

**UNITED NATIONS
HUMAN RIGHTS
TREATY BODIES**



MAURITIUS

Aumeeruddy-Cziffra and Others v Mauritius

(2000) AHRLR 3 (HRC 1981)

Communication 35/1978

Decided at the 12th session, 9 April 1981, CCPR/C/12/D/35/1978

Equality, non-discrimination (discrimination on the grounds of sex, 9)

Locus standi (9.1, 9.2)

Family (interference with, 9.2)

1.1. The authors of this communication (initial letter dated 2 May 1978 and a further letter dated 19 March 1980) are 20 Mauritian women, who have requested that their identity should not be disclosed to the state party. They claim that the enactment of the Immigration (Amendment) Act, 1977 and the Deportation (Amendment) Act, 1977 by Mauritius constitutes discrimination based on sex against Mauritian women, violation of the right to found a family and home, and removal of the protection of the courts of law, in breach of articles 2, 3, 4, 17, 23, 25 and 26 of the International Covenant on Civil and Political Rights. The authors claim to be victims of the alleged violations. They submit that all domestic remedies have been exhausted.

1.2. The authors state that prior to the enactment of the laws in question, alien men and women married to Mauritian nationals enjoyed the same residence status, that is to say, by virtue of their marriage, foreign spouses of both sexes had the right, protected by law, to reside in the country with their Mauritian husbands or wives. The authors contend that, under the new laws, alien husbands of Mauritian women have lost their residence status in Mauritius and must now apply for a 'residence permit', which may be refused or removed at any time by the Minister of Interior. The new laws, however, do not affect the status of alien women married to Mauritian husbands who retain their legal right to residence in the country. The authors further contend that under the new laws alien husbands of Mauritian women may be deported under a ministerial order which is not subject to judicial review.

2. On 27 October 1978, the Human Rights Committee decided to transmit the communication to the state party, under rule 91 of the provisional Rules of Procedure, requesting information and observations relevant to the question of admissibility.

3. The state party, in its reply of 17 January 1979, informed the Committee that it had no objection to formulate against the admissibility of the communication.

4. On 24 April 1979, the Human Rights Committee, (a) Concluding that the communication, as presented by the authors, should be declared admissible; (b) Considering, however, that it might review this decision in the light of all the information which would be before it when it considered the communication on the merits; Therefore decided: (a) That the communication was admissible; (b) That in accordance with article 4(2) of the Optional Protocol, the state party be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements on the substance of the matter under consideration; (c) That the state party be requested, in this connection, to transmit copies of any relevant legislation and any relevant judicial decisions.

5.1. In its submission dated 17 December 1979, the state party explains the laws of Mauritius on the acquisition of citizenship and, in particular on the naturalisation of aliens. The state party further elaborates on the deportation laws, including a historical synopsis of these laws. It is admitted that it was the effect of the Immigration (Amendment) Act, 1977 and of the Deportation (Amendment) Act, 1977 to limit the right of free access to Mauritius and immunity from deportation to the wives of Mauritian citizens only, whereas this right had previously been enjoyed by all spouses of citizens of Mauritius irrespective of their sex. Both acts were passed following certain events in connection with which some foreigners (spouses of Mauritian women) were suspected of subversive activities. The state party claims, however, that the authors of the communication do not allege that any particular individual has in fact been the victim of any specific act in breach of the provisions of the Covenant. The state party claims that the communication is aimed at obtaining a declaration by the Human Rights Committee that the Deportation Act and the Immigration Act, as amended, are capable of being administered in a discriminatory manner in violation of articles 2, 3, 4, 17, 23, 25 and 26 of the Covenant.

5.2. The state party admits that the two statutes in question do not guarantee similar rights of access to residence in Mauritius to all foreigners who have married Mauritian nationals, and it is stated that the 'discrimination', if there is any, is based on the sex of the spouse. The state party further admits that foreign husbands of Mauritian citizens no longer have the right to free access to Mauritius and immunity from deportation therefrom, whereas prior to 12 April 1977, this group of persons had the right to be considered, *de facto*, as residents of Mauritius. They now must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law.

5.3. The state party, however, considers that this situation does not amount to a violation of the provisions of the Covenant which — in the

state party's view — does not guarantee a general right to enter, to reside in and not to be expelled from a particular country or a certain part of it and that the exclusion or restriction upon entry or residence of some individuals and not others cannot constitute discrimination in respect of a right or freedom guaranteed by the Covenant. The State party concludes that if the right 'to enter, reside in and not to be expelled from' Mauritius is not one guaranteed by the Covenant, the authors cannot claim that there has been any violation of articles 2(1), 2(2), 3, 4 or 26 of the Covenant on the grounds that admission to Mauritius may be denied to the authors' husbands or prospective husbands or that these husbands or prospective husbands may be expelled from Mauritius, and that such exclusion of their husbands or prospective husbands may be an interference in their private and family life.

5.4. As far as the allegation of a violation of article 25 of the Covenant is concerned, the state party argues that if a citizen of Mauritius chooses to go and live abroad with her husband because the latter is not entitled to stay in Mauritius, she cannot be heard to say that she is thus denied the right to take part in the conduct of public affairs and to have access on general terms of equality to public service in her country. The state party claims that nothing in the law prevents the woman, as such, from exercising the rights guaranteed by article 25, although she may not be in a position to exercise the said rights as a consequence of her marriage and of her decision to live with her husband abroad. The state party mentions, as an example of a woman who has married a foreign husband and who is still playing a prominent role in the conduct of public affairs in Mauritius, the case of Mrs Aumeeruddy-Cziffra, one of the leading figures of the *Mouvement Militant Mauricien* opposition party.

5.5. The state party further argues that nothing in the laws of Mauritius denies any citizen the right to marry whomever he may choose and to found a family. Any violation of articles 17 and 23 is denied by the state party which argues that this allegation is based on the assumption that 'husband and wife are given the right to reside together in their own countries and that this right of residence should be secure'. The state party reiterates that the right to stay in Mauritius is not one of the rights guaranteed by the provisions of the Covenant, but it admits that the exclusion of a person from a country where close members of his family are living can amount to an infringement of the person's right under article 17 of the Covenant, ie that no one should be subjected to arbitrary and unlawful interference with his family. The state party argues, however, that each case must be decided on its own merits.

5.6. The state party recalls that the Mauritian Constitution guarantees to every person the right to leave the country, and that the foreign husband of a Mauritian citizen may apply for a residence permit or even naturalisation.

5.7. The state party is of the opinion that if the exclusion of a non-citizen is

lawful (the right to stay in a country not being one of the rights guaranteed by the provisions of the Covenant), then such an exclusion (based on grounds of security or public interest) cannot be said to be an arbitrary or unlawful interference with the family life of its nationals in breach of article 17 of the Covenant.

6.1. In their additional information and observations dated 19 March 1980, the authors argue that the two acts in question (Immigration (Amendment) Act, 1977 and Deportation (Amendment) Act, 1977) are discriminatory in themselves in that the equal rights of women are no longer guaranteed. The authors emphasise that they are not so much concerned with the unequal status of the spouses of Mauritian citizens — to which the state party seems to refer — but they allege that Mauritian women who marry foreigners are themselves discriminated against on the basis of sex, and they add that the application of the laws in question may amount to discrimination based on other factors such as race or political opinions. The authors further state that they do not claim ‘immunity from deportation’ for foreign husbands of Mauritian women but they object that the Deportation (Amendment) Act, 1977 gives the Minister of the Interior an absolute discretion in the matter. They argue that, according to article 13 of the Covenant, the alien who is lawfully in the country has the right not to be arbitrarily expelled and that, therefore, a new law should not deprive him of his right of hearing.

6.2. As has been stated, the authors maintain that they are not concerned primarily with the rights of non-citizens (foreign husbands) but of Mauritian citizens (wives). They allege: (a) That female citizens do not have an unrestricted right to married life in their country if they marry a foreigner, whereas male citizens have an unrestricted right to do so; (b) That the law, being retroactive, had the effect of withdrawing from the female citizens the opportunity to take part in public life and restricted, in particular, the right of one of the authors in this respect; (c) That the ‘choice’ to join the foreign spouse abroad is only imposed on Mauritian women and that only they are under an obligation to ‘choose’ between exercising their political rights guaranteed under article 25 of the Covenant, or to live with their foreign husbands abroad; (d) That the female citizen concerned may not be able to leave Mauritius and join her husband in his country of origin for innumerable reasons (health, long-term contracts of work, political mandate, incapacity to stay in the husband’s country of origin because of racial problems, as, for example, in South Africa); (e) That by rendering the right of residence of foreign husbands insecure, the state party is tampering with the female citizens’ right to freely marry whom they choose and to found a family.

The authors do not contest that a foreign husband may apply for a residence permit, as the state party has pointed out in its submission; but they maintain that foreign husbands should be granted the rights to residence and naturalisation. The authors allege that in many cases foreign husbands

have applied in vain for both and they claim that such a decision amounts to an arbitrary and unlawful interference by the state party with the family life of its female citizens in breach of article 17 of the Covenant, as the decision is placed in the hands of the Minister of the Interior and not of a court of law, and as no appeal against this decision is possible.

6.3. The authors enclose as an annex to their submission a statement by one of the co-authors, Mrs Shirin Aumeeruddy-Cziffra, to whose case the state party had referred (see paragraph 5(4) above). She states *inter alia* that on 21 April 1977, in accordance with the new laws, her foreign husband applied for a residence permit and later for naturalisation. She alleges that during 1977 her husband was twice granted a one-month visa and that an application for a temporary work permit was refused. She states that when returning to Mauritius, after a one-week stay abroad, her husband was allowed to enter the country on 24 October 1978 without question and that he has been staying there since without a residence or work permit. She remarks that her husband is slowly and gradually giving up all hope of ever being naturalised or obtaining a residence permit. The author, an elected member of the legislative assembly, points out that this situation is a cause of frustration for herself and she alleges that the insecurity has been deliberately created by the government to force her to abandon politics in view of the forthcoming elections in December 1981. She stresses that she does not want to leave Mauritius, but that she intends, after the expiry of her present mandate, to be again a candidate for her party.

7. The Human Rights Committee bases its view on the following facts, which are not in dispute: Up to 1977, spouses (husbands and wives) of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. They had the right to be considered *de facto* as residents of Mauritius. The coming into force of the Immigration (Amendment) Act, 1977 and of the Deportation (Amendment) Act, 1977 limited these rights to the wives of Mauritius citizens only. Foreign husbands must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law. Seventeen of the co-authors are unmarried. Three of the co-authors were married to foreign husbands when, owing to the coming into force of the Immigration (Amendment) Act, 1977 their husbands lost the residence status in Mauritius which they had enjoyed before. Their further residence together with their spouses in Mauritius is based under the statute on a limited, temporary residence permit to be issued in accordance with section 9 of the Immigration (Amendment) Act, 1977. This residence permit is subject to specified conditions which might at any time be varied or cancelled by a decision of the Minister of the Interior, against which no remedy is available. In addition, the Deportation (Amendment) Act, 1977 subjects foreign husbands to a permanent risk of being deported from Mauritius. In the case of Mrs Aumeeruddy-Cziffra, one of the three married co-authors, more than three years have elapsed

since her husband applied to the Mauritian authorities for a residence permit, but so far no formal decision has been taken. If her husband's application were to receive a negative decision, she would be obliged to choose between either living with her husband abroad and giving up her political career, or living separated from her husband in Mauritius and there continuing to participate in the conduct of public affairs of that country.

8.1. The Committee has to consider, in the light of these facts, whether any of the rights set forth in the Covenant on Civil and Political Rights have been violated with respect to the authors by Mauritius when enacting and applying the two statutes in question. The Committee has to decide whether these two statutes, by subjecting only the foreign husband of a Mauritian woman — but not the foreign wife of a Mauritian man — to the obligation to apply for a residence permit in order to enjoy the same rights as before the enactment of the statutes, and by subjecting only the foreign husband to the possibility of deportation, violate any of the rights set forth under the Covenant, and whether the authors of the communication may claim to be victims of such a violation.

8.2. Pursuant to article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee only has a mandate to consider communications concerning individuals who are alleged to be themselves victims of a violation of any of the rights set forth in the Covenant.

9.1. The Human Rights Committee bases its views on the following considerations: In the first place, a distinction has to be made between the different groups of the authors of the present communication. A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility.

9.2(a). In this respect the Committee notes that in the case of the 17 unmarried co-authors there is no question of actual interference with, or failure to ensure equal protection by the law to any family. Furthermore there is no evidence that any of them is actually facing a personal risk of being thus affected in the enjoyment of this or any other rights set forth in the Covenant by the laws complained against. In particular it cannot be said that their right to marry under article 23(2) or the right to equality of spouses under article 23(4) is affected by such laws. The Committee will next examine that part of the communication which relates to the effect of the laws of 1977 on the family life of the three married women. The Committee notes that several provisions of the Covenant are applicable

in this respect. For reasons which will appear below, there is no doubt that they are actually affected by these laws, even in the absence of any individual measure of implementation (for instance, by way of a denial of residence, or an order of deportation, concerning one of the husbands). Their claim to be 'victims' within the meaning of the Optional Protocol has to be examined.

9.2(b)1(i)1. First, their relationships to their husbands clearly belong to the area of 'family' as used in article 17 (1) of the Covenant. They are therefore protected against what that article calls 'arbitrary or unlawful interference' in this area.

9.2(b)2(i)2. The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the state party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17(1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either 'arbitrary or unlawful' as stated in article 17(1), or conflicts in any other way with the state party's obligations under the Covenant.

9.2(b)2(i)3. In the present cases, not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the state party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius. Moreover, as described above (paragraph 7(4)) in one of the cases, even the delay for years and the absence of a positive decision granting a residence permit must be seen as a considerable inconvenience, among other reasons because the granting of a work permit, and hence the possibility of the husband to contribute to supporting the family, depends on the residence permit, and because deportation without judicial review is possible at any time.

9.2(b)2(i)4. Since, however, this situation results from the legislation itself, there can be no question of regarding this interference as 'unlawful' within the meaning of article 17(1) in the present cases. It remains to be considered whether it is 'arbitrary' or conflicts in any other way with the Covenant.

9.2(b)2(i)5. The protection owed to individuals in this respect is subject to the principle of equal treatment of the sexes which follows from several provisions of the Covenant. It is an obligation of the State parties under article 2(1) generally to respect and ensure the rights of the Covenant

‘without distinction of any kind, such as . . . sex’, and more particularly under article 3 ‘to ensure the equal right of men and women to the enjoyment’ of all these rights, as well as under article 26 to provide ‘without any discrimination’ for ‘the equal protection of the law’.

9.2(b)2(i)6. The authors who are married to foreign nationals are suffering from the adverse consequences of the statutes discussed above only because they are women. The precarious residence status of their husbands, affecting their family life as described, results from the 1977 laws which do not apply the same measures of control to foreign wives. In this connection the Committee has noted that under section 16 of the Constitution of Mauritius sex is not one of the grounds on which discrimination is prohibited.

9.2(b)2(i)7. In these circumstances, it is not necessary for the Committee to decide in the present cases how far such or other restrictions on the residence of foreign spouses might conflict with the Covenant if applied without discrimination of any kind.

9.2(b)2(i)8. The Committee considers that it is also unnecessary to say whether the existing discrimination should be called an ‘arbitrary’ interference with the family within the meaning of article 17. Whether or not the particular interference could as such be justified if it were applied without discrimination does not matter here. Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the grounds of sex. Whether the restriction in itself would be in breach of that right regarded in isolation is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination. Here it is sufficient, therefore, to note that in the present position an adverse distinction based on sex is made, affecting the alleged victims in their enjoyment of one of their rights. No sufficient justification for this difference has been given. The Committee must then find that there is a violation of articles 2(1) and 3 of the Covenant, in conjunction with article 17(1).

9.2(b)2(ii)1. At the same time each of the couples concerned constitutes also a ‘family’ within the meaning of article 23(1) of the Covenant, in one case at least — that of Mrs Aumeeruddy-Cziffra — also with a child. They are therefore as such ‘entitled to protection by society and the state’ as required by that article, which does not further describe that protection. The Committee is of the opinion that the legal protection or measures a society or a state can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions.

9.2(b)2(ii)2. Again, however, the principle of equal treatment of the sexes applies by virtue of articles 2(1), 3 and 26, of which the latter is also relevant because it refers particularly to the ‘equal protection of the law’. Where the Covenant requires a substantial protection as in article

23, it follows from these provisions that such protection must be equal, that is to say not discriminatory, for example on the basis of sex.

9.2(b)2(ii)3. It follows that also in this line of argument the Covenant must lead to the result that the protection of a family cannot vary with the sex of the one or the other spouse. Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.

9.2(b)2(ii)4. The Committee therefore finds that there is also a violation of articles 2(1), 3 and 26 of the Covenant in conjunction with the right of the three married co-authors under article 23(1).

9.2(c)1. It remains to consider the allegation of a violation of article 25 of the Covenant, which provides that every citizen shall have the right and the opportunity without any of the distinctions mentioned in article 2 (*inter alia* as to sex) and without unreasonable restrictions to take part in the conduct of public affairs, as further described in this article. The Committee is not called upon in this case to examine any restrictions on a citizen's right under article 25. Rather, the question is whether the opportunity also referred to there, ie a *de facto* possibility of exercising this right, is affected contrary to the Covenant.

9.2(c)2. The Committee considers that restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, ie deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of article 25 or to the provisions of the Covenant against discrimination, for example if such interference with opportunity should infringe the principle of sexual equality.

