14, 16, 18(1) and 22 of the African Charter.

229. The African Commission recommends that the Respondent State should take all necessary and urgent measures to ensure protection of victims of human rights violations in the Darfur Region, including to:

- a. conduct effective official investigations into the abuses, committed by members of military forces, i.e. ground and air forces, armed groups and the Janjaweed militia for their role in the Darfur;
- b. undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations;
- c. take steps to prosecute those responsible for the human rights violations, including murder, rape, arson and destruction of property;
- d. take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation;

- e. rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and Refugees;
- f. establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur, resolve issues of land, grazing and water rights, including destocking of livestock;
- g. desist from adopting amnesty laws for perpetrators of human rights abuses; and
- h. consolidate and finalise pending Peace Agreements.

Adopted during the 45th Ordinary Session, held between 13 and 27 May 2009, Banjul, The Gambia.

EX.CL/600(XVII)

ANNEX VI
REPORT OF THE 8TH EXTRA-ORDINARY
SESSION OF THE ACHPR

EX.CL/600(XVII)

**REPORT OF THE 8TH EXTRAORDINARY SESSION OF THE
AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
HELD, IN BANJUL, THE GAMBIA,
22 FEBRUARY TO 3RD MARCH 2010**

28th Activity Report of the ACHPR

2010
MAKE PEACE HAPPEN

**REPORT OF THE 8TH EXTRAORDINARY SESSION OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS HELD,
IN BANJUL, THE GAMBIA, 22 FEBRUARY TO 3RD MARCH 2010**

1. The 8th Extraordinary Session of the African Commission on Human and Peoples' Rights (ACHPR) was held in Banjul, The Gambia, from the 23rd February to 3rd March, 2010.
2. The following Members were in attendance:
 - Commissioner Reine Alapini- Gansou, Chairperson
 - Commissioner Mumba Malila, Vice-Chairperson
 - Commissioner Musa Ngary Bitaye, Member;
 - Commissioner Zainabo Sylvie Kayitesi, Member;
 - Commissioner Soyata Maiga, Member;
 - Commissioner Catherine Dupe Atoki, Member;
 - Commissioner Mohamed Bechir Khalfallah, Member;
 - Commissioner Mohamed Fayek, Member;
3. The following Members did not attend the 8th Extraordinary Session:
 - Commissioner Pansy Tlakula
 - Commissioner Yeun
4. The session was chaired by Commissioner Reine Alapini-Gansou, Chairperson of the Commission.

OPENING REMARKS BY THE CHAIRPERSON

5. In her opening statement, Commissioner Reine Alapini-Gansou, Chairperson of the Commission touched on the reasons for the organisation of extraordinary sessions in the past two years. She then gave an overview of the agenda and lauded the timeliness of its items in the light of the relevant directive of 14th Assembly of Heads of State of the African Union, held from 31st January to 2nd February, 2010. The Assembly urged the ACHPR to ensure the effective execution of the budget in order to better dispatch its duties, as outlined in Article 45 of the Charter and the relevant rules of its Rules of Procedure.
6. The Chairperson opined that her colleagues and her good self are fully awake to their oath and that the Commission's accomplishments over time bear ample testimony to their commitment. However, despite the Commission's performance: 18 promotional missions fielded in 2009 and the 33 slated for 2010, she still felt there was room for improvement.
7. On the issue of extra budgetary resources, she stated that these funds would go a long way in assisting the Commission implement all the activities slated for 2010. This will also avail the Members of the Commission the opportunity to re-

establish contacts with their former partners and forge new ties and in so doing, restore the Commission to the status it enjoyed in its heydays. Such, she added was the vision outlined by the Executive Council, echoed by the Assembly of Heads of State, at its latest Summit.

ADOPTION OF THE AGENDA

8. **The agenda and the organisation of work were adopted.** Commissioner **Kayitesi Zainabo Sylvie** was designated as Rapporteur for Session.

CONSIDERATION OF THE REPORT OF THE 2ND MEETING OF THE ACHPR AND THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

9. While discussing this report, the Meeting delved into the propriety of the African Commission singlehandedly adopting the report of the joint meeting between the latter and the African Court. The Secretariat advised that the report be considered as a record of the proceedings as it would be improper for the Commission to adopt the report when the African Court was yet to do so. It was then decided that the said report be considered as a record of the proceedings, pending its adoption by the two bodies.

10. The Chairperson then reported on her audience with the President of the Court, in Addis Ababa, and informed the meeting that the next joint meeting is slated for early June 2010.