9.2(c)3. However, there is no information before the Committee to the effect that any of this has actually happened in the present cases. As regards Mrs Aumeeruddy-Cziffra, who is actively participating in political life as an elected member of the legislative assembly of Mauritius, she has neither in fact nor in law been prevented from doing so. It is true that on the hypothesis that if she were to leave the country as a result of interference with her family situation, she might lose this opportunity as well as other benefits which are in fact connected with residence in the country. The relevant aspects of such interference with a family situation have already been considered, however, in connection with article 17 and related provisions above. The hypothetical side-effects just suggested do not warrant any finding of a separate violation of article 25 at the present stage, where no particular element requiring additional consideration under that article seems to be present.

10.1. Accordingly, the Human Rights Committee acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts, as outlined in paragraph 7 above, disclose violations of the Covenant, in particular of articles 2(1), 3 and 26 in relation to articles 17(1) and 23(1) with respect to the three co-authors who are married to foreign husbands, because the coming into force of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, resulted in discrimination against them on the grounds of sex.

10.2. The Committee further is of the view that there has not been any violation of the Covenant in respect of the other provisions invoked.

10.3. For the reasons given above, in paragraph 9(a), the Committee finds that the 17 unmarried co-authors cannot presently claim to be victims of any breach of their rights under the Covenant.

11. The Committee, accordingly, is of the view that the state party should adjust the provisions of the Immigration (Amendment) Act, 1977 and of the Deportation (Amendment) Act, 1977 in order to implement its obligations under the Covenant, and should provide immediate remedies for the victims of the violations found above.

**AFRICAN COMMISSION
ON HUMAN AND PEOPLES'
RIGHTS**



ALGERIA

Mohamad v Algeria

(2000) AHRLR 15 (ACHPR 1994)

Communication 13/88, *Hadjali Mohamad v Algeria*
7th Annual Activity Report

Admissibility (compatibility with the Charter, 3)

- [1.] Communication about slow judicial process but no specific breaches.
- [2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;
- [3.] Considering that the communication does not state the complaints directed against the state concerned or the human rights violations suffered by the author of the communication or the procedures engendered by such violations;
- [4.] Declares the communication inadmissible.

* * *

Centre for Independence of Judges and Lawyers v Algeria

(2000) AHRLR 15 (ACHPR 1994)

Communication 104/93, *Centre for Independence of Judges and Lawyers v Algeria*
7th Annual Activity Report
(See also *Centre for Independence of Judges and Lawyers v Algeria* (ACHPR 1995), below)

Admissibility (compatibility with the Charter, 2)

- [1.] Communication on the general political situation in Algeria.

Final decision

[2.] This communication provides general information to the Commission and deals with no specific breaches of the Charter. The file is closed accordingly.

* * *

Centre for the Independence of Judges and Lawyers v Algeria

(2000) AHRLR 16 (ACHPR 1995)

Communications 104/93, 109-126/93, *Centre for the Independence of Judges and Lawyers v Algeria and Others*
8th Annual Activity Report
(See also *Centre for Independence of Judges and Lawyers v Algeria* (ACHPR 1994), above)

Admissibility (compatibility with the Charter, 5)
Locus standi (6)

The facts

1. The communication is in the form of a report published by the Centre for the Independence of Judges and Lawyers (CIJL) of Geneva, Switzerland. It describes harassment and persecution of judges and lawyers in 53 different countries including 18 of the African countries party to the African Charter. The harassment and persecution described include murder, torture, intimidation and threats of all kinds. The report describes special features of court systems, such as military courts and special tribunals.

Complaint

2. The communication does not specify which of the facts it contains it regards as violations. Neither does it specify any sought remedy.

The law

3. Article 56 of the African Charter reads: 'Communications . . . shall be considered if they: (1) Indicate their authors even if the latter request anonymity. . .'

4. Rule 114(3) of the Rules of Procedure of the African Commission on Human and Peoples' Rights of 1988 reads:

In order to decide on the admissibility of a communication . . . the Commission shall ensure: . . . (b) That the author alleges to be a victim of a violation . . . that the communication is submitted in the name of an individual who is a victim (or individuals who are victims) who is unable to submit a communication or to authorise it to be done.

5. The reason for these provisions is that the Commission must receive communications with adequate information with a certain degree of specificity concerning the victims.

6. The present report submitted by the CIJL does not give specific places, dates, and times of alleged incidents sufficient to permit the Commission to intervene or investigate. In some cases, incidents are cited without giving the names of the aggrieved parties. There are numerous references to 'anonymous' lawyers and judges. Thus, in this case the author is not an alleged victim, nor is the communication submitted in the name of a specific victim, nor does the complainant allege grave and massive violations. The information in the communication is insufficient to permit the Commission to take action.

For the above reasons, the African Commission:

[7.] Declares the communications inadmissible.

ANGOLA

Union Interafricaine des Droits de l'Homme and Others v Angola

(2000) AHRLR 18 (ACHPR 1997)

Communication 159/96, *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v Angola*

Decided at the 22nd ordinary session, Nov 1997, 11th Annual Activity Report

Admissibility (exhaustion of local remedies, mass expulsion, 11-12)

Expulsion (mass expulsion, 14-17)

Property, education, work, family (consequences of expulsion, 17)

Equality, non-discrimination (discrimination on the grounds of origin, 18)

Fair trial (right to be heard — no possibility to challenge expulsion in courts, 19)

Interpretation (international law, 20)

The facts

1. The communication is jointly filed by *Union Interafricaine des Droits de l'Homme* (UIDH), *Fédération Internationale des Ligues des Droits de l'Homme* (FIDH), *Rencontre Africaine des Droits de l'Homme* (RADDHO), *Organisation Nationale des Droits de l'Homme au Sénégal* (ONDH) and *Association Malienne des Droits de l'Homme v Angola* (AMDH). All these NGOs are acting in this case on behalf of certain West African nationals expelled from Angola in 1996. According to the complainants, between April and September 1996, the Angolan government rounded up and expelled West African nationals on its territory. These illegal expulsions were preceded by acts of brutality committed against Senegalese, Malian, Gambian, Mauritanian and other nationals. Those affected lost their belongings in the process.

2. The complainants maintain that the Angolan state violated the provisions of articles 2, 7(1)(a), 12(4) and (5) of the African Charter on Human and Peoples' Rights.

Procedure

3. The communication is not dated, but it was received during the 20th session of the Commission, held in Grand Bay, Mauritius in October, 1996.
4. On 24 October 1996 the Secretariat acknowledged receipt of the communication.
5. On 19 December 1996 the Secretariat notified the Angolan government of the communication.
6. During its 21st session in Nouakchott (Mauritania) in April 1997, the Commission declared the communication admissible.
7. The government and the complainants were informed of this decision on 23 June 1997.
8. At the 22nd session in November 1997, the Commission ruled on the merits of the case.

Law

Admissibility

9. The Commission considered the issue of admissibility of this communication on the basis of information furnished by the complainants. It deplores the fact that the defendant state did not respond to the notification sent to it on 19 December 1996, following the decision of the seizure of the Commission.
10. Article 57 of the Charter implicitly indicates that the state party to the said Charter against which allegation of human rights violations are levelled is required to consider them in good faith and to furnish the Commission with all information at its disposal to enable the latter to come to an equitable decision. In this case, in view of the defendant state's refusal to co-operate with the Commission, the latter can only give more weight to the accusations made by the complainants and this on the basis of the evidence furnished by them.
11. The evidence shows that between April and September 1996, the government of the Republic of Angola embarked on the mass expulsion of aliens from its territory, and that these expulsions were illegal and arbitrary, and in violation of article 12(4) and (5) of the African Charter on Human and Peoples' Rights.
12. According to information at the disposal of the Commission, it appears that those expelled were not able to challenge their expulsion in court. In communication 71/92 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [paragraph 15], the Commission was of the view that:

The mass nature of the arrests, the fact that victims were kept in detention prior to their expulsion, and the speed with which the expulsions were carried out gave the complainants no opportunity to establish the illegality of these actions in the courts.

In view of the foregoing, the Commission notes that local remedies were not accessible to the complainants.

13. On these grounds, the Commission declared the communication admissible.

Merits

14. Article 12(4) stipulates 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. Paragraph 5 of the same article stipulates that: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

15. In communication 71/92, cited here above, the Commission [in paragraph 20] indicated that 'mass expulsion presented a special threat to human rights'. A government action specially directed at specific national, racial, ethnic or religious groups is generally qualified as discriminatory in the sense that none of its characteristics has any legal basis or could constitute a source of particular incapacity.

16. The Commission concedes that African states in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, states often resort to radical measures aimed at protecting their nationals and their economy from non-nationals. Whatever the circumstances may be, however, such measures should not be taken to the detriment of the enjoyment of human rights. 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'.

17. This type of deportations calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (article 14), the right to work (article 15), the right to education (article 17(1)) and results in the violation by the state of its obligations under article 18(1) which stipulates that 'the family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.' By deporting the victims, thus separating some of them from their families, the defendant state has violated and violates the letter of this text.

18. Article 2 of the Charter emphatically stipulates 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 other status.

This text obligates states parties to ensure that persons living on their territory, be they their nationals or non-nationals, enjoy the rights guar-

anteed in the Charter. In this case, the victims' rights to equality before the law were trampled on because of their origin.

19. It emerges from the case file that the victims did not have the opportunity to challenge the matter before the competent jurisdictions which should have ruled on their detention, as well as on the regularity and legality of the decision to expel them by the Angolan government. Consequently, article 7(1)(a) of the Charter [has been violated].

20. The Commission does not wish to call into question, nor is it calling into question the right of any state to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is, however, of the view that it is unacceptable to deport individuals without allowing 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.

On these grounds, the Commission:

[21.] Declares that the deportation of the victims constitutes a violation of articles 2, 7(1)(a), 12(4) and (5), as well as articles 14 and 18 of the African Charter on Human and Peoples' Rights.

[22.] With regards to damages for prejudice suffered, it urges the Angolan government and the complainants to draw all the legal consequences arising from the present decision.

BENIN

Comité Culturel pour la Démocratie au Bénin and Others v Benin

(2000) AHRLR 22 (ACHPR 1994)

Communications 16/88, *Comité Culturel pour la Démocratie au Bénin v Benin*, 17/88 *Badjogoume Hilaire v Benin* and 18/88 *El Hadj Boubacare Diawara v Benin*
Decided at the 15th ordinary session, April 1994, 7th Annual Activity Report
(See also *Comité Culturel pour la Démocratie au Bénin and Others v Benin* (ACHPR 1995), below)

- [1.] Communications about false imprisonment.
- [2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;
- [3.] Meeting at its 15th ordinary session held in Banjul, The Gambia, from 18 to 27 April 1994;
- [4.] Considering that, at its 5th ordinary session held in Benghazi (Libya), in April 1989, the Commission decided to link the three petitions registered under nos 16/88, 17/88 and 18/88 at the Secretariat due to their interrelation;
- [5.] Considering that the three petitions were brought to the knowledge of the parties concerned on 14 March 1990, 17 November 1990, 16 November 1992, 12 August 1993 and 20 January 1994;
- [6.] Considering that during this same session, the Commission declared the three petitions admissible, in application of articles 56 and 57 of the Charter and rules 114 and 117 of the Rules of Procedure of 1988;
- [7.] Considering that by letter dated 18 March 1994 the state of Benin acknowledged receipt of all the notifications, informed the Commission of the dispatch of the requisite documents and information;
- [8.] Considering moreover that it was a result of a letter from Mr Diawara to the Commission dated 12 April 1994 that the political and judicial authorities took into consideration the requests of Mr Diawara by referring the matter to the examining magistrate and the President of the Republic of Benin;

[9.] Considering that prior to any substantive consideration, the communications must be referred to the 16th session of the Commission pursuant to rule 115 of the Rules of Procedure of 1988;

[10.] Decides to refer the matter to the 16th session for decision on the admissibility of the communication.

* * *

Comité Culturel pour la Démocratie au Bénin and Others v Benin

(2000) AHRLR 23 (ACHPR 1995)

Communication 16/88, *Comité Culturel pour la Démocratie au Bénin v Benin*, joined with 17/88 *Hilaire Badjogoume v Benin* and 18/88 *El Hadj Boubacare Diawara v Benin*
8th Annual Activity Report
(See also *Comité Culturel pour la Démocratie au Bénin and Others v Benin* (ACHPR 1994), above)

Admissibility (failure to exhaust local remedies, 8)

State responsibility (violation by previous regime satisfactorily resolved, 3)

Complaint

[1.] Communication no 16/88, submitted by *Comité Culturel pour la Démocratie au Bénin*, alleges serious violations of various articles of the African Charter, committed by the Benin government. They refer to the detention of hundreds of citizens without charge or trial, torture, and the murder of a Mr Akpokpo.

[2.] The communication requests full and unconditional liberation of all political prisoners. A letter submitted by the government on 9 May 1994 states that all political prisoners were released after the new government took over in 1990.

Finding

[3.] Notices of hearing were sent to the parties, but only the representative of the government of Benin appeared. The government representative was duly given the opportunity to present his case at the end of which

the Commission, after due consideration, decided that the present government of Benin had satisfactorily resolved the issue of violations of human rights under the previous administration. This decision was communicated to the authors of the communication. In the absence of a response, the Commission confirms that the issue has been satisfactorily resolved.

[4.] Communication no 17/88 was submitted by Mr Hilaire Badjogoume. He complained of being arbitrarily detained for two years, from 5 April 1988 to 10 January 1990.

Decision

[5.] Notices of hearing were sent to the parties, but only the representative of the government of Benin appeared. The government representative was duly given the opportunity to present his case at the end of which the Commission, after due consideration, decided that the government of Benin had settled the complainant's claim administratively.

[6.] This decision was communicated to the complainants and, in the absence of a response, the Commission confirms its decision.

[7.] Communication no 18/88 was submitted by Mr El Hadj Boubacare Diawara. He had been detained without charge or trial from 18 February 1982 for a period of more than seven years. Furthermore, he reports the arbitrary detention of seven others, one of whom died in prison 11 months after imprisonment. All detainees, he claimed, were tortured while imprisoned.

Finding

[8.] Notice of hearing was sent to the parties, but only the representative of the government of Benin appeared. The Commission decided that since the complainant has referred his complaint to the courts in Benin, where it is now pending, the Commission declared the communication inadmissible for want of exhaustion of local remedies, under article 56(5) of the Charter and rule 103(1)(f) of the Rules of Procedure of 1988.

BOTSWANA

Modise v Botswana

(2000) AHRLR 25 (ACHPR 1994)

Communication 97/93, *John K Modise v Botswana*
7th Annual Activity Report
(See also *Modise v Botswana* (ACHPR 1997) and *Modise v Botswana*
(ACHPR 2000), below)

[1.] Communication on denial of nationality.

Final discussion

[2.] It was decided to write to the author stressing the need for exhaustion of local remedies as required by article 56 of the Charter. He should also be advised to contact the NGO Botswana Centre for Human Rights which enjoys observer status with the Commission for assistance.

* * *

Modise v Botswana

(2000) AHRLR 25 (ACHPR 1997)

Communication 97/93, *John K Modise v Botswana*
10th Annual Activity Report
(See also *Modise v Botswana* (ACHPR 1994), above, and *Modise v Botswana*
(ACHPR 2000), below)

Admissibility (continuing violation, 23)

Cruel, inhuman and degrading treatment (31, 32)

Family (effect of deportation, 32)

Admissibility (failure to exhaust local remedies, 39-40)

Political participation (prohibition to stand for public office, 37, 38)

Facts

[1.] The complainant claims citizenship of Botswana under the following

circumstances: His father was a citizen of Botswana who went to work in South Africa. While in South Africa, he married and the complainant was an issue of that marriage. The complainant's mother died shortly after birth and the complainant was sent to Botswana where he grew up. The complainant therefore claims Botswana citizenship by descent.

[2.] The complainant alleges that in 1978 he was one of the founders and leaders of the Botswana National Front opposition party. He alleges it was as a result of these activities that he was declared a 'prohibited immigrant' by the Botswana government.

[3.] On 17 October 1978, the complainant was arrested and handed over to the South African Police, without being brought before any tribunal. He already had a court action in process in Botswana concerning a Temporary Occupation Permit, but due to his deportation was unable to attend the hearing.

[4.] When he returned to Botswana, he was arrested and deported again without a hearing. After his third entry back into Botswana he was charged and convicted of unlawful entry and being a prohibited immigrant. He was serving a ten-month sentence and appealing his conviction when he was deported for a fourth time to South Africa, before his last appeal could be heard.

[5.] Because the complainant was not a citizen of South Africa, he was forced to live in the 'homeland' of Bophuthatswana. He remained there for seven years, until the government of Bophuthatswana issued a deportation order against him, which landed him in the no man's land between Bophuthatswana and Botswana, where he remained for five weeks before he was admitted to Botswana on a humanitarian basis. He lived there on three-month residents permit renewable at the absolute discretion of the minister concerned, until June 1995.

[6.] The complainant does not possess, nor has he ever possessed, a South African passport or Bophuthatswanan nationality.

[7.] The complainant alleges he has suffered financial losses, since much of his property and possessions was confiscated by the government. He cannot work because he is not permitted to, and is in constant danger of being deported. The complainant has made several efforts to assert his Botswana nationality and an appeal from his prison sentence is still pending, but has not been heard. He presently has no funds to continue in the courts.

[8.] He is asking the government of Botswana to recognise him as a citizen by birth.

Procedure

[9.] The communication is dated 3 March 1993 and is sent by John K Modise.

[10.] At the 13th session in March 1993, the Commission was seized of the communication.

[11.] On 12 April 1993, a notification of the communication was sent to the Botswana government.

[12.] At the 17th session the communication was declared admissible. It was found to be a fit subject for settlement by the commissioner responsible for Botswana, that is, commissioner Janneh. The parties were notified of this decision.

[13.] The government of Botswana was invited to consider the possibility of an amicable resolution.

[14.] On 19 October 1995 the Commission received a *note verbale* by fax from the Ministry of Foreign Affairs of Botswana, stating that Mr Modise had been granted citizenship by the president. The citizenship certificate was posted to him on 26 June 1995.

[15.] On 30 November 1995 a copy of this *note verbale* was sent to Mr Odinkalu with a letter asking if the granting of citizenship could be considered an amicable resolution of the case.

[16.] On 14 December 1995 the Commission received a letter from Mr Chidi Odinkalu, the complainant's counsel, indicating that he did not consider that a friendly settlement had been reached and requesting further action on the part of the Commission.

[17.] On 9 October 1996 the Secretariat of the Commission received a fax from Interights with a copy of a letter from Mr Modise stating that all local remedies had been exhausted, and that even though the government of Botswana had promised Commissioner Dankwa that they would issue a passport to Mr Modise, his application to get a passport had still not been approved by the authorities.

Law

Admissibility

[18.] Article 56(5) of the African Charter requires that communications shall be admissible only if the complainant has exhausted the remedies available domestically, provided these are not unduly prolonged. Other international human rights instruments have similar provisions.

[19.] The complainant affirms that he has been trying without success to establish his Botswana nationality legally since 1978 and his final appeal is still pending, 16 years later.

[20.] In this case the complainant brought his first action over 16 years ago, and the legal process was repeatedly interrupted the summary deportations of which he was the victim. The national legal procedures were wilfully obstructed.

[21.] All the preceding elements lead to the conclusion that the complainant has exhausted all local remedies.

[22.] For all these reasons the Commission declared the communication admissible.

Merits

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

[24.] The complainant argues that he has been unjustly denied Botswana citizenship. In the brief submitted by the complainant's representative, it is explained that the complainant was born in Cape Town to a father and mother both from the Goo-Modultwa Ward in Kanye of the Bangwaketse in the former Protectorate of Bechuanaland.

[25.] The complainant furthermore alleges that in 1978 he was one of the founding members and leaders of the opposition party, National Front of Botswana. As a consequence of his activities he was declared a prohibited immigrant and expelled to South Africa, which also expelled him several times, with all the disturbing consequences described above.

[26.] Botswana became an independent country in 1966. Section 20 of its Constitution states:

Every person who, having been born in the former Protectorate of Bechuanaland, is on 29 September 1966 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Botswana on 30 September 1966.

[27.] The complainant thus alleges that as a matter of law, by birth, he is a citizen of Botswana. The government has nowhere contested the facts on which the complainant bases his claim.

[28.] Article 7 of the African Charter specifies:

(1) Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force . . .

[29.] To this day, no court has remedied the effects of the complainant's original deportation, which constitutes a flagrant violation of article 7.

[30.] The complainant's defence against deportation rests on the fact that he is by law a citizen of Botswana. In his trial for illegal re-entry into Botswana, this defence was not considered by the court. To this day, there is no resolution in the courts of this essential issue. This constitutes another violation of article 7.

[31.] Article 5 of the African Charter states:

Every 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 . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

[32.] The complainant was deported to South Africa and was forced to live for eight years in the 'homeland' of Bophuthatswana, and then for another seven years in 'no man's land', a border strip between the former South African homeland of Bophuthatswana and Botswana. Not only did this expose him to personal suffering, it deprived him of his family, and it deprived his family of his support. Such inhuman and degrading treatment offends the dignity of a human being and thus violates article 5.

[33.] The government of Botswana, without acknowledging any responsibility, did take some steps to remedy the complainant's situation by granting him a certificate of citizenship in June 1995, under section 9(2) of the Citizenship Act of Botswana.

[34.] However, subsequent information from the complainant indicates that the citizenship granted is in several ways inferior to citizenship by birth. Citizenship by birth is a right which cannot be taken away, whereas citizenship by registration is a privilege that is granted only at discretion of state officials.

[35.] When the complainant applied for an international passport to enable him to travel abroad for medical treatment, the government of Botswana issued him a 'Local Passport', # L213968, on 6 July 1995. This passport restricted his travelling to countries on mainland Africa south of latitude 15 south. It expired on 5 January 1996.

[36.] Furthermore, a person who acquires citizenship under section 9(b) of the Citizenship Act, rather than by birth, is considered a citizen from the time of granting only. This means that prior to his registration the complainant was a stateless person, and his children are in the same situation.

[37.] Article 13 of the African Charter stipulates:

(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. (2) Every citizen shall have the right of equal access to the public service of his country.

[38.] Citizens by registration cannot be candidates for the presidency of the Republic. Taken together with his first deportation, soon after he founded an opposition political party, it appears that this is an action designed to hamper his political participation. Granting the complainant citizenship by registration has effectively deprived him of what is for him one of the most valuable rights that Botswana citizenship affords.

[39.] Elements in the file show that the complainant did obtain Botswana nationality, but he is not satisfied. The Commission considers, however,

that the other rights which the complainant is seeking could be obtained through local judicial action.

[40.] If issues related to the acquisition of full citizenship are not resolved by competent domestic judicial authorities, or in the event of new facts coming to light, Mr Modise can resort once more to the Commission.

For the above reasons, the Commission:

[41.] Takes note of the granting of Botswana citizenship to Mr Modise;

[42.] Calls upon the government of Botswana to continue with its efforts to amicably resolve this communication in compliance with national laws and with the provisions of the African Charter on Human and Peoples' Rights.

* * *

Modise v Botswana

(2000) AHRLR 30 (ACHPR 2000)

Communication 97/93, *John K Modise v Botswana*
Decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual Activity Report
Rapporteurs: 17th–21st sessions: Umozurike; 22nd–28th sessions: Dankwa
(See also *Modise v Botswana* (ACHPR 1994) and *Modise v Botswana* (ACHPR 1997), above)

Admissibility (local remedies unduly prolonged, 69)
Equal protection of the law (citizenship, 88)
Recognition of legal status (citizenship, 88)
Cruel, inhuman or degrading treatment (91)
Family (effect of deportation, 92)
Movement (deportation, 93)
Property (deportation, 94)
Political participation (prohibition to stand for public office, 95-96)

Summary of facts

1. The complainant is claiming the right to Botswana citizenship under the following circumstances: his father, a Botswana citizen, immigrated to

South Africa to work there. During his stay, he got married and the complainant was born of that marriage. His mother died shortly after his birth, and he was thus brought to Botswana, where he grew up. The complainant is therefore claiming Botswana nationality by ancestry.

2. He alleges that in 1978 he was one of the founders and leaders of an opposition party called Botswana National Front. He is of the view that it is because of his political activities that he was declared an 'undesirable immigrant' in Botswana by the government.

3. On 17 October 1978, he was arrested and handed over to the South African police without being brought before a tribunal. He already had a judicial action pending before a Botswana court, regarding a temporary work permit, but with his deportation, he was unable to follow the case.

4. Having returned to Botswana, he was once again arrested and deported without trial. After his third attempt at returning, he was charged, convicted of illegal entry and declared an undesirable immigrant. He was serving a ten-month prison term and had filed an appeal when he was deported for the fourth time to South Africa, before the case was concluded.

5. Since the complainant did not have South African nationality, he was obliged to settle in the homeland of Bophutatswana. He lived there for seven years until the government of Bophutatswana issued a deportation order against him and he found himself in the no man's land between Bophutatswana and Botswana, where he remained for five weeks, when he was admitted into Botswana on a humanitarian basis. He obtained a three-month entry permit, renewable at the entire discretion of the competent Ministry, until June 1995.

6. The complainant does not and has never held a South African passport or citizenship of Bophutatswana.

7. He claims to have suffered heavy financial losses, since the government of Botswana confiscated his belongings and property. He cannot work, since he does not have the relevant permit, and he is constantly under threat of deportation. He has gone to great lengths to try to prove his Botswana nationality, and the appeal against his prison sentence is still pending. He presently has no funds to prosecute his claims in court.

8. He is asking the government to concede him his nationality by birth.

Complaint

The complainant alleges that he has been unjustly deprived of his real nationality and claims violation of articles 3(2), 5, 7(1)(a), 12(1) and (2), 13(1) and (2), 14, 16(1) and (2) and 18(1) of the African Charter.

Procedure

9. John K Modise presented the communication on 3 March 1993.

10. The Commission was seized of it at its 13th session, held in March 1993.

11. The government was notified of it on 12 April 1993 without any reaction coming from its side.

12. On 13 May 1993, a letter was addressed to Mr John K Modise informing him that the communication had been examined at the 13th session, and that the Commission required some clarifications from him regarding the exhaustion of local remedies.

13. A second notification was addressed to the government on 12 August 1993, with the same result.

14. On 7 September 1993, the complainant replied to the Secretariat's letter dated 13 May 1993 emphasising that he had exhausted the available local remedies. He added that he could no longer pursue his case before the national jurisdictions due to lack of financial resources.

15. Another notification was sent to the government on 29 January 1994, with a copy to the complainant.

16. On 30 January 1994, the Secretary to the Commission received correspondence from the spouse of the complainant, stressing that Mr John K Modise had no more money to pursue the case brought before the national jurisdiction, since he had been forced into exile and that he had suffered heavy financial losses due to the confiscation of his belongings by the Botswana Police.

17. On 22 February 1994, the complainant acknowledged receipt of the copy of the notification addressed by the Secretariat to the government on 29 January 1994. He also called on the Commission to consider his case, as he believed that he had exhausted all the available local remedies. A short chronicle of the case was attached to the said correspondence.

18. The complainant wrote again on 24 October 1994 in reply to the Secretariat's correspondence dated 8 August 1994, to confirm having exhausted local remedies.

19. At its 16th session held in October 1994, the Commission re-examined the communication and decided to defer its decision until it received information on the manner in which other human rights bodies handle cases involving complainants who are lacking financial means.

20. At the 17th session, the communication was declared admissible. It was considered appropriate to assign the case to the Commissioner covering Botswana to deal with under his human rights promotion activities. Consequently, responsibility was assigned to Commissioner Janneh. However, no concrete measures were taken.

21. On 20 April 1995, a correspondence was dispatched to the complainant.

nant to inform him of the decision regarding the admissibility of the communication.

22. On 18 May 1995, a letter was received from the European Commission on Human Rights in reply to the Secretariat's request regarding the issue of financial difficulties.

23. On 26 May 1995, a correspondence was sent to the Botswana government to inform it of the decision on admissibility taken by the Commission and to request it to consider an amicable settlement of the case. There was no response from the government of Botswana.

24. On 23 September 1995, the Commission received a correspondence dated 15 May 1995 from the non-governmental organisation Interights informing it that it had been designated by Mr Modise to represent him at the next session of the Commission. Mr Modise's letter to Interights dated 2 December 1994 in this regard was annexed to the said correspondence.

25. The same envelope contained a second letter from Interights dated 15 May, stating that the NGO had just been informed of the decision on admissibility taken by the Commission at its 17th session and requesting, therefore, that a formal notification of the said admissibility be addressed to it. Interights also enclosed an explanatory note on the case and the demands of the complainant, and indicated its intention to be present at Praia, at the 18th session, to argue the case.

26. At the 18th session held in October 1995, the Commission heard the counsel of the complainant, Mr Odinkalu. It was decided to defer the decision on the merits in order to allow some time for the efforts to arrange an amicable settlement and, if necessary, the case would be re-examined at the 19th session.

27. On 19 October 1995, the Secretariat received by fax a *note verbale* from the Ministry of Foreign Affairs of Botswana with the information that the Head of State had granted Botswana nationality to Mr Modise, and that his certificate of nationality had been sent to him by post on 26 June 1995.

28. On 30 November 1995, a copy of this *note verbale* was dispatched to Mr Odinkalu with a letter informing him that if the Commission did not receive any contrary information before its next session, the granting of nationality would be considered an amicable settlement.

29. On 14 December 1995, the Secretariat received a letter from Mr Odinkalu, counsel to the complainant, indicating that he did not consider the granting of nationality as an amicable settlement and asking the Commission to continue the examination of the case.

30. On 28 December 1995, the Secretariat received correspondence from Commissioner Dankwa asking for copies of all documentation relevant to the case for his use during a mission to Botswana.

31. On 25 January 1996, the Secretariat received faxed correspondence from Mr Odinkalu indicating his intention to send some supplementary information to the Commission.
32. On 13 February 1996, the Secretariat received a letter from Commissioner Dankwa asking for copies of certain pages of Mr Modise's passport. The Secretariat forwarded them to him by fax.
33. On 23 February 1996, the Secretariat sent a fax message to Commissioner Dankwa inquiring about the results of his mission to Botswana.
34. On 28 February 1996, Mr Odinkalu, counsel for the complainant presented an additional note describing the special conditions of the nationality by naturalisation granted to Mr Modise.
35. On 1 March 1996, the Secretariat received a fax message from Commissioner Dankwa informing it that he had not been able to carry out his mission to Botswana before the 19th session.
36. During the 19th session, the communication was not examined.
37. On 8 May 1996, a letter was sent to the Botswana government, acknowledging receipt of its *note verbale* of 19 October 1995, and informing it that the communication had not been examined at the 19th session, but that it would be examined at the 20th session in October 1996.
38. On 8 May 1996, a letter was sent to the complainant giving him the same information as above. A copy of the *note verbale* addressed to the Commission by the government on 19 October 1995 was attached to the letter.
39. On 9 October 1996, the Secretariat of the Commission received a fax message from Interights mainly to transmit a copy of Mr Modise's letter stating that all domestic remedies had been exhausted, and that even though the government of Botswana had promised Commissioner Dankwa that Mr Modise would be issued with a passport, his application had still not been approved by the competent authorities.
40. On 10 October 1996, the Secretariat acknowledged receipt of Interights' correspondence.
41. At its 20th session, held in Grand Bay, Mauritius, in October 1996, the Commission heard a presentation made by Interights. Following the hearing, it decided to defer a decision on the merits to its next session in order to give more time to explore the avenue of an amicable settlement.
42. On 12 December 1996, the Secretariat addressed a *note verbale* to that effect to the government.
43. On 12 December 1996, the Secretariat addressed a letter to that effect to Interights.
44. At its 21st session in April 1997, the Commission decided to close the

case, by considering that Mr Modise's naturalisation constituted an amicable settlement of the matter.

45. On 11 June 1997, the Secretariat notified the complainant, the state party and the counsel of the complainant.

46. On 16 June 1997, the Secretariat received a fax message from Interights, indicating that it was not satisfied with the Commission's decision and that it was consequently calling for the matter to be reopened.

47. On 19 June 1997, the Secretariat acknowledged receipt of Interights' letter of 16 June 1997, while also explaining the decision taken by the Commission.

48. On 26 June 1997, a letter was written to Mr Modise on the subject, with a copy to Interights.

49. On 18 July 1997, the Secretariat received a letter from Interights subtitled 'Reopening of communication 97/93' with a nine-page explanatory note.

50. On 29 July 1997, the Secretariat wrote a letter to Commissioner Dankwa, with Interights' explanatory note attached, calling for his opinion as rapporteur on the communication.

51. At its 22nd session, held from 2 to 11 November 1997, the Commission decided to accede to Interights' request, to reopen the case and therefore to re-examine the reasons that led its previous decision which considered that the communication had been closed on the basis of an amicable settlement. The Commission further requested Botswana to provide it with information on the terms of the settlement reached between the two parties, the directives regarding its implementation, as well as the type of citizenship granted to Mr Modise.

52. On 18 November 1997, the Secretariat wrote to the parties to inform them of the Commission's decision.

53. On 11 February 1998, the Secretariat addressed a reminder *note verbale* to Botswana's Ministry of Foreign Affairs.

54. By the 23rd session, the government of Botswana had not yet reacted to the above request. The Commission consequently requested the Secretariat to remind the government about the request.

55. On 10 August 1998, the respondent state responded to the request.

56. At its 24th ordinary session held from 22 to 31 October 1998, the Commission heard Mr Botsweletse Kingsley Sebele, Secretary General of the Botswana Ministry of Labour and Home Affairs. He stated that the laws of his country could not give Mr Modise any status other than that which he has already been granted, adding that Mr Modise had obstinately refused to co-operate with the government of Botswana. The Commission thereafter deferred a decision on the merits to its 25th session.

57. On 10 November 1998, the Secretariat wrote to the parties concerned informing them of the Commission's decision.
58. By two *note verbales* dated 6 October 1998 and 9 December 1998, the government of Botswana reiterated its position as contained in its earlier note of 27 May 1998.
59. On 16 April 1999, Interights wrote to the Commission requesting a deferral of the hearing of the case to the 26th ordinary session due to Mr Odinkalu's illness.
60. At the 25th ordinary session of the Commission held in Bujumbura, Burundi, the Commission deferred hearing of the communication to its 26th ordinary session.
61. On 6 July 1999, the Secretariat of the Commission wrote letters to the parties informing them of the Commission's decision.
62. On 29 September 1999, the government of Botswana replied by fax confirming its position contained in its *note verbale* of 9 December 1998, and requesting that the information therein be brought to the attention of the Commissioners and the legal representatives of the complainant.
63. On 1 October 1999, the Secretariat of the Commission replied to the said *note verbale*. A copy of the government's response was forwarded to Interights for information and necessary action.
64. On 20 October 1999, Interights sent to the Secretariat of the Commission its written response to the observations of the government of Botswana.
65. At its 26th ordinary session held in Kigali, Rwanda, the Commission reviewed the case and noted that the government of Botswana had indicated that if it did not hear anything contrary to its position, it would consider the case closed. Since Interights had submitted a brief to the contrary, the Commission, therefore, decided to bring it to the attention of the government of Botswana. A final decision on the merits was deferred to the next ordinary session.
66. The above decision was conveyed to parties on 18 January 2000. A copy of Interights' brief was attached to the letter sent to the government of Botswana. No response has been received from the competent authorities of Botswana.
67. At the 27th ordinary session of the Commission held in Algeria from 27 April to 11 May 2000, the Commission examined the case and deferred its further consideration to the next session.
68. Parties were informed of the said decision on 12 July 2000.