REPORT OF THE PREPARATORY MISSION OF THE 47TH SESSION TO BE HELD IN TUNIS

11. The Secretary of the Commission reported on the preparatory mission conducted by a delegation from her office from 5th to 13th February, 2010. She explained that a misunderstanding had arisen between her delegation and the Tunisian authorities, stemming from the delegation's arrival in Tunis earlier than anticipated due to flight problems: there was no flight arriving in Tunis on the 7th in time for the mission to start on the 8th as agreed. She informed the Commission that up to the delegation's departure from Tunis no agreement was signed with regard to the hosting of the 47th session.

12. After several contributions by Members of the Commission, it was decided that the issue be given priority. Commissioner Khalfallah was designated by the Commission to serve as "liaison" between the latter and the Tunisian authorities, to contact the Tunisian Authorities by telephone and to report back to the Commission. The Secretary was requested to provide all Commissioners with the documents which were discussed in Tunis and to work closely with Commissioner Khalfallah.

MEETING WITH THE DELEGATION OF THE NATIONAL HUMAN RIGHTS COMMISSION OF SIERRA LEONE.

13. The Commission received a delegation of the National Human Rights Commission of Sierra Leone, Mr. Abraham John, Executive Secretary of the Commission and Reverend Moses B. Khanu. The Delegation explained that it had come to enquire about the modus operandi of the Commission and to lay the foundation for lasting cooperation with this venerable organ responsible for the promotion and protection of human rights on the continent. The Delegation underscored the importance of an effective National Commission for the promotion and protection of human rights in a country such as Sierra Leone, what with the trying times it had gone through and the attendant consequences it is still grappling with.

14. All the Members of the African Commission presented the mechanisms under their purview and pledged to help build the capacity of the National Human Rights Commission of Sierra Leone. They commended the National Human Rights Commission of Sierra Leone for taking this initiative and urged the Delegation to apply for affiliate status before the Commission and to contact the Secretariat of the Commission for additional information on the criteria governing affiliate membership before the African Commission. The Commissioners dwelt on the cooperation between the National Human Rights Institutions and on the pivotal role of these Institutions as important partners who stand to complement the efforts of the Government in the area of promotion and protection of human rights.

CONSIDERATION OF THE RULES OF PROCEDURE OF THE AFRICAN COMMISSION

15. The Commission considered the observations on the Rules of Procedure received from State Parties, the Legal Officer of the African Union, National Human Rights Institutions and Non Governmental Organisations.

CONSIDERATION OF COMMUNICATIONS

16. The African Commission considered 6 Communications. It was seized of one Communication, adopted a decision on the Merits of one and deferred the rest of the Communications to its 47th Ordinary Session for further considerations.

RESOLUTION

17. In order to address the latest developments in Niger, the Commission adopted a resolution tabled by the Country's Special Rapporteur.

CONSIDERATION OF THE BUDGET

18. The consideration of the budget started with general discussions. The Officer responsible for administrative and financial matters gave an overview of the document submitted to the Commissioners, at the behest of the Chairperson.

19. The presentation led to fruitful discussions revolving around the promotion and protection of human rights and the respective mandates of the Commissioners under

their special mechanisms. Many questions were raised, discussed and the conclusions thereon summed up by the Chairperson.

20. On the issue of joint missions, it was decided that the practice be maintained. It was intimated that where a joint mission is partly funded through a support fund to a specific special mechanism, the balance could be supplemented by the African Union.

21. On promotion missions in general, it was concluded that such missions should be conducted as agreed.

22. Regarding the recruitment of new members of staff, the Commission agreed that the Secretariat should keep the Members abreast with all steps taken to recruit new members of staff. The Secretariat was advised to contact all partners in order to settle matters relating to their assistance to special mechanisms.

23. On technical assistance, internships and other forms of assistance, Commissioners were reminded that the Commission has a policy on the recruitment of interns and that partners such as the University of Pretoria have signed a permanent agreement with the Secretariat to provide the latter with one intern for a one year period. The Secretariat was therefore requested to draft a similar agreement to be signed with all partners who are amenable to assisting the Commission and the Special Mechanisms.

CONSIDERATION OF THE BUDGET- LINE BY LINE

24. The Commission considered the budget, line by line. Thus it was clarified that official missions should be understood as missions of the Bureau, (Chairperson and Vice-Chairperson), where the latter cannot conduct the mission, other Commissioners can stand in for them. It was further underscored that contrary to official missions which can be funded from the Commission's budget, those of the Special Mechanisms are generally financed by partners who invite the Commissioners concerned.

25. On the question of how the funds earmarked for the mission are used, it was suggested that the Bureau, in collaboration with the Secretariat, proposes to the Commission a plan for the use of such funds.

26. After discussing the issue, it was agreed that since the principle of official missions is agreeable, the Secretariat should consult with the Bureau whenever an invitation is sent to the Commission. It was further intimated that since a theme is chosen for discussion at the respective African Union Summit every six months, Commissioners could be selected to participate on the basis of the relevance of theme to their mandate. It was also agreed that the themes of the meetings of the Human Rights Council should also help in determining the list of Commissioners for any given meeting.