Law

Admissibility

69. This communication has a long history before the Commission. It was declared admissible at the 17th ordinary session of the Commission on grounds that local remedies were unduly prolonged and the legal process wilfully obstructed by the government through repeated deportations of the complainant. The case was later closed because the Commission considered that the complainant's naturalisation constituted an amicable settlement of the matter. It was however reopened upon the application of Interights on behalf of the complainant.

Merits

State party's response

70. The respondent state later responded to the Commission's request on the terms of the settlement reached with the complainant. It submitted, among others, that Mr Modise had been naturalised as a Botswana citizen on 28 February 1995. By virtue of that, he enjoyed all the rights inherent to his status as provided in chapter II of the country's Constitution. Furthermore, a document attached to the note from the respondent state contained the relevant constitutional provisions regarding Botswana citizenship as at the time of the country's independence. The document provide explanatory details on the birth and parentage of the complainant, who was born in the territory of what was then the Union of South Africa (which became the Republic of South Africa in 1961), of a father who had the status of a Protected Person of the British crown, though originating from the Protectorate of Bechuanaland (present day Botswana). The respondent state pointed out that Mr Modise and his counsel had probably innocently misunderstood and misinterpreted section 20(2) of the Botswana Constitution. The respondent states that the place of birth of an individual immediately confers its nationality on that person. This nationality-by-birth may later be rejected or given up by that person, his parents or legal custodian. To avoid a child being born stateless, the law operates in such a way that the place of birth confers its nationality to an individual. It is not necessary to take any legal steps to guarantee that nationality. Section 20(2) of the Constitution concerns those individuals born outside the Protectorate of Bechuanaland and who were at the time of their birth either subjects of Her Majesty or crown protected persons and whose fathers had acquired Botswana citizenship in compliance with the provisions of section 20(1). John K Modise could have benefited from the provisions of section 20(1) of the Constitution if his father, born in the protectorate territory and having the status of a crown protected person, alive at the time of Botswana's independence. John K Modise did not meet the conditions of section 20(2) because, having been born in South Africa, he was by that fact a South African citizen by simple application of the law and without his having to take any legal steps to prove his nationality. Hence, in 1966, he was not a subject of Her Britannic Majesty and of her

Colonies, nor a Protected Person of the English crown. South Africa was not, in 1966, a British colony. Consequently, he did not meet the conditions required for acquiring Botswana nationality under section 20(2).

71. Section 23(1) concerns the case of those individuals who have found themselves in a similar situation to that of Mr Modise in the sense that it had provided the possibility of acquiring Botswana nationality to those persons whose fathers had acquired that nationality in compliance with section 20(1); but even the children of such persons have been excluded in the light of the provisions of section 20(2). Since Mr Modise, by virtue of the legal provisions, could not lay claim to the nationality of the new state of Botswana either by birth or by parentage (section 20(2)), the law gave him the possibility of choosing that nationality by naturalisation, section 23(1). This text provides that all those who had reached the age of majority should apply for their naturalisation before 1 October 1968. It seems that Mr Modise, who was 33 years old as of that date, had not taken advantage of that possibility which was open to him for a period of two years. This explains his present difficulties, for since he had not taken the steps necessary for his naturalisation, in the eyes of the law he was considered as not being interested.

72. The argument of Mr Modise and his counsel that he was a Botswana citizen by birth and by parentage does indeed seem tenuous. In terms of the legal provisions in force in September 1966, he could not lay claim to the said nationality. He was born in South Africa and not in the Protectorate of Bechuanaland. He could not claim Botswana nationality by parentage because he was explicitly excluded therefrom by section 20(2). The proposition that he had never claimed any other nationality is entirely immaterial — for he did not have any reason to do so. Having been born in South Africa, he automatically enjoyed the nationality of that country. That automatically disqualified him from holding Botswana nationality in compliance with section 20(2). He could, however, by virtue of the provisions of section 23(1), have opted for the said nationality, but he did not. The state of Botswana has offered all and sundry the possibility of making a conscious choice between keeping their nationality-by-birth and naturalisation as citizens of the new state of Botswana. Mr John Modise could not, in this regard, hide behind the excuse of ignorance, because no one is expected to be ignorant of the law.

73. In reaction to the above claims by the respondent state, the complainant's legal representative submitted that such claims contained several adverse claims of facts, law, and of mixed facts and law that were untrue, self-contradictory and contested.

74. He contended the claim that when Mr Modise was deported to South Africa, the authorities there accepted him as a citizen. He pointed out that Mr Modise was first deported to South Africa from Botswana on 17 October 1978, pursuant to a directive issued on 16 October 1978 by the Permanent Secretary in the Office of the President of the respondent state.

Upon returning to Botswana four days later on 21 October 1978, he was arrested and charged with re-entering Botswana while being a prohibited immigrant.

75. The question as to whether or not South Africa accepted Mr Modise as a national was directly addressed in the decision of Hayfron-Benjamin (Chief Justice) in the appeal of Mr Modise against his conviction in the case of *John K Modise v The State*, decided by the High Court of the Republic of Botswana on 20 September 1979. The relevant part of the said decision reads:

The acceptance warrant, exhibit P2, was issued at the Kopfontein Border Post and was dated 18 December 1978, ie two months after the immigration officer says he handed the accused over to the South African authorities. Cross-examination of the witness (the immigration officer, testifying for the prosecution) disclosed that he was mistaken as to which document the South African authorities had signed that day. He said: 'The document P2, the acceptance warrant, is not the one which was signed by the immigration post in South Africa at the time I handed the accused to the border post'. The prosecution, therefore, closed its case without clearing up a matter, which apart from any other considerations, would be a factor in the assessment of the sentence to be imposed. If the South African authorities were only prepared to accept the appellant in December, the indications are that he was bundled out of the country before the necessary preparation for his acceptance had been completed and before the accused, who had been in the country (Botswana) from infancy had settled his affairs here.

76. From the above therefore, he claims that this decision, which is still uncontested, shows that the government of Botswana has never shown and was unable to show that Mr Modise had indeed been accepted by the South African authorities as a national of South Africa. On the contrary, he submits that South Africa did not accept Mr Modise, but that Mr Modise was then banished to the defunct South African homeland of Bophuthatswana, whose then government by a letter to Mr Modise (ref no 4/6/2/8/818/78) of 6 October 1986 wrote that: 'Modise does not appear in the population register of the citizens of Bophuthatswana and that the subject of citizenship is a matter between you (Mr Modise) and the Botswana Government.' To validate their point, in the same year, the then government of the defunct homeland of Bophuthatswana deported Mr Modise back to Botswana.

77. Regarding the claim that there is no citizenship that can be offered or granted to Mr Modise, he averred that such is contradicted by the other claim in the letter to the Commission by Mr BK Sebele, Permanent Secretary, Ministry of Foreign Affairs dated 9 December 1998 that Mr Modise registered as a citizen under special circumstances at the direction of the President of the Republic of Botswana, although he failed to indicate the date on which Mr Modise was so registered. He submits that it is impossible to reconcile the claim that the complainant registered as a citizen under special circumstances at the direction of the President of Botswana

with the claim by Mr BK Sebele in his letter aforesaid that 'There is no citizenship that can be offered or granted to Mr Modise'. He attested that Mr Modise had reported that sometime in 1998, immigration officials in Lobatse, Botswana, visited him and invited him to sign a document to facilitate the renewal of his residence permit in Botswana that had expired. When he tried to verify the document, he was warned that he risked immediate and prompt deportation unless he signed the document, whereupon he promptly signed. Although he is physically in Botswana, he has not received any documentation or indication on his current nationality status from the respondent state.

78. He disputes as factually untrue the claim that Mr Modise is responsible for his failure to enjoy his rights as a citizen of Botswana by refusing to produce the necessary documents as proof of his citizenship. In any case, he points out that their production would not remedy the violations asserted by him in this case.

79. On the issue that Mr Modise could not and did not become a citizen by descent under the repealed section 20(2) of the Constitution of Botswana, because he was neither a British Protected Person nor a citizen of the United Kingdom and Colonies on 29 September 1966, the counsel submits as follows: The repealed section 20 of the Constitution of Botswana referred to in the letter of Mr BK Sebele provides:

(1) Every person who, having been born in the former Protectorate of Bechuanaland, is on 29 September 1966 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Botswana on 30 September 1966. (2) Every person who, having been born outside the former Protectorate of Bechuanaland, is, on 29 September 1966 a citizen of the United Kingdom and Colonies or a British protected person, and is not a citizen of any other country, shall, if his father becomes, or would but for his death have become, a citizen of Botswana in accordance with the provisions of subsection (1) of this section, become a citizen of Botswana on 30 September 1966.

80. Counsel submits that since it is common ground that Mr Modise was born in South Africa of parents from Botswana, section 20(1) is inapplicable to him. Section 20(2) is, therefore, the applicable provision. However, determination of whether or not Mr Modise was a citizen of the United Kingdom and colonies or a British protected person on 29 September 1966 can only be made in terms of the British Nationality Act of 1948. The provision of that Act which applies to Mr Modise is section 12(2), which provides that:

A person who was a British subject immediately before the date of the commencement of this Act shall, on that date become a citizen of the United Kingdom and Colonies and possessed any of the qualification specified in the last foregoing subsection.

The last foregoing subsection referred to in this provision is section 12(1) of the same Act that provides:

A person who was a British subject immediately before the date of the com-

mencement of this Act shall on that date become a citizen of the United Kingdom and Colonies if he possesses any of the following qualifications, that is to say: (a) That he was born within the territories comprised at the commencement of this Act in the United Kingdom and Colonies, and would have been such a citizen if section four of this Act had been in force at the time of his birth; (b) That he is a person naturalised in the United Kingdom and Colonies; (c) That he became a British subject by reason of the annexation of any territory included at the commencement of this Act in the United Kingdom and Colonies.

81. The counsel submits further that it is not in dispute that Mr John Modise's father, Samuel Remaphoi Modise and his mother, Elizabeth Ika-neng Modise, were both born in Goo-Modultwa ward in Kanye of the Bangwaketse in the former Protectorate of Bechuanaland (now Botswana). John Modise, their son and complainant in this case, was born in Cape Town where his father, Samuel Remaphoi Modise was an immigrant worker, about 1943. Had he (Mr Samuel Remaphoi Modise) been alive on 30 September 1966, Samuel Remaphoi Modise who was born in 1912 would have fulfilled the requirement of section 12(1)(a) of the British Nationality Act of 1948 and, thereby been a national of the United Kingdom and the Colonies. Thus, by the combined operation of section 12(1) and (2) and section 1 of the British Nationality Act, John Modise, his son, was both a British subject and a citizen of the United Kingdom and Colonies on the day preceding 30 September 1966. As a result, he became a citizen of Botswana by descent on 30 September 1966. The relevant provision of section 1 of the British Nationality Act provides:

(1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country, shall, by virtue of that citizenship have the status of a British subject (2) The following are the countries herein before referred to, that is to say, Canada, Australia, New Zealand, The Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia (now Zimbabwe) and Ceylon (now Sri Lanka).

82. On the claim by the respondent state that there are no classes of citizenship in Botswana for purposes of enjoying rights and privileges, the complainant's counsel asserts that apart from the concession by Mr BK Sebele, Permanent Secretary, Ministry of Foreign Affairs, that 'as a registered or naturalised citizen, one is not eligible for election as a President', there remain, in addition, in Botswana three more serious consequences of citizenship by registration. These are:

(a) Citizenship by descent arises by operation of law and by biological facts over which the claimant has no control. Citizenship by registration, on the other hand, arises by the interposition of an administrative act facilitated by acts and facts supplied by the beneficiary. (b) Citizenship by descent can be transmitted down the line to the children; but citizenship by registration can only be transmitted to children born after it has been acquired. This is particularly relevant in this case as all the children of the complainant are now adults (above 21 years) and would therefore remain stateless even if their father was granted citizenship by registration. (c) The manner in which different classes of citizenship may be lost differs. While it takes a voluntary act of renunciation to lose

citizenship by descent, citizenship by registration or naturalisation can be withdrawn by a directive issued by a minister of the ruling party or government.

83. 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. In order for the Commission to determine whether there have been violations of the Charter as alleged by the complainant, it is incumbent on it to assess the nationality of the complainant based on the facts presented before it. The current circumstances of the complainant are a result of a policy decision taken by the Botswana government.

84. The complainant argues that he has been unjustly deprived of Botswana citizenship. In the brief submitted by his counsel, it is claimed that the complainant was born in South Africa of Samuel Remaphoi Modise (father) and Elizabeth Ikaneng Modise (mother) from Goo-Modultwa ward in Kanye of the Bangwaketse in the former Protectorate of Bechuanaland (now Botswana). His father went to work in South Africa as a migrant worker. These facts are not contested by the respondent state (see a copy of a document outlining Botswana Citizenship Law attached to the *note verbale* of 27 May 1998). In fact, paragraphs 3(a) and (b) of the said document emphatically assert concerning John Modise's father thus: 'He was therefore a British protected person At all times he remained a British protected person' (see also paragraph 6 of the said document). Paragraphs 3(d) and (e) of the said document assert that John Modise's mother died when he was three months old and his father brought him to the then Bechuanaland Protectorate (Botswana) to ensure that relatives would take care of him; while his boyhood days are outlined in paragraph 3(e) to the effect that John subsequently grew up in the Protectorate and regularly travelled in and out of the Protectorate. The attainment of independence by Botswana on 30 September 1966 changed things and a new citizenship law was incorporated into the new Constitution. The state party reproduced some of the relevant provisions of the said Constitution. They are sections 20(1) and (2) and 23(1).

85. The main point of contention of the respondent state is that Mr Modise could not and did not become a citizen by descent under the repealed section 20(2) of the Constitution of Botswana because he was neither a British protected person nor a citizen of the United Kingdom and colonies on 29 September 1966, being a person who was born outside the former Protectorate of Bechuanaland (now Botswana). Granted that John Modise's father was at all times a British Protected Person, the question for determination is what then was his son's (John Modise's) nationality? To do this successfully, it is necessary to look at the relevant provision of the Botswana Constitution. The government has cited three provisions, to wit: sections 20(1) and (2) and 23(1) of the Constitution. [*Section 20, quoted above in paragraph 79, is then repeated — eds.*]

86. Section 20(1) of the said Constitution is not applicable to this case, for the simple reason that Mr John Modise was not born in the former Protectorate of Bechuanaland. Section 20(2) of the Constitution is the applicable law in this regard, since Mr John Modise was born outside the former Protectorate of Bechuanaland of a British Protected Person (his father). Had Mr Samuel Remaphoi Modise lived on 30 September 1966, he would, of course, have been a citizen of Botswana by virtue of the provision of subsection (1) of this section. The respondent state does not dispute this fact. Following the clear wordings of the subsection, Mr John Modise, having been born outside the former Protectorate of Bechuanaland of a British Protected Person, would have become a citizen of Botswana but for his father's death. Mr John Modise would therefore have become a citizen of Botswana by birth by the operation of this subsection. The government's position, stated in its brief accompanying its *note verbale* of 27 May 1998, and Mr BK Sebele's statement contained in his letter of 9 December 1998 (Ref: CHA 4/19X(88)PS), that Mr John Modise is not covered by section 20(2) of the Constitution of Botswana are neither convincing nor satisfactory. The respondent state's *note verbale* referred to above assigns South African citizenship to Modise as at 30 September 1966 without proof. Nothing is produced about South African law that confers citizenship on Modise. It should not be assumed that it is a universal principle that a person automatically acquires citizenship of the place of birth. It is not Botswana law that determines South African law.

87. In any event, evidence abounds that the complainant, Mr John Modise, is not and has never been accepted in South Africa as a citizen. If that had happened, Mr Modise would not have suffered the fate of being deported four times. The refusal of South Africa to accept him as its citizen forced Mr Modise to live for eight years in the 'homeland' of Bophuthatswana, and then for another seven years in 'no man's land', a border strip between the former South African homeland of Bophuthatswana and Botswana. The then government of the defunct homeland of Bophuthatswana deported Mr Modise back to Botswana (see paragraphs 75 and 76 above).

88. John Modise's father was a Tswana at the time of independence, 30 September 1966 and his son, the complainant not having been shown to have any other citizenship, acquired Botswana citizenship by virtue of section 20(2) of the Constitution of Botswana in force at the time. The denial of this right is in violation of articles 3(2) and 5 of the Charter. Article 3(2) provides: 'Every individual shall be entitled to equal protection of the law'. Article 5 on the other hand provides: 'Every individual shall have the right to the respect to the recognition of his legal status'. Having arrived at this, it is therefore not necessary to consider the other provisions of the Constitution cited by the state party.

89. The Commission takes notice of the fact that the complainant, Mr John Modise as indicated in the above judgment, had lived in the Republic of

Botswana from his infancy. Mr John Modise had also worked in Botswana until 1978, without being subjected to the rigours of obtaining necessary nationality documents applicable to citizens by registration, whom the government claims he is. The Commission also takes notice that the government of Botswana, without acknowledging any responsibility, did take some steps to remedy the complainant's situation by granting him a certificate of citizenship in June 1995, under section 9(2) of the Citizenship Act of Botswana.

90. Deportation or expulsion has serious implications on other fundamental rights of the victim, and in some instances, the relatives. Having decided on the issue of Modise's citizenship, the Commission would now avert its mind to the other claims made by the complainant, in order to determine whether his rights guaranteed under the Charter have been violated.

91. The complainant contends that his incessant deportation, constant threats of deportation and the accompanying disastrous consequences constitute a violation of article 5 of the Charter. The facts of this case reveal that the complainant was deported four times to South Africa, and on all these occasions, he was rejected. He was forced to live for eight years in the 'homeland' of Bophuthatswana, and then for another seven years in 'no man's land', a border strip between the former South African homeland of Bophuthatswana and Botswana. These acts exposed him to personal suffering and indignity in violation of the right to freedom from cruel, inhuman or degrading treatment guaranteed under article 5 of the Charter. Article 5 of the Charter provides:

Every 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 torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

92. The deportation also deprived him of his family, and his family of his support. The Commission finds this in violation of the complainant's right to family life enshrined under article 18(1) of the Charter. Article 18(1) provides: 'The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health'.

93. The complainant alleges, and the state has not contested, that he was deported four times from Botswana. The complainant also detailed his plights as a result of these acts. In this circumstance, the Commission finds that the said deportations greatly jeopardised the complainant's right to freedom of movement, as a citizen of Botswana in contravention of his rights under article 12(1) of the Charter. It also infringed upon his right to leave and to return to his country guaranteed by article 12(2) of the Charter. Article 12(1) and (2) provide:

(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.

94. The complainant also claimed to have suffered heavy financial losses, since the government of Botswana confiscated his belongings and property. The government of Botswana has not refuted this allegation. It is trite law that where facts go uncontested by a party, in this case the respondent state, such would be taken as given. The Commission therefore finds the above action of the government of Botswana an encroachment of the complainant's right to property guaranteed under article 14 of the Charter. Article 14 reads:

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

95. The complainant alleges that in 1978 he was one of the founders and leaders of an opposition party, the Botswana National Front. He alleges further that it was as a result of his political activities that he was declared an 'undesirable immigrant' in Botswana by the government. He contends that citizenship by registration, which the respondent government granted to him, is in several ways inferior to citizenship by birth, which he deserves as a right. One of such consequences is that he cannot vie for the highest elected political office in the country, that is, the presidency of the Republic of Botswana. This fact has been admitted by BK Sebele, Permanent Secretary, Ministry of Labour and Home Affairs of the respondent state to the effect that 'Except for being barred to be elected or becoming President of Botswana, he enjoyed all other rights enjoyed by a citizen of Botswana'. (See paragraph 2, page 3 of Mr Sebele's letter of 9 December 1998.)

96. While this may not seriously affect most individuals, it is apparent that for Mr Modise such a legal disability is of grave consequence. Considering the fact that his first deportation came soon after he founded an opposition political party, it suggests a pattern of action designed to hamper his political participation. When taken together with the above action, granting the complainant citizenship by registration has, therefore, gravely deprived him of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives. It also constitutes a denial of his right of equal access to the public service of his country guaranteed under article 13(2) of the Charter. Article 13 of the Charter provides:

(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. (2) Every citizen shall have the right of equal access to the public service of his country.

For the above reasons, the Commission:

[97.] Finds the Republic of Botswana in violation of articles 3(2), 5, 12(1) and (2), 13(1) and (2), 14 and 18(1) of the African Charter;

[98.] Urges the government of Botswana to take appropriate measures to recognise Mr John Modise as its citizen by descent and also compensate him adequately for the violations of his rights occasioned.

BURKINA FASO

International Pen v Burkina Faso

(2000) AHRLR 47 (ACHPR 1994)

Communication 22/88, *International Pen v Burkina Faso*
Decided at the 15th ordinary session, April 1994, 7th Annual Activity
Report

[1.] Communication on alleged wrongful detention.

[2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;

[3.] Meeting at its 15th ordinary session held in Banjul, The Gambia, from 18 to 27 April 1994;

[4.] Considering that Mr Ernest N Ouedraogo has been released on 4 August 1989;

[5.] Decides that the file be closed.

BURUNDI

Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi

(2000) AHRLR 48 (ACHPR 2000)

Communication 231/99, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamyé) v Burundi*
Decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual Activity Report
Rapporteur: Rezag-Bara

Interim measures (stay of execution, 15)

Admissibility (discretionary remedy, 22-23)

Fair trial (defence — access to legal counsel, irreversible character of death penalty, equality between persecution and defence, 24-31)

Interpretation (trials must conform with international standards, 26, 31)

State responsibility (duty to give effect to rights in the Charter in national law, 31)

Summary of facts

1. Lawyers Fabien Sagatwa, Moussa Coulibaly and Cédric Vergauwen, respectively called to the bars of Burundi, Niger and Brussels and members of *Avocats Sans Frontières* in Burundi and acting on behalf of Mr Gaëtan Bwampamyé, currently detained at the Mpimba Prison (Bujumbura), present the facts of the case as follows.

2. On 25 September 1997, Mr Gaëtan Bwampamyé was sentenced to death by the Criminal Chamber of the Appeal Court of Ngozi after being convicted for having, in Ruhoro on 21 October 1993, as author, co-author or accomplice, incited the population to commit crimes and for having, under the same circumstances, organised an attack geared towards provoking massacres and set up barricades with a view to hindering the enforcement of public order; all offences under articles 212, 417 and 425 of the Penal Code of Burundi.

3. On 2 October 1997, he filed an appeal with the Supreme Court of Burundi. In support of his appeal, he invoked six grounds, including the violation of article 75 of the Penal Procedure Code of Burundi, article 14(3)(d) of the International Covenant on Civil and Political Rights, as well as article 51 of Decree no 100/103 of 29 August 1979, defining the

status of the profession of lawyers. According to the complainants, the latter argument was invoked by the accused to denounce the fact that he was denied the services of his counsel during the public prosecution's closing address and that, in spite of his request for assistance, he was compelled to prepare his own defence.

4. The complainants assert that on 3 June 1997, the Criminal Chamber of the Court of Appeal closed the hearing of the witnesses, and on account of the volume of the case, decided to adjourn the hearing to 20 August 1997.

5. During the hearing of 20 August 1997, the prosecution refused to make its closing address, arguing that it needed more time to study the contents of the statement of the defence counsel. The Criminal Chamber therefore decided to adjourn the case to 25 September 1997. On that day, the counsel for the defence was unable to attend the hearing due to ill-health. In spite of the repeated request of Mr Bwampanye for the case to be adjourned to another date, the chamber decided to hear the prosecution, and compelled the accused to defend himself, without the assistance of his lawyer. The verdict sentencing him to death was rendered that same day at the end of the submissions.

6. The complainants point out that the Supreme Court had rejected this argument invoked before it by the accused, who wanted the ruling of the Ngozi Court of Appeal quashed on the grounds that for the court the law does not obligate the judge to designate a lawyer, but he may do so.

7. The Supreme Court continues in the following terms:

further whereas for the specific case in question, the accused has always been assisted by a lawyer, the evidence being that his lawyer had already submitted his 19 page written arguments on 20 August 1997, that furthermore they had already pleaded together in the public hearing, whereas in the face of such situation, the plaintiff has no justification in saying that the judge should have designated a lawyer for him whereas he already had one who had already accomplished all the essential duties expected of a lawyer; that consequently, this argument is also to be rejected.

8. This line of argument of the Supreme Court is challenged by the complainants who raise a certain number of points of law, including *inter alia*, the ignorance according to them by the said court of the principles of the right of defence and judicial assistance. They claim that this ruling of the Supreme Court is not only contrary to the provisions of article 73 of Burundi's Criminal Procedure Code, which unequivocally establishes the right to judicial assistance, but also the general principle of oral submissions in criminal proceedings.

9. They assert on the one hand that 'whilst it is customary for a lawyer to communicate his pleas to the prosecution before the closing address of the latter, no written rule requires him to do so'. On the other hand, the complainants assert that:

. . . the lawyer is obviously never bound by the contents of a statement of defence deposited before the hearing. Such a statement therefore is not exhaustive and may only be confined to certain aspects of the case and not focus on issues that the defence intends to elaborate on later at the bar. Counsel for the defence may also renounce certain arguments contained in his note, depending on for instance the issues raised by the prosecution. This freedom is at the very core of the rights of the defence. Before any decision, they assert, there is the unconditional right to oral submissions and freedom of speech.

10. The complainants assert that this same freedom of speech was accorded to the prosecution, and recall that the 'prosecutor is never bound by the written closing speeches of his office'. The principle is furthermore established by the old saying that 'the written word is not as free as the spoken word'. They vehemently assert that in indicating in its judgment that the lawyer had already submitted a 19-page statement of defence and that in this respect he had accomplished all the fundamental duties of a lawyer,

the court ignores all the principles that have just been set forth and, consequently, authorises a blatant violation of the rights of the defence in general and the rights of judicial assistance in particular.

11. On the basis of the foregoing, the complainant, while stressing that the aim of the present complaint is to highlight the above violations, call on the Commission to rule that:

(a) By refusing Mr Gaëtan Bwampamye the assistance of his legal counsel to plead his case, the Criminal Chamber of the Ngozi Court of Appeal held a hearing which was not equitable under the African Charter on Human and Peoples' Rights and all the relevant international instruments; (b) To establish the violation by the Republic of Burundi of the rights enshrined in the Charter more specifically, the violation of article 7(1)(c) of the Charter and the general principles on the rights of the defence; (c) To report its findings to the parties concerned and to the Assembly of Heads of State and Government of the OAU.

Procedure

12. The communication is dated 11 April 1999. It was sent to the Secretariat by e-mail.

13. On account of the fact that the judgment of the Ngozi Court of Appeal (a major piece written in Kirundi) was still being translated, the communication could not be brought before the Commission during its 25th ordinary session held in Bujumbura in May 1999. Towards the end of the said session, however, the plaintiffs forwarded to the Secretariat the outstanding documents, thus enabling it to complete the file on the communication and bring the matter before the 26th session of the Commission.

14. At its 26th session, the Commission heard from the representatives of Mr Bwampamye who had come to present their position on the matter. After a long debate, the Commission reached a decision to be seized of the

communication. Mr Bwampamye was represented by lawyers: Segatwa Fabien; A Moctar; Seydou Doumbia and Boubine Touré, all members of *Avocats Sans Frontières*.

15. On 13 December 1999, the Secretariat informed the parties of this decision and a letter signed by the Chairman of the Commission requesting a stay of execution was addressed to the Burundian Head of State.

16. On 15 February 2000, the Burundi office of *Avocats Sans Frontières* acknowledged receipt of the letter of 13 December 1999, addressed to it by the Secretariat without, however communicating its observations as regards the admissibility of the communication.

17. At its 27th ordinary session held in Algiers, Algeria, the Commission examined the case and declared it admissible and requested parties to furnish it with arguments on its merits. It also requested the Chairman of the Commission to repeat its earlier appeal for stay of execution pending the determination of the communication.

18. The above decision was communicated to parties on 1 August 2000.

19. During its 28th session, the respondent state and counsel for the complainant presented their written and oral submissions before the Commission.

Law

Admissibility

20. Article 56(5) of the Charter stipulates that:

Communications relating to human and peoples' rights . . . received by the Commission shall be considered if they . . . Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .

21. It is apparent from an examination of the documents appended to the dossier that the verdict handed down on 25 September 1997 by the Ngozi Court of Appeal, sentencing Mr Gaétan Bwampamye to death, was confirmed on 5 October of the same year by the Supreme Court of Burundi. The Commission notes, consequently, that the domestic remedies had been duly exhausted. For these reasons, it declares the communication admissible.

22. In its oral submission, the respondent state argued that the complainant had not exhausted other local remedies which include *le recours dans l'interet de la loi*, revision and the plea for pardon.

23. The Commission, however, holds the view that the complainant could only benefit from the first two remedies at the initiative of the Ministry of Justice and also as a result of discovery of new facts that may lead to reopening the file. With regard to the plea for pardon, it is not a judicial remedy but serves to affect the execution of a sentence. For these reasons the Commission maintains its decision on admissibility.

Merits

24. Article 7(1)(c) of the Charter states that: 'Every individual shall have the right to have his cause heard. This comprises: . . . the right to defence, including the right to be defended by counsel of his choice'.

25. In its verdict of 5 October 1997, the Supreme Court of Burundi adjudged and stated:

Whereas this court is of the view that the law implies no obligation on the part of the judge to nominate a lawyer, though he may do so; whereas in the case under consideration, the accused had always been assisted by a lawyer, proof being that his 19 page written plea of 20 August was filed by his lawyer; and that they had appeared together at the public sitting; whereas, in view of such situation, the appellant has no reason to claim that the judge should appoint a lawyer for him, since he already had one who had performed all essential functions of a lawyer for him; this procedure is, therefore, also hereby rejected . . .

26. The Commission recalls that the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all. The Commission shall examine the verdict of the Ngozi Court of Appeal, as well as that of the Supreme Court in the light of the above criteria.

27. The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner. In the case under consideration, it is expected of the Commission to attend to the first aspect, that is, observation of the rule of equality of the means utilised by the defence and the prosecution.

28. The right to defence also implies that at each stage of the criminal proceedings, the accused and his counsel be able to reply to the indictment of the public prosecutor and in any case, to be the last to intervene before the court retires for deliberations.

29. The Ngozi Court of Appeal had on 25 September 1997 handed down a verdict sentencing Mr Bwampamyé to death, thereby following the prayer of the public prosecutor, paying no heed to the accused's prayer for adjournment of the case, pleading the absence of his lawyer. The

Commission holds the view that the judge should have upheld the prayer of the accused, in view of the irreversible character of the penalty involved. This was all the more imperative considering that during the 20 August 1997 hearing he had upheld the arguments of the prosecutor who had refused to proceed with his pleading claiming that he needed time to study the written plea presented by counsel for the accused. The criminal court then decided to adjourn the case to 25 September 1997. The Commission holds that by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial.

30. The Supreme Court, in its verdict, upholds the position of the lower court judge in refusing to designate a defence lawyer as follows: 'this court is of the view that the law implies no obligation on the part of the judge to nominate a lawyer, though he may do so.' The Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial, more so where the interests of justice demand it. It holds the view that, in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case.

31. In its consideration of what appears to be the liberty allowed the judge under Burundian law to designate or not to designate a defence lawyer for the accused, the Commission recalls the fundamental principle enshrined in article 1 of the Charter, that not only do the state parties recognise the rights, obligations and freedoms proclaimed in the Charter, they also commit themselves to respect them and take measures to give effect to them. In other words, if a state party fails to ensure respect for the rights contained in the African Charter, this constitutes a violation of the said Charter. (See communication 74/92 [*Commission Nationale des Droits des l'Homme et des Libertés v Chad*].) It is apparent, consequently, that Burundian legislation, in this regard, does not comply with the country's treaty obligations emanating from its status as a state party to the African Charter. The court's argument flies in the face of a well-known general legal principle, which states that 'no one may profit from his own turpitude'. The argument should furthermore be rejected because by considering the various instruments cited in his opening statement by counsel for the accused, the court, though admittedly it does not state a position on them, had become aware of the country's obligations as regards human rights, especially the provisions of the International Covenant on Civil and Political Rights and, subsequently, those of the African Charter on Human and Peoples' Rights. By upholding the position of the appellate judge, the court ignored the obligation of courts and tribunals to conform to international standards of ensuring fair trial to all.

For these reasons, the Commission:

[32.] Finds the Republic of Burundi in violation of article 7(1)(c) of the African Charter;

[33.] Requests Burundi to draw all the legal consequences of this decision; and to take appropriate measures to allow the reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and the pertinent provisions of the African Charter on Human and Peoples' Rights;

[34.] Calls on Burundi to bring its criminal legislation in conformity with its treaty obligations emanating from the African Charter.

CAMEROON

Vitine v Cameroon

(2000) AHRLR 55 (ACHPR 1994)

Communication 106/93, *Amuh Joseph Vitine v Cameroon*
7th Annual Activity Report

Complaint

[1.] Communication on wrongful persecution.

Final decision

[2.] Mr Amuh Joseph Vitine wants the Commission to save his life and prevail on his government to stop the hunt against him. He also wants the Commission to appeal to the governments of Senegal and Niger to grant him refugee status.

[3.] The Commission applied article 55 and decided not to take up the communication.

* * *

Pagnouille (on behalf of Mazou) v Cameroon

(2000) AHRLR 55 (ACHPR 1995)

Communication 39/90, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon*
8th Annual Activity Report
(See also *Pagnouille (on behalf of Mazou) v Cameroon* (ACHPR 1997), below)

Complaint

[1.] This communication was submitted by Annette Pagnouille of Amnesty International and concerns one Abdoulaye Mazou, a Cameroonian na-

tional who continues to be held in prison, despite completing, in April 1989, a five-year prison term.

Decision

[2.] The Commission decides to close the file because the victim has been released and the issue satisfactorily resolved.

* * *

Embga Mekongo v Cameroon

(2000) AHRLR 56 (ACHPR 1995)

Communication 59/91, *Embga Mekongo Louis v Cameroon*
8th Annual Activity Report

Remedies (amount of damages not determined by Commission, 2)

Complaint

[1.] Embga Mekongo, a Cameroonian citizen, alleges false imprisonment, miscarriage of justice and damages for which he claims the sum of \$105 million.

Finding

[2.] The Commission finds that the author had been denied due process, contrary to article 7 of the African Charter and had in fact suffered damages. Being unable to determine the amount of damages, the Commission recommends that the quantum should be determined under the law of Cameroon.