27. Commissioner Maiga reminded the meeting that all AU Summits are preceded by a Gender pre-summit and proposed that the Special Rapporteur be part of the official mission. On this point, the Chairperson concluded that since the Gender Department has a Fund, it would be advisable that the Secretary contacts this Department to request for funding for the Special Rapporteur.

28. In conclusion, it was agreed that for all Summits and meetings of the Human Rights Council, official delegations should comprise of members of the Bureau and a Commissioner whose work is relevant to the theme figuring on the Summit's agenda. The participation of a member of the Budget Committee would be governed by the fact that Budget figures on the agenda or otherwise.

29. The question arose as to who heads a delegation during a promotional mission where the Chairperson of the Commission is part of the delegation. All the Commissioners agreed that protocol demands that the Chairperson be automatically considered as head of the mission, however the Commissioner responsible for the country where the mission is being fielded should be in the forefront during discussions.

30. On the priority activities for 2010, the following were identified:

- Death penalty, Robben Island,
- Women,
- Refugees (for this theme, it was decided to check whether Mauretania could host with meeting),
- Older Persons,
- Prisons and detention,
- Freedom of expression,
- Seminar on Human Rights Education,
- Consultative meeting (PRC),
- Consultative meeting (Ministers responsible for human rights).

31. Regarding the funds from Norway, the issue of the approval of additional funds being contingent on the receipt of an audit report was raised and it was agreed that a letter be sent to Norway requesting permission to fund the audit from the remaining fund.

32. Within the framework of follow-up missions on the Budget, it was decided that Commissioners could accompany the Secretariat.

33. Commissioners were informed that they were all invited to the Seminar on Communications procedures, to be held Kenya.

34. The Commission requested the Secretariat to review the capacity building programme for Commissioners to enable them carry out their duties efficiently.

35. On the auditing of funds provided by partners, the Secretariat was requested to incorporate a provision in the agreement for the audit to be funded from the funds.

CONSIDERATION OF COMMISSIONER'S HONORARIUMS

36. The Chairperson informed the Commission that the request submitted to the African Union for the revision of the honorarium of the Commissioners was not considered during the 14th Summit of the African Union in Addis Ababa, Ethiopia because it reached the desk of the Human Resources Officer of the Chairperson of the African Union tardily. New Commissioners were briefed on the circumstances leading to the request.

37. After extensive discussions among the Members of the Commission and clarifications from the Secretariat, it was unanimously agreed that the original request be revised and a fresh request be conveyed to the AU Commission taking into consideration the honorarium and other benefits enjoyed by Members of other organs of the Union, such as the African Court on Human and Peoples' Rights. To this end, it was decided that the Budget Committee be convened on 2nd March at 8 o'clock in the morning to discuss and prepare a new request to be tabled before the Commission for approval.

ADOPTION OF THE REPORT OF THE 46TH ORDINARY SESSION

38. The commission considered and adopted the report of the 46th Ordinary Session.

ANY OTHER BUSINESS

39. Under any other business, the questions of Commissioner's honorariums, translation of documents into Arabic, the March meetings in Banjul, were raised and discussed.

EX.CL/600(XVII)

ANNEX VII:

**PROPOSAL ON HONORARIUM AND ALLOWANCES OF THE MEMBERS
OF THE ACHPR PURSUANT TO ASSEMBLY DECISION
Assembly/AU/Dec.200 (XI) AND EXECUTIVE COUNCIL DECISIONS Dec.
EX.CL/529 (XV) AND Dec. EC.CL/575 (XVI)**

**PROPOSAL ON HONORARIUM AND ALLOWANCES OF THE MEMBERS OF
THE ACHPR PURSUANT TO ASSEMBLY DECISION Assembly/AU/Dec.200 (XI)
AND EXECUTIVE COUNCIL DECISIONS Dec. EX.CL/529 (XV) AND Dec.
EC.CL/575 (XVI).**

INTRODUCTION

1. The African Commission on Human and Peoples' Rights (the African Commission or ACHPR) is an organ of the African Union established in 1987 by the erstwhile Organisation of African Unity, to promote and protect human and peoples' rights in Africa. In terms of Article 31(1) of the African Charter on Human and Peoples' Rights (the African Charter), the African Commission is composed of eleven African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights. The members serve part time and in their personal capacity.

2. For over two decades of its existence, the majority of members of the ACHPR have been Legal Practitioners. In the discharge of the promotion and protection mandate of the Commission, they attend the Ordinary and Extraordinary sessions. During the intersession, they spend considerable time conducting missions, attending meetings and performing other duties as the exigency of the human rights situation demands.