* * *

Pagnouille (on behalf of Mazou) v Cameroon

(2000) AHRLR 57 (ACHPR 1997)

Communication 39/90, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon*

Decided at the 21st ordinary session, April 1997, 10th Annual Activity Report

(See also *Pagnouille (on behalf of Mazou) v Cameroon* (ACHPR 1995), above)

Admissibility (continuing violation, 15-17)

Personal liberty and security (detained beyond expiry of sentence, 16-17)

Fair trial (trial within reasonable time, 19; presumption of innocence, 20-21)

Work (denial of reinstatement in former professional capacity despite amnesty to that effect, 22-29)

Facts

[1.] This communication was submitted by Annette Pagnouille of Amnesty International and concerns Abdoulaye Mazou, a Cameroonian national. Mr Mazou was imprisoned in 1984 by a military tribunal without trial, without witnesses, and without right to defence. He was sentenced to five years imprisonment for hiding his brother who was later sentenced to death for an attempted *coup d'état*. Even after he had served his sentence in April 1989, he continued to be held in prison and was only freed by the intervention of Amnesty International on 23 May 1990. He continued to be under detention at his residence until the law of amnesty of 23 April 1991.

[2.] Although Mr Mazou has now been freed, he has not been reinstated in his position as a magistrate. The complainant therefore requests action be continued on his behalf.

[3.] The government was represented by a delegation at the 20th session of the Commission held in Mauritius in October 1996, which asked that the communication should be declared inadmissible because it was still pending at the Supreme Court.

[4.] The alleged victim petitioned the President of the Republic in order to solicit his reinstatement as a magistrate. He then submitted an out of court settlement to the Ministry of Justice. When no response from the President or the Ministry was forthcoming, the alleged victim made a submission for a legal settlement to the Administrative Chamber of the Supreme Court which rejected his case in principle. He submitted further petitions to the

Supreme Court and seized the Ministry of Justice for reinstatement in his position. He has also undertaken to bring political pressure, jointly with others, to reclaim his profession. As yet, none of these actions has produced any result.

Procedure

[5.] The Commission was seized of the communication at the 7th session in April 1990.

[6.] On 31 May 1990, the Secretariat of the Commission notified the state of Cameroon of the communication and asked it for its views on admissibility.

[7.] On 1 March 1995, the Secretariat informed the complainant that the Commission takes note of the release of Mr Mazou. The complainant was advised to inform the Commission whether or not his release was satisfactory reparation for Mr Mazou no later than 1 July 1995.

[8.] On 8 June 1995, a fax was received from the complainant stating that although the victim, Mr Abdoulaye Mazou, had been released he had not been reinstated in his position as a magistrate, to which he is legally entitled.

[9.] At the 19th session, in March 1996, the communication was declared admissible. The parties were notified of this decision.

[10.] At the 20th session, held in October 1996, a delegation of the government of Cameroon was present and submitted a written response to the effect that the communication was inadmissible. The delegation also admitted, however, that the conditions under which Mr Mazou was tried by a military tribunal fell short of the standards provided for in the African Charter, but that the laws governing such tribunals had since been changed. The delegation promised to forward to the Commission the written judgment of the military tribunal, any judgment concerning the alleged disciplinary measures against Mr Mazou, a document proving the existence of recourse as concerns disciplinary measures and the law in terms of which Mr Mazou was condemned. The Commission decided to postpone consideration of the case to the 21st session.

[11.] On 24 March the Secretariat received a letter from the Ministry of Foreign Affairs of Cameroon informing the Secretariat that the question had been dealt with in the Administrative Chamber of the Supreme Court and that all interested parties had the possibility of exhausting local remedies. The Ministry also sent the Supreme Court judgment, the Ordinance no 304 which placed Mr Mazou under surveillance, Ordinances no 72/5 and 72/20 concerning the competence of the military court and Law no 74/4 modifying Ordinance no 72/5, the judgment of the military court, Ordinance no 72/13 concerning state of emergency, Ordinance 72/6 concerning the organisation of the Supreme Court and Law no 76/28

modifying this ordinance, Decree no 80/276 concerning the nomination of Secretary Generals of Ministries and Decree no 82/467 relating to the judiciary.

Law

Admissibility

[12.] Article 56 of the African Charter reads: 'Communications . . . shall be considered if they: . . . (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. . .'

[13.] In this case, the alleged victim petitioned the President of the Republic in order to solicit his reinstatement as a magistrate. He then submitted an out of court settlement to the Ministry of Justice. When no response from the President or the Ministry was forthcoming the alleged victim made a submission for a legal settlement to the Administrative Chamber of the Supreme Court. He submitted further petitions to the Supreme Court and seized the Ministry of Justice for reinstatement in his position. In the light of the above actions taken by the victim and their failure to yield any results, the Commission holds that local remedies have been duly exhausted.

Merits

[14.] Article 6 of the Charter reads: '. . . 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.'

[15.] In conformity with article 65 of the Charter, the Commission cannot pronounce on the equity of court proceedings that took place before the African Charter entered into force in Cameroon on 20 September 1989. [*The Commission then cites an unofficial version of an earlier decision, which is omitted here — eds.*] If, however, irregularities in the original sentence has consequences that constitute a continuing violation of any of the articles of the African Charter, the Commission must pronounce on these.

[16.] Mr Mazou was held in prison after the expiration of his sentence in April 1989 until 23 May 1990. After his release, he was placed under house arrest. The delegation of Cameroon at the 20th session stated that:

After serving his sentence he was released, but the problem is that he was the subject of purely administrative measures based on existing laws at that time. These laws were however abrogated only in 1989.

[17.] All parties agree that Mr Mazou was held beyond the expiry of his sentence. No judgment was passed to extend his sentence. Therefore the detention is arbitrary, and the Commission finds that this constitutes a violation of article 6.

[18.] Article 7 of the African Charter reads:

(1) Every individual shall have the right to have his cause heard. This comprises:

... (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; ... (d) the right to be tried within a reasonable time by an impartial court or tribunal.

[19.] Mr Mazou has not yet had a judgment on his case brought before the Supreme Court over two years ago, without being given any reason for the delay. At the 20th session the delegation held that the case might be decided upon by the end of October 1996, but still no news of it has been forwarded to the Commission. Given that this case concerns Mr Mazou's ability to work in his profession, two years without any hearing or projected trial date constitutes a violation of article 7(1)(d) of the African Charter.

[20.] At the 20th session, the delegation of Cameroon stated that:

[The administrative detention of Mr Mazou was not linked to his trial]. When the state believes that an individual who is free can trouble public order we can take preventive measures, and this explains why he was detained administratively. This can be renewed at any time when the administrative authorities deem that there is a risk and therefore they deem need of preventive measures.

[21.] Detention on the mere suspicion that an individual may cause problems is a violation of his right to be presumed innocent.

[22.] Article 15 of the African Charter reads: 'Every individual shall have the right to work under equitable and satisfactory conditions ...'

[23.] Article 2 of the Amnesty Law of 23 April 1992 reads:

Have been amnestied: — All persons sentenced of subversion to penalty of imprisonment and/or fined; — All persons sentenced a punishment of detention or serving an penalty of detention; — All persons authors of offences of a political nature, condemned to death penalty.

[24.] Article 3 of the Amnesty Law of 23 April 1992 reads: '... the persons condemned who have been granted amnesty and who had public employment will be reintegrated...'

[25.] Despite the Amnesty Law of 23 April 1992, Mr Mazou had been denied reinstatement by the government in his former professional capacity as a magistrate.

[26.] The delegation of the government which appeared at the 20th session claimed the reason was that he was not covered by the Amnesty Law of 23 April 1992, because he had not been judged of subversion or sentenced to detention. It also stated that disciplinary action had been taken against Mr Mazou because of his sentence.

[27.] According to the delegation, although Mr Mazou had been judged for an ordinary criminal offence in Cameroon, he was still judged by a military tribunal. The delegation answered the Commission's questions about this as follows:

Why was he tried by a military tribunal? Everybody knows that when you are

involved in a problem which includes the attempt to violently, using arms, overthrow a government and a president, then you are actually taking part in political acts. The *coup* plotters of 1984 were judged by the military tribunal. [Mr Mazou hid for some time a brother of his who was involved. Thus there was] a connection between the *coup* attempt and the fact that Mr Mazou had accepted to hide his brother.

[28.] To the Commission it still seems peculiar that Mr Mazou was tried by a military tribunal like the *coup* plotters and that afterwards he is not given amnesty like them. The delegation promised to forward to the Commission the written judgment of the military tribunal. This has not yet happened.

[29.] The Commission finds that by not reinstating Mr Mazou in his former position after the Amnesty Law, the government has violated article 15 of the African Charter, because it has prevented Mr Mazou from working in his capacity of a magistrate even though others who have been condemned under similar conditions have been reinstated.

For the above reasons, the Commission:

[30.] Declares the violations of articles 6, 7(1)(b), 7(1)(d) and 15;

[31.] Recommends that the government of Cameroon draws all the necessary legal conclusions to reinstate the victim in his rights.

* * *

Ligue Camerounaise des Droits de l'Homme v Cameroon

(2000) AHRLR 61 (ACHPR 1997)

Communication 65/92, *Ligue Camerounaise des Droits de l'Homme v Cameroon*
Decided at the 21st ordinary session, April 1997, 10th Annual Activity Report

Admissibility (insulting language, 13; compatibility with the Charter, 14)

[1.] The complaint is in two parts. The first, submitted by the *Ligue Camerounaise des Droits de l'Homme*, alleges a number of serious and massive violations in Cameroon committed by the present government. The *Ligue*

alleges that the prison conditions in Cameroon constitute cruel, inhuman and degrading treatment and that many people have been arbitrarily arrested and detained in these conditions. Between 1984 and 1989 at least 46 persons were tortured and deprived of food in the Central Prison of Yaoundé. Further violations consist in the repression of freedom of expression, creation of special tribunals, denial of fair hearing, ethnic discrimination, and massacres of the civil population.

[2.] The second part relates to the situation of Mr Joseph Vitine, an ex-police officer. He stated that he has been persecuted by his former colleagues since March 1990. Subsequent to this submission Mr Vitine re-submitted his case as a separate communication, no 106/93 [*Vitine v Cameroon* (2000) AHRLR 55 (ACHPR 1994)].

[3.] The government of Cameroon responded in writing that the case of Mr Vitine should be declared inadmissible because the author did not appear to be in possession of his full mental faculties. The government responded orally that the allegations of the *Ligue Camerounaise* should be declared inadmissible because they are posed in disparaging and insulting language.

Procedure

[4.] The communication is not dated but was received from the *Ligue Camerounaise* just before March 1992. The Commission was seized of the communication at the 11th session.

[5.] The government of Cameroon was notified of the communication on 8 April 1992. No response was forthcoming. On 13 November 1992 another notification was sent.

[6.] As of the 19th session, no information had been received from the government. The Commission declared the communication as regards Mr Vitine inadmissible.

[7.] On 17 May 1996 the Commission sent a letter to Mr Vitine informing him that his communication had been declared inadmissible at the 19th session.

[8.] At the 20th session, a delegation of the government of Cameroon was present and submitted a written response to the communication, dealing with the portion of the communication submitted by Mr Vitine, which had already been declared inadmissible. The government delegation made an oral presentation concerning the allegations of the *Ligue Camerounaise*. The Commission decided to request more information from both the government and the complainant, and to postpone a decision on the merits of the case. On 10 December 1996 the parties were informed of this decision.

Law

Admissibility

[9.] Article 55(2) of the Charter reads: 'A communication shall be considered by the Commission if a simple majority of its members so decide.'

[10.] This power of the Commission to consider communications naturally includes the lesser power to decline to hear them.

[11.] The allegations submitted by Mr Vitine were in 1993 submitted separately to the Commission and registered as communication 106/93. The information in this communication did not give evidence of *prima facie* violations of the African Charter. For this reason the Commission declared the communication inadmissible.

[12.] Article 56(3) of the Charter reads:

Communications relating to human and peoples' rights referred to in article 55, received by the Commission, shall be considered if they: Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity.

[13.] The allegations submitted by the *Ligue Camerounaise* are of a series of serious and massive violations of the Charter. The communication contains statements such as: 'Paul Biya must respond to crimes against humanity', '30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya', 'regime of torturers', and 'government barbarisms'. This is insulting language.

[14.] In addition to the requirements of form, the commission has a clear precedent that communications must contain a certain degree of specificity, such as will permit the Commission to take meaningful action. (See the Commission's decision on communications 104/93, 109-126/93, *Centre for the Independence of Judges and Lawyers v Algeria*.)

For these reasons, the Commission:

[15.] Declares the communication inadmissible.

* * *

Motale v Cameroon

(2000) AHRLR 64 (ACHPR 2000)

Communication 230/99, *Motale Zacharia Sakwe v Cameroon*
Decided at the 28th ordinary session, Oct/Nov 2000, not reported in
the 14th Annual Activity Report, source: www1.umn.edu/humanrts/africa/

Admissibility (failure to exhaust local remedies, 19)

1. The complainant is Motale Zacharia Sakwe, a citizen of Cameroon.
2. The complaint was received at the secretariat of the Commission on 4 January 1999.
3. The complaint contains various information on the general state of human rights in Lobe Town Community between 30 December 1996 and 27 September 1998. In the relevant part however, the complainant alleges that on 15 December 1996, at 1.30 am in the night, he was abducted from his house by the Divisional Officer for Mbonge sub-division accompanied by well armed police and gendarmes officers. The same officers at the same time and in the same way and manner also abducted the complainant's mother.
4. The complainant also alleged that he was taken to the police post at Mbonge and subsequently detained for three days.
5. His aged mother was also detained at the gendarme's office for three days.
6. The complainant alleges further that during the detention, he was tortured by being made to roll on the ground after being soaked with water and sleeping under the sun for 12 hours, while his aged mother was stripped naked and dumped into a pit.
7. The complainant contends that as a result of the aforementioned treatments, he has severe pains in his eyes, on his ribs and acute headaches.
8. On 17 December 1996, the complainant alleges that he was summoned to the Divisional Officer's office and asked to pay six thousand francs (6 000 CFA) before being released, to which he complied.
9. Throughout the period of their detention, they were not informed of the nature of their offences, neither were they charged for the commission of any crime.

Complaint

10. The complainant alleges violation of articles 5, 6 and 7 of the African Charter.

Procedure

11. At its 26th ordinary session in Kigali, Rwanda, the Commission decided to be seized of the communication and requested parties to furnish it with additional information on the issue of exhaustion of local remedies.

12. On 24 January 2000, the Secretariat informed parties of the above decision.

13. On 16 February 2000, the Secretariat received a *note verbale* from the Embassy of the Republic of Cameroon in Dakar, informing it that the *note verbale* and document attached had been forwarded to the Cameroonian Ministry of External Relations for due consideration.

14. At its 27th ordinary session held in Algeria, the Commission examined the case and deferred its further consideration to the 28th ordinary session to enable the competent authorities of Cameroon to respond to its request for additional information on the issue of exhaustion of local remedies.

15. The decision was communicated to the parties on 12 July 2000.

16. On 28 August 2000, the Secretariat received a *note verbale* from the Embassy of the Republic of Cameroon in Dakar acknowledging receipt of the above letter, but pointing out that it would not be able to meet the deadline for submission of the arguments on the admissibility of the case. It therefore appealed for the case to be adjourned to the next session.

17. On 30 August 2000, the Secretariat replied to the said *note verbale* pointing out that the request for such information had already been communicated to the competent authorities of Cameroon on two separate occasions, to which they had acknowledged receipt. Regarding their appeal for adjournment, it was indicated that it was the prerogative of the Commission to take such a decision, but [the Secretariat] promised to convey the request to the Commission accordingly.

Law

Admissibility

18. Article 56(5) of the Charter provides: 'Communications shall be considered if they: . . . Are sent after exhausting local remedies, if any, unless, it is obvious that this procedure is unduly prolonged.'

19. On the surface of the complaint, it appears that the complainant did not exhaust domestic remedies. The Commission noted further that the parties did not respond to its requests for additional information on the issue of exhaustion of local remedies, despite repeated reminders.

For the above reasons, the Commission:

[20.] Declares the communication inadmissible.

CHAD

International Pen v Chad

(2000) AHRLR 66 (ACHPR 1994)

Communication 55/91, *International Pen v Chad*
7th Annual Activity Report

[1.] Communication on alleged false imprisonment.

Final decision

[2.] Following the withdrawal of the communication by the author, the Commission closes the case.

* * *

Commission Nationale des Droits de l'Homme et des Libertés v Chad

(2000) AHRLR 66 (ACHPR 1995)

Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*
Decided at the 18th ordinary session, Oct 1995, 9th Annual Activity Report

Expression (persecution of journalists, 2, 23)

Derogation (derogation not possible under the Charter, 21)

Serious or massive violations (15, 22)

State responsibility (duty to give effect to rights in the Charter in national law, responsibility for actions of non-state actors, 20-22)

Personal liberty and security (arbitrary arrest and detention, disappearances, 3, 4, 23-26)

Life (extrajudicial executions, 4, 23-26)

Torture (4, 23-26)

Interpretation (international standards, 25)

The facts

1. The communication is brought by *La Commission Nationale des Droits de l'Homme et des Libertés de la Fédération Nationale des Unions de Jeunes Avocats de France*. The complaint alleges several massive and severe violations in Chad.

2. The complaint alleges that journalists are harassed, both directly and indirectly. These attacks are often by unidentified individuals whom the complainants claim to be security service agents of the government. The government denies responsibility.

3. The complaint alleges the arbitrary arrest of several people, among those four members of the opposition party, RDP, by the security services. These people were never brought before a court, although they were eventually set free. Fifteen more people were illegally detained, but have now been liberated.

4. There are several accounts of killings, disappearances and torture. Fifteen people are reported killed, 200 wounded, and several persons tortured as a result of the civil war between the security services and other groups.

5. The communication alleges the assassination of Bisso Mamadou, who was attacked by armed individuals. The minister responsible was warned of the danger to Mr Bisso, but he refused to issue protection. Subsequently, the minister did not initiate investigation into the killing.

6. The communication also alleges the assassination of Joseph Betudi, Vice-President of *Ligue Tchadienne des Droits de l'Homme*. It also contains allegations of inhuman treatment of prisoners.

Procedure before the Commission

7. The communication is dated 11 May 1992 and includes a report based on an observation mission to Chad made by the association *Agir ensemble pour les droits de l'homme* and the *Fédération Nationale des Unions de Jeunes Avocats*.

8. The Commission was seized of the communication at its 12th session and on 16 November 1992 the government of Chad was notified of the communication.

9. On 10 March 1993, the Ministry of Justice responded to the communication.

10. On 12 April 1993, the Chairman of the Commission wrote to the Ministry of Foreign Affairs and requested its permission to conduct an on-the-spot investigation in Chad.

11. The government did not reply to that letter, nor to the following reminders.

12. A letter was sent to the government on 3 February 1995, and to the complainant on 17 February 1995, stating that the communication would be considered at the 17th session.

13. At the 17th session in March 1995, the communication was declared admissible. The government and complainant were informed of that decision.

14. On 1 September 1995, a letter was sent to the government stating that the communication would be heard on its merits at the 18th session of the Commission and inviting the government to send a representative.

15. At the 18th session, the Commission heard Ms Febiene Trusses-Naprou, from *Fédération Nationale des Unions de Jeunes Avocats, Commission Nationale des Droits de l'Homme et des Libertés* of France. She reiterated the information in the original communication, both verbally and by way of a *mémoire*. This *mémoire*, in addition to summarising the information in the original communication, affirmed that the human rights situation in Chad has not seen improvement to the present day. The Commission decided the communication on the merits, resolving that there was evidence of serious and massive violations of human and peoples' rights. Article 58 was invoked to draw the attention of the Assembly of Heads of State and Government of the OAU to this fact.

16. On 27 November 1995 a letter was received from the Ministry of External Affairs of Chad with regard to the Secretariat's letter of 1 September 1995. This letter stated that the National Human Rights Commission of Chad could find no record of the communication.

Law

17. Article 1 of the African Charter reads:

The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

18. In this case, the complainant claims that not only did government agents commit violations of the African Charter, but that the state failed to protect the rights in the Charter from violation by other parties.

19. The government claims that no violations were committed by its agents, and that it had no control over violations committed by other parties, as Chad is in a state of civil war.

20. The Charter specifies in article 1 that the states parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but they should also 'undertake . . . measures to give effect to them'. In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation.

21. The African Charter, unlike other human rights instruments, does not

allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

22. In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.

23. The complainant claims that the events in Chad constitute violations of articles 4 (right to life), 5 (prohibition of torture, inhuman and degrading treatment), 6 (right to security of person), 7 (right to a fair trial), and [9] (right to freedom of expression).

24. In the present case, there has been no substantive response from the government of Chad, only a blanket denial of responsibility.

25. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, the Commission must decide on the facts provided by the complainant and treat those facts as given. This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights. Since the government of Chad does not wish to participate in a dialogue, the Commission must, regrettably, continue its consideration of the case on the basis of facts and opinions submitted by the complaints alone.

26. Thus, in the absence of a substantive response by the government, in keeping with its practice, the Commission will take its decisions based on the events alleged by the complainants.

For these reasons, the Commission:

[27.] Finds that there have been serious and massive violations of human rights in Chad;

[28.] Finds that there have been violations of articles 4, 5, 6, 7 [and 9].

CÔTE D'IVOIRE

International Pen (on behalf of Senn and Another) v Côte d'Ivoire

(2000) AHRLR 70 (ACHPR 1995)

Communication 138/94, *International Pen on behalf of Senn and Sangare v Côte d'Ivoire*
8th Annual Activity Report

Admissibility (failure to exhaust local remedies, effect of amnesty, 2)

The facts

[1.] International Pen submitted the communication on behalf of two journalists — Senn and Sangare — who published an article that had appeared in *Jeune Afrique* about President Bédié. They were charged, imprisoned and fined while the appeal was pending. They were again detained, charged and imprisoned but subsequently released in an amnesty. In a subsequent letter to the Commission, the author insisted that the journalists were detained in violation of their rights.

Finding

[2.] After reviewing the situation, the Commission held the view that if the author required any remedies, he should first resort to the legal system of Côte d'Ivoire, the amnesty having extirpated the legal effects of detention and of which the Commission could take note.

DEMOCRATIC REPUBLIC OF CONGO (formerly Zaire)

Mpaka-Nsusu v Zaire

(2000) AHRLR 71 (ACHPR 1994)

Communication 15/88, *Mpaka-Nsusu André Alphonse v Zaire*
7th Annual Activity Report

Admissibility (consideration by other international body, 3)

- [1.] Communication on false imprisonment.
- [2.] The African Commission on Human and Peoples' Rights;
- [3.] Considering that the communication had already been referred for consideration to the Human Rights Committee established under the International Covenant on Civil and Political Rights;
- [4.] Declares the communication inadmissible.

* * *

Lawyers Committee for Human Rights v Zaire

(2000) AHRLR 71 (ACHPR 1994)

Communication 47/90, *Lawyers Committee for Human Rights v Zaire*
7th Annual Activity Report
(See also *Free Legal Assistance Group and Others v Zaire* (ACHPR 1995),
below)

Serious or massive violations (2)

- [1.] Communication on violations of human rights by the government of Zaire including arbitrary arrests, detention and torture.

Final decision

[2.] The Commission admits evidence of the existence of a series of serious or massive violations of human and peoples' rights and decides under article 58(1) of the African Charter to call the attention of the Assembly of Heads of State and Government to the situation.

* * *

Baes v Zaire

(2000) AHRLR 72 (ACHPR 1995)

Communication 31/89, *Maria Baes v Zaire*
8th Annual Activity Report

Admissibility (loss of contact with complainant, 2)

[1.] The communication was submitted by a Danish national, Maria Baes, on behalf of her colleague, Dr Shambuyi Naiadia Kandola, of the University of Kinshasa, Zaire. She alleges that her colleague was detained without charge in April 1988 for purely political reasons, in breach of articles 6 and 7 of the African Charter on Human and Peoples' Rights.

Finding

[2.] The author has failed to respond to inquiries from the Commission which learns that the detained person had since been released. The author shows no interest in pursuing the case. The Commission decides to close the file since the author has no interest in proceeding with the case.

* * *

Katangese Peoples' Congress v Zaire

(2000) AHRLR 72 (ACHPR 1995)

Communication 75/92, *Katangese Peoples' Congress v Zaire*
8th Annual Activity Report

Peoples' right to self-determination (ways in which self-determination can be exercised, 4; possible grounds for secession, 6)

1. The communication was submitted in 1992 by Mr Gerard Moke, President of the Katangese Peoples' Congress requesting the African Commission on Human and Peoples' Rights to recognise the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga; to recognise the independence of Katanga and to help secure the evacuation of Zaire from Katanga.

Law

2. The claim is brought under article 20(1) of the African Charter on Human and Peoples' Rights. There are no allegations of specific breaches of other human rights apart from the claim of the denial of self-determination.

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

4. The Commission believes that self-determination may be exercised in any of the following ways — independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people, but is fully cognisant of other recognised principles such as sovereignty and territorial integrity.

5. The Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights.

6. In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

For the above reasons, the Commission:

[7.] Declares that the case holds no evidence of violations of any rights under the African Charter. The request for independence for Katanga therefore has no merit under the African Charter on Human and Peoples' Rights.

Free Legal Assistance Group and Others v Zaire

(2000) AHRLR 74 (ACHPR 1995)

Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire*
Decided at the 18th ordinary session, Oct 1995, 9th Annual Activity Report
(See also *Lawyers Committee for Human Rights v Zaire* (ACHPR 1994), above)

Serious or massive violations (5, 35, 49)

Mission by Commission (mission to state party, 6)

Admissibility (exhaustion of local remedies — serious or massive violations, 36-37)

Evidence (uncontested fact to be considered as given, 40)

Interpretation (international standards, 40)

Torture (41)

Personal liberty and security (arbitrary arrest and detention, 42)

Life (extrajudicial executions, 43)

Conscience (harassment of Jehovah's Witnesses, 3, 45)

Health (failure of government to provide basic services such as safe drinking water and electricity — shortage of medicine, 47)

Education (closure of universities and schools, 4, 48)

1. Communication 25/89 is filed by the Free Legal Assistance Group, the Austrian Committee Against Torture and the *Centre Haitien des Droits et Libertés*, all members of the World Organization Against Torture (OMCT). The submission of the Free Legal Assistance Group was dated 17 March 1989, that of the Austrian Committee Against Torture 29 March 1989 and that of the *Centre Haitien* 20 April 1989. The Communication alleges the torture of 15 persons by a military unit, on or about 19 January 1989, at Kinsuka near the Zaire River. On 19 April 1989 when several people protested their treatment, they were detained and held indefinitely.

2. Communication 47/90, dated 16 October 1990, was filed by the Lawyers' Committee for Human Rights in New York. It alleges arbitrary arrests, arbitrary detentions, torture, extrajudicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, and suppression of the freedom of the press.

3. Communication 56/91 was submitted by the Jehovah's Witnesses of Zaire and dated 27 March 1991. It alleges the persecution of the Jehovah's Witnesses, including arbitrary arrests, appropriation of church property, and exclusion from access to education.

4. Communication 100/93 was submitted by the *Union Inter africaine des Droits de l'Homme* and dated 20 March 1993. It makes allegations of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleges that public finances were mismanaged; that the failure of the government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years; that freedom of movement was violated; and that ethnic hatred was incited by the official media.

5. The African Commission, when it determined that the communications, taken together, evidenced a grave and massive violation of human rights in Zaire, brought the matter to the attention of the Assembly of the Heads of State of the Organization of African Unity in December 1995.

6. The Commission also requested that a mission consisting of two members of the Commission be received in that country, with the objective of discovering the extent and cause of human rights violations and of endeavouring to help the government to ensure full respect for the African Charter. The government of Zaire has never responded to these requests for a mission.

Procedure before the Commission

7. Communication 25/89 was received by the Commission in June 1989. The Commission was seized of the communication at its 11th session in October 1989 and the state of Zaire was notified on 14 March 1990.

8. Between 1990 and 1993, numerous reminders were sent by the Secretariat to the government of Zaire, but no response was received.

9. The Secretariat also sent the complainants regular updates on the status of the communications.

10. On 23 September 1993, the Ministry of Justice of Zaire wrote that no copy of the communication had ever been received.

11. A copy was sent on 3 March 1994 by registered post to the Embassy of Zaire in Dakar but no response was forthcoming.

12. At the 16th session, held in April 1994, the Commission decided to send a mission to Zaire in order to create a dialogue.

13. At the 17th session, held in March 1995, the communications against Zaire were declared admissible.

14. The government of Zaire was notified of this decision on 26 April 1995.

15. At the 18th session, held in October 1995, the Commission decided to apply article 58(1) of the Charter and to draw the attention of the Heads

of State and Government to the serious and massive violations of human rights in Zaire.

16. On 12 January 1996, a *note verbale* was sent to the Ministry of Foreign Affairs of Zaire informing the Ministry of the proposed mission to Zaire to be undertaken by Commissioners Nguema and Ben Salem.

17. Communication no 47/90 was received by the Commission in October 1990.

18. On 20 October 1990, at its 8th ordinary session in Banjul, the African Commission was seized of the communication and decided to notify the State of Zaire of the complaint and invite its written comments on the admissibility.

19. On 6 November 1990, the Secretariat of the Commission informed the Ministry of Zaire of this decision by registered post. No response was forthcoming.

20. At its 11th ordinary session, the Commission decided to send a reminder to Zaire. The Secretariat sent this reminder on 30 March 1992. No response was forthcoming.

21. At its 12th ordinary session, held in Banjul in October 1992, the Commission declared the communication admissible and decided that it would be examined on the merits.

22. The notice of this decision was sent on 16 November 1992. No response was forthcoming.

23. In 1993 and 1994, the Secretariat sent several reminders to the government of Zaire. No response was received.

24. From August 1994 to the present, the correspondence in respect of this communication is identical with that in communication 25/89 above.

25. Communication no 56/91 was received by the Commission in the summer of 1991.

26. The Commission was seized of the communication at its 10th session in October 1991 and a notification was sent to the state on 14 November, 1991. No response was forthcoming.

27. Two reminders were sent by the Secretariat to the government of Zaire in 1992.

28. In a letter dated 14 September 1993, the Ministry of Justice of Zaire claimed that a copy of the communication had never been received.

29. A copy of the communication was sent on 3 March 1994 by registered post to the Embassy in Dakar, but no response was received.

30. From August 1994, the correspondence in respect of this communication is identical with that in communication 25/89, given above.

31. Communication no 100/93 was received by the Commission in April 1993.

32. The Commission was seized of the communication at its 13th session in April 1993 and it was brought to the attention of the state on 12 April 1993. No response was forthcoming.

33. In 1993 and 1994, reminders were sent to the government of Zaire but no response was forthcoming.

34. As from August 1994, the correspondence in respect of this communication is identical with that in communication 25/89, given above.

Law

Admissibility

35. After deliberations, as envisioned by article 58 of the African Charter, the Commission considered that communications 25/89, 47/90, 56/91 and 100/93 against Zaire reveal the existence of serious and massive violations of human rights.

36. Article 56 of the African Charter requires that complainants exhaust local remedies before the Commission can take up a case, unless these remedies are as a practical matter unavailable or unduly prolonged. The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body. In this case, the government has had ample notice of the violation.

37. The Commission has never held the requirement of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation. This is the situation here, given the vast and varied scope of the violations alleged and the general situation prevailing in Zaire.

38. For the above reasons, the Commission declared the communications admissible.

Merits

39. The main goal of the communications procedure before the Commission is to initiate a positive dialogue [between the complainant and the state concerned in order to reach an amicable settlement]. A prerequisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.

40. In the present case, there has been no substantive response from the government of Zaire, despite the numerous notifications of the communications sent by the African Commission. The African Commission, in several previous decisions, has set out the principle that where allegations

of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given. This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights. Since the government of Zaire does not wish to participate in a dialogue, the Commission must, regrettably, continue its consideration of the case on the basis of facts and opinions submitted by the complainants alone.

41. Article 5 of the African Charter prohibits torture and inhuman or degrading treatment. The torture of 15 persons by a military unit at Kin-suka, near the Zaire River, as alleged in communication 25/89, constitutes a violation of this article.

42. Article 6 of the African Charter guarantees the right to liberty and security of person. The indefinite detention of those who protested against torture, as described in communication 25/89, violates article 6.

43. Article 4 of the African Charter protects the right to life. Communication 47/90, in addition to alleged arbitrary arrests, arbitrary detention and torture, alleges extrajudicial executions which are a violation of article 4.

44. Article 7 of the African Charter specifies the right to have one's cause heard. The unfair trials described in Communication 47/90 constitute a violation of this right.

45. Article 8 of the African Charter protects freedom of conscience. The harassment of the Jehovah's Witnesses, as described in communication 56/91, constitutes a violation of this article, since the government has presented no evidence that the practice of their religion in any way threatens law and order. The arbitrary arrests of believers of this religion likewise constitute a contravention of article 6 above.

46. The torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press described in communication 100/93 violate the above articles.

47. Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that states parties should take the necessary measures to protect the health of their people. The failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitute a violation of article 16.

48. Article 17 of the Charter guarantees the right to education. The closures of universities and secondary schools as described in communication 100/93 constitute a violation of article 17.

For these reasons, the Commission:

[49.] Holds that the facts constitute serious and massive violations of the African Charter, namely of articles 4, 5, 6, 7, 8, 16 and 17.

DJIBOUTI

Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti

(2000) AHRLR 80 (ACHPR 2000)

Communication 133/94, *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti*

Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report

Rapporteurs: 17th session: Amega; 18th–19th sessions: Ndiaye; 20th–21st sessions: Beye; 22nd–27th sessions: Ben Salem

Interim measures (during time of military conflict, 5)

Mission by Commission (mission to state party 10-11)

Admissibility (exhaustion of local remedies — terms of amicable settlement unknown, 14)

Amicable settlement (17)

Summary of facts

1. The communication is filed by the *Association pour la Défense des Droits de l'Homme et des Libertés*, an NGO from Djibouti. The communication complains that there has been a series of human rights abuses against members of the Afar ethnic group committed by government troops in areas of renewed fighting with the FRUD, *Front pour la Restauration de l'Unité et de la Démocratie*. The FRUD draws its support mainly from the Afar ethnic group. There are reports on extrajudicial executions, torture and rape. The communication names 26 people who have been executed, jailed without trial or tortured.

Complaint

2. The complainant alleges the violation of articles 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 13 of the African Charter by the government of Djibouti.

Procedure

3. The communication is dated 7 April 1994 and was received on 19 April 1994 at the Secretariat.

4. The Commission was seized of the communication at its 15th ordinary session, and the Ministries of External Affairs and Justice of Djibouti were

notified on 29 July 1994. The complainant was also notified of this decision.

5. On 26 August 1994, the Secretariat invoked rule 109 of the Rules of Procedure, ie asking the government to avoid irreparable prejudice to the complainant or the victims.

6. On 21 October 1996, at the 20th session, the Commission received a letter from the complainant which demanded that the consideration of the communication be postponed during negotiations with the government. The Commission agreed to this demand, particularly in the light of the fact that the communication had been given a new rapporteur, who would like more time to study the file.