3. It is important to note that the African Commission has a quasi judicial mandate by virtue of which it receives and considers complaints/communications from States, NGOs and individuals alleging violations of the rights guaranteed in the African Charter. The members of the Commission examine, undertake research and draft decisions on these complaints during intersession, which are thereafter adopted during the session. This function is similar to the judicial function performed by the African Court.

4. The time Commissioners spend in the work of the African Commission has continued to increase, and presently is estimated at about 181 days, an equivalent of about 6 months in a year.¹⁶⁶ This increase is due to a number of factors and challenges related to recent human rights developments on the continent, including *inter alia*:

- i. increased awareness by African populations about their fundamental rights,
- ii. the establishment of the African Court on Human and Peoples' Rights, and the complementary role envisaged for the ACHPR,
- iii. the need for the African Commission to increasingly discharge its promotion and protection mandate, to meet the requirements arising from the creation of special mechanisms,
- iv. the need to carry out investigation and fact- finding missions,

¹⁶⁶ Please see attached average compilation for number of days per annum spent by a member of the ACHPR on Commission work.

- v. increased nature of work and demand on the time of the members of the Commission by human rights actors.

5. Since the establishment of the African Union in 2002, similar Organs with human rights mandate have been established and their emoluments have been fixed taken into consideration the nature of human rights work and the evolving socio-economic circumstances. However, the emoluments for members of the ACHPR have remained unchanged for over seven years.

6. Duly taking into account this situation, the AU Assembly, at its Eleventh Ordinary Session held in Sharm El Sheikh, Egypt in July 2008, via its decision **Assembly/AU/Dec.200 (XI)**, requested the ACHPR to prepare proposals on honorarium, per-diem and allowances for its members for consideration by AU Policy Organs. At its Fifteenth Ordinary Session held in Sirte, Libya in July 2009, the Executive Council in **Dec. EX.CL/529 (XV)** requested the African Union Commission, in consultation with the Permanent Representatives Committee, to review the honorarium, per diem and allowances of members of the ACHPR in accordance with the Financial Rules and Regulations of the African Union.

7. In its recent decision **Dec EC.CL/575 (XVI)** taken at the Sixteenth Ordinary Session of the Executive Council held in Addis Ababa, Ethiopia in January 2010, the Council reiterated the need for the African Union Commission, in consultation with the Permanent Representatives Committee to review the honorarium, per diem and allowances of members of the ACHPR in accordance with the Financial Rules and Regulations of the African Union.

8. The African Commission therefore calls on the African Union Commission and the Permanent Representative Council to take urgent measures to implement the decision of the Assembly, reiterated by two decisions of Executive Council.

9. The African Commission further submits that it will be fair and equitable that this decision be implemented in conformity with the emoluments of other AU Organs with similar mandate, and in addition be made effective to January 2010, in view of the fact that the decision to review the honorarium and allowances of members of the ACHPR was taken since 2008.

ITEMS TO CONSIDER

i. HONORARIUM

10. ACHPR members have been paid a flat rate of US\$2,500 (two thousand five hundred Dollars), when they attend Ordinary as well as Extraordinary Sessions. This rate has been in place since 2003.

RECOMMENDATION

11. The Commission recommends that the Honorarium be calculated per day, at the rate of \$500.00 (Five hundred US Dollars) per sitting for Ordinary as well as

Extraordinary Sessions, knowing that their accommodation during that period is provided by the Commission.

ii ALLOWANCES:

12. Currently, when members of the ACHPR undertake promotion or protection missions, they are paid just per diem for their travel. This rate is inadequate to meet the high cost of living in most African countries and compensate for the loss that this may occasion.

13. Members of the ACHPR are also paid USD1, 500.00 (one thousand, five hundred Dollars) per annum, to offset administrative expenses incurred during the intersession. This amount does not meet the expenses of Members of the African Commission when doing the Commission's work.

RECOMMENDATION

14. The African Commission recommends that apart from the accommodation fees, members of the ACHPR should be paid \$500 per day when they are on promotion and protection missions.

15. The African Commission recommends further that during the intersession period, a monthly allowance be paid to its members to cover for administrative and other expenses.

iii THE BUREAU OF THE COMMISSION

16. The Bureau of the Commission is composed of the Chairperson and the Vice Chairperson. Apart from the normal functions they perform as members of the Commission, they also undertake additional responsibilities during the intersession, such as engaging with relevant stakeholders, including African leaders to deal with human rights problems, taking measures to intervene in urgent human rights situations, follow-up on the implementation of the recommendations of the African Commission, etc. In that regard, The African Commission recommends that the allowances for members of the Bureau be increased to enable them effectively execute their functions.

RECOMMENDATIONS

The ACHPR recommends that:

- i. measures be taken as soon as possible to approve the new rate of allowances for ACHPR Commissioners;
- ii. the new approved rate be effective from January 2010; and
- iii. the allowances of members of the Bureau be increased to enable them function effectively.

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