7. At the 22nd session held in Banjul, The Gambia from 2-11 November 1997, the Communication was declared admissible.

8. On 11 February 1998, the Secretariat received a faxed *note verbale* from the Ministry of External Affairs and International Co-operation, with a declaration of the General Assembly of the *Association pour la Défense des Droits de l'Homme et des Libertés*, dated 25 May 1996, in which it decided to withdraw the communication due to the signing of a protocol with the government of which the objective was to bring about a lasting settlement to the demands of the civilian victims, refugees and displaced persons. The Secretariat acknowledged receipt of this *note verbale* on 20 February 1998.

9. The Secretariat contacted the complainant to confirm the veracity of the claimed compromise and the subsequent withdrawal of its complaint. This was done by letter dated 1 June 1998, which was never [answered].

10. At its 25th session, the Commission mandated Commissioner Rezag-Bara to go to Djibouti and find an amicable solution to the dispute. At the same time, it deferred its decision on the merits to its 26th session, awaiting the outcome of the efforts of Commissioner Rezag-Bara.

11. During his mission from 26 February to 5 March 2000, Commissioner Rezag-Bara met with the Djiboutian authorities and the complainant, which confirmed that an amicable settlement had already been concluded.

12. On 30 March 2000, the Secretariat received a letter signed by the President of the *Association pour la Défense des Droits de l'Homme et des Libertés* (Association for the Defence of Human Rights and Freedoms), Mr Mohamed Moumed Soulleh, indicating that the disagreement which formed the basis for the communication under consideration had been amicably resolved between the parties. Mr Houmed Soulleh concluded by requesting the Commission to take note of this settlement.

Law

Admissibility

13. Article 56(5) of the African Charter on Human and Peoples' Rights requires of any recourse to the Commission that the communications be sent 'after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged'.

14. At its 20th session, the Commission declared the communication admissible on the grounds, among others, that the material content and effectiveness of the arrangements struck between the parties remained unknown to it, as well as the results of the enquiries and judicial proceedings mentioned by the respondent state in its correspondence dated 8 March 1995.

15. The case brought by the complainant is aimed at causing the Commission to declare and consider that the facts hereunder imputed to the Djiboutian armed forces and certain other agencies of the state constitute a series of violations by the respondent state of various provisions of the Charter. The alleged wrongful acts are the perpetration of attacks against unarmed civilians who were thus not participants in the combats between the [Djiboutian armed] forces and the rebel movement, *Front pour la Restauration de l'Unité et de la Démocratie* (in particular, summary and arbitrary executions, acts of mass rape, forced displacement and regrouping, arrests and preventive detention for periods exceeding the legal limit, etc).

16. For its part, the respondent state transmitted to the Commission documents strongly suggesting that arrangements aimed at obtaining a lasting settlement of the demands of the victims of the violations blamed on the armed forces had been established, and consequently calls on the Commission to declare the communication inadmissible.

17. The meeting between the complainant and Commissioner Rezag-Bara while on mission to Djibouti, as well as the complainant's letter, received at the Secretariat on 30 March 2000, have clarified the situation and also confirmed the existence of the settlement reached between the two parties.

For these reasons, the Commission:

[18.] Decides to close the case on the basis of the amicable settlement reached by the parties.

EGYPT

Njoku v Egypt

(2000) AHRLR 83 (ACHPR 1997)

Communication 40/90, *Bob Ngozi Njoku v Egypt*
Decided at the 22nd ordinary session, Nov 1997, 11th Annual Activity Report

Fair trial (defence — translation not available, 3, 4, 61)

Admissibility (consideration by other international body, 54-57)

Evidence (Commission not to judge facts, 60, 61)

Facts as alleged by the complainant

1. The communication is submitted by a Nigerian student who was in transit from New Delhi to Lagos. He complains that at the Cairo airport, on 20 September 1986, while he was waiting for his connecting flight, Colonel Mohamed El Adile of the Egyptian police stamped a false entry visa for Egypt on his travel papers.

2. As a consequence, his luggage was searched. A suitcase bearing another person's name, of a different weight than that recorded on his ticket, and for which he had no key, was ascribed to him. The Egyptian police did not ask the airline to identify the owner of the suitcase. Drugs were found in the suitcase.

3. In the presence of two Nigerian diplomats, Mr Njoku denied that the suitcase was his. A police officer wrote down a statement in Arabic, which the three signed, without it having been translated for them. The subsequent trial was held behind closed doors, without a translator being present for the defendant.

4. Apparently, the Arabic statement signed by the complainant contained the admission that the suitcase was his. The complainant did have a lawyer, but complains that the lawyer was ineffective and appeared afraid of the judge. The trial lasted only five minutes and there was no translator present. The complainant was given a life sentence under a law specifying this punishment for importers of drugs who have visas for Egypt, whose final destination is Egypt and who cross into Egyptian territory. The complaint argues that none of these three conditions applies to him, as he was a transit passenger with no Egyptian visa who wished to remain in the airport. The complainant's appeal was rejected.

5. Article 33 of the Egyptian Criminal Code prohibits the searching of transit passengers. The complainant argues that the interception and search of transit passengers is a common practice by the Egyptian police, and has been condemned by Dr Adwar Gali of the Legal Commission of Egypt. The former director of the Drug Enforcement Agency has stated that the Egyptian Criminal Code nowhere provides for transit related cases and that Egypt is intercepting people only because of international conventions on drug abuse.

6. The complainant argues that the judge who sentenced him, Mr Anwe Gebali, believed the testimony of the police colonel who forged the Egyptian visa in the complainant's passport. The complainant exhausted his last appeal in March 1991.

Facts according to the government of Egypt

7. The government agrees that on the date in question the complainant was arrested in the transit lounge at Cairo airport, and that the visa for Egypt was stamped in his passport only so that he could be admitted into Egypt for investigations of the case, but that the time at which he acquired the visa was found irrelevant by the courts. The government representative stated at the 19th session that the transit area is 'a free zone for customs only', not for crime, and under the anti-drug convention of New York [Single Convention on Narcotic Drugs, 1961] states parties may not permit individuals to carry drugs into another state party.

8. The government states that the validity of the complainant's arrest in the transit lounge was raised by his lawyer during his trial, and that this was his first grounds for overturning his conviction on appeal, but the Supreme Court refused his appeal and the conviction became final.

9. The government states that the complainant then availed himself of a special process by which appeal to the Attorney-General is possible, and raised the point that the confession attributed to him was not valid. The government said that in the Attorney-General's review of the case it was found that the court did recognise that the complainant had denied guilt in the case; no confession was used.

10. The government states that the complainant had access to all the protections of Egyptian law, that during the investigations he was represented by a private attorney, a representative of the Nigerian consulate, and during the trial he had a lawyer chosen by the Bar Association and paid for by the court. As evidenced by the appeals brought before the High Court, the Supreme Court, and the Court of Cassation, the lawyer did a competent job.

11. The government states that the complainant was tried and convicted under the 1961 Egyptian drug law, which was in force in 1986. This law was revised in 1995, but the changes made the law harsher and would not be to the advantage of the complainant.

12. The government further claims that the communication is inadmissible because the Working Group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN decided not to take any action in respect of a communication from Mr Njoku.

Procedure

13. The communication is dated 10 October 1989. It was originally sent to the Secretary General of the OAU, who forwarded it to the Commission. It was received on 12 April 1990.

14. The Commission was seized of the communication at the 7th ordinary session, and the Ministry of External Affairs and Ministry of Justice of Egypt were notified on 31 May 1990. The complainant was also notified of this decision.

15. Between 1990 and 1995, several letters were exchanged between the Secretariat and the parties to ascertain the various issues raised by the protagonists as well as the exhaustion of local remedies.

16. At the 17th session, held in March 1995 the Commission declared the communication admissible and it was decided that the case should be heard on its merits at the 18th session.

17. On 31 March 1995, a letter was sent to the complainant stating that his case had been declared admissible at the 17th session.

18. On 31 March and 20 May 1995 letters were sent to the government of Egypt requesting further information.

19. On 23 June 1995 copies of the letter of 31 March and decision were sent to him.

20. On 1 September 1995, a letter was sent to the complainant requesting him for further information with regard to the legal basis for the sentence he received.

21. On 11 September the complainant responded to the Secretariat's letter of 1 September.

22. On 30 November 1995 the Secretariat sent a *note verbale* to the Ministry of Foreign Affairs of Egypt informing it that it would examine the case at the 19th session.

23. On 19 December 1995 a letter was sent to the complainant acknowledging receipt of his previous three letters, and informing him that his case would be heard on its merits at the 19th session.

24. On 20 December 1995 the complainant wrote to the Secretariat with details on a court judgment relating to transit cases, enclosing a photocopied newspaper article describing the judgment, and a translation of it that he had made.

25. On 23 January 1996, the Secretariat of the Commission sent a copy of the complainant's 20 December 1996 letter and a copy of the newspaper article to the Ministry of Foreign Affairs of Egypt.

26. On 13 February 1996 the Commission received a letter, dated 6 February 1996, from the Embassy of Egypt in Dakar with a copy of the government's submission on the case.

27. At the 19th session, in March 1996, the Commission heard the representative of the Egyptian government, but deferred taking a final decision, pending receipt from the Egyptian government of the Egyptian law or laws under which the complaint was dealt with.

28. On 26 July 1996 the Secretariat received a letter from the complainant acknowledging receipt of the letter of 8 May 1996 and stating that as he could not appear in person at the session in October 1996, he requested that the Secretary or an NGO represent him.

29. On 1 August 1996 a copy of the Secretariat's last letter to the complainant was sent to the priest indicated by the complainant. With it was sent a summary of the presentation of the government at the 19th session.

30. On same date a copy of the Secretariat's letter of 8 May 1996, requesting copies of laws, was sent to the government of Egypt. With it was sent a summary of the presentation of the government at the 19th session, for the government's approval.

31. On 13 August 1996 the Secretariat acknowledged receipt of the letter dated 22 June and informed the complainant that as neither the Secretary nor the Commission could represent him at the session, a list of NGOs was attached whom he could contact.

32. On 13 August 1996 the Secretariat sent a letter to the Egyptian Organisation for Human Rights requesting that they represent Mr Njoku at the session.

33. On 13 August 1996 the Secretariat received a letter from the complainant informing it that he had already contacted the Egyptian Human Rights Organisation which had agreed to represent him at the session.

34. On 27 August 1996 the Secretariat received a letter from the complainant giving the names of the two lawyers who would be representing him in their private capacities at the 20th session.

35. On 23 September 1996 the Secretariat received a letter from the Egyptian Organisation for Human Rights with the complainant's power of attorney.

36. On 8 October 1996 the Secretariat received a letter from the complainant stating that his punishment was harsher than authorised by Egyptian law.

37. On 9 October 1996 the Secretariat received a *note verbale* from the

Embassy of Egypt in Dakar giving additional information and asking whether it would still be necessary to send a representative to the 20th session of the Commission.

38. The same date, the Secretariat sent a letter to the Embassy of Egypt in Dakar acknowledging receipt of the latter's *note verbale* of the 9 October 1996 and answering that the Secretariat still found it important that Egypt send a representative to the 20th session.

39. On 21 October 1996 the Secretariat received a letter from the representative of the complainant asking the Commission to postpone the consideration of the communication because of new information.

40. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the decision to the following session.

41. On 10 December 1996 a *note verbale* to this effect was sent to the government. The *note verbale* also asked the government to send relevant laws to the Secretariat.

42. On the same date, the Secretariat sent a letter to the complainant, informing him of the decision of the Commission to postpone the consideration of the communication.

43. On 10 January 1997 the Secretariat sent a letter to Mr Monieb, informing him of the decision taken by the Commission at its 20th session.

44. On 23 January 1997 the Secretariat received a *note verbale* from the Embassy of Egypt in Dakar, informing the Secretariat that the Working Group on Communications of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN had decided not to take any action in respect of a communication submitted by Mr Njoku.

45. On 31 January 1997 the Secretariat received a letter from Mr Njoku summarising his case and giving examples of Egyptian case law in drug-related cases.

46. On 3 February 1997 the Secretariat sent an acknowledgement of receipt to Mr Njoku, enclosing a copy of the embassy's letter of 23 January 1997.

47. On 11 February 1997 the Secretariat sent a letter to the Embassy of Egypt in Dakar informing it that all relevant information would be taken up by the Commission at its 21st session and requesting it once more to send copies of the relevant laws.

48. On 8 April 1997, the Secretariat received letters from the complainant reiterating the facts of the case and indicating cases of individuals prosecuted on similar grounds and who, according to the complainant, received lighter sentences.

49. On 23 April 1997, the Secretariat renewed its request to the Embassy of Egypt in Senegal for the provision of the relevant legislative enactment

against drug trafficking, as well as examples of case law dealing with passengers in transit charged with drug trafficking. The embassy was also informed of cases presented to the Secretariat by Mr Ngozi Njoku.

50. On 21 May 1997, the Secretariat received a *note verbale* from the Embassy of Egypt in Senegal forwarding copies of the legislative instruments in force relating to drug trafficking in Arabic (as well as amendments made thereto) as requested by the Commission. The *note verbale* also underscored that there was no special law applicable to passengers in transit in Egypt and therefore that the latter were subject to the same law.

51. On 28 May 1997, the Secretariat informed the complainant of the defendant's response.

52. On 9 July 1997, the Secretariat acknowledged receipt of the complainant's last letter and on the same day sent a *note verbale* to the Embassy of Egypt seeking the reaction of its government to the information provided by Mr Ngozi Njoku.

53. At the 22nd ordinary session held in Banjul, (The Gambia) from 2 to 11 November 1997, the Commission took a decision on the merits of the case.

Law

Admissibility

54. Article 56(7) of the African Charter on Human and Peoples' Rights stipulates *inter alia* that:

Communications . . . shall be considered if they . . . do not deal with cases which have been settled in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

55. The defendant state maintains that the communication should be declared inadmissible on the grounds that the Working Group of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities seized of the matter by Mr Ngozi Njoku decided not to entertain the case.

56. The Commission, considering the provisions of the above article, observes that the said text talks about 'cases which have been settled . . .' It is therefore of the view that the decision of the United Nations Sub-Commission not to take any action and therefore not to pronounce on the communication submitted by the complainant does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled as envisaged under article 56(7) of the African Charter on Human and Peoples' Rights. The Commission therefore rejected the arguments of the defendant.

57. On the issue of exhaustion of local remedies as provided for by article 56(5), the Commission observes that the complainant has exhausted all

local remedies provided for by Egyptian law, including the possibility of having the case reviewed. Moreover, the government has not indicated the existence of remedies other than those used by the complainant.

58. For all these reasons, the Commission declared the communication admissible.

Merits

59. Both the complainant and the defendant (state) admit that Mr Ngozi Njoku was arrested in the transit zone of Cairo airport on 20 September 1986, while he was on his way to Lagos from New Delhi. They also admit that drugs were found in a suitcase which was alleged to belong to the complainant, the latter was tried and sentenced to life imprisonment, that he was provided with the services of a lawyer and that he exhausted all local remedies in 1991.

60. Apart from these points of convergence, the rest of the communication contains serious divergences as regards the information provided by the parties. It does not, however, behove the Commission to judge the facts. That is the responsibility of the Egyptian courts.

61. The role of the Commission in such a case is to ensure that during the process from the arrest to the conviction of Mr Ngozi Njoku, no provision of the African Charter on Human and Peoples' Rights was violated. It is also incumbent on it to ensure that the defendant state respected and indeed enforced its own law in total good faith. To all these questions, the Commission responded in the affirmative.

On these grounds, the Commission:

[62.] Considers that no provision of the African Charter on Human and Peoples' Rights has been violated and therefore declares the communication closed;

[63.] Gives mandate to Commissioner Isaac Nguema to pursue his good offices with the Egyptian government with a view to obtaining clemency for Mr Ngozi Njoku on purely humanitarian grounds.

* * *

Egyptian Organisation for Human Rights v Egypt

(2000) AHRLR 90 (ACHPR 2000)

Communication 201/97, *Egyptian Organisation for Human Rights v Egypt*

Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report

Rapporteur: Pityana

Admissibility (failure to exhaust local remedies, 15)

Summary of facts

1. On 17 June 1997, a State Security Investigation Force arrested eight people for peacefully opposing the implementation of Law 96 of 1992, which regulates the relation between landowners and tenants of agricultural land. The individuals arrested were Hamdien Sabbahi, a journalist; Mohamed Abdu, a veterinarian; Mohamed Soliman Fayad and Harudi Heikal, lawyers; Mahmoud Soliman Abu-Rayya, Mahmoud Al-Sayid Abu-Rayya and Sabe Hamid Ibrahim, farmers; and Al-Tokhi Ahmed Al-Tokhi, who was taken hostage pending the surrender of his brother to the authorities.

2. Mahmoud Soliman Abu-Rayya, Mahmoud Al-Sayid Abu-Rayya and Sabe Hamid Ibrahim were arrested for hanging black banners on their houses in protest of Law 96. Mohamed Abdu, Mohamed Soliman Fayad and Harudi Heikal were arrested shortly after participating in a rally held in Banha to protest Law 96.

3. Hamdien Sabbahi was apparently arrested for promoting a signature petition meant to be sent to the President in protest of Law 96.

4. When the SSI force arrested Hamdien Sabbahi, it broke into his office, searched it, and confiscated some documents. The arrest and search were carried out without a warrant or the presence of a public prosecution representative, which contradicts state law.

5. Hamdien Sabbahi, Mohamed Abdu, Mohamed Soliman Fayad and Harudi Heikal have all been charged with violations of article 86(*bis*) and 86(*bis*)(a) of the Penal Code, introduced as part of an anti-terrorist law. Specifically, these individuals were charged with: (a) Promoting — orally — ideas that oppose the basic foundations of the present regime and inciting hatred and contempt against it; encouraging the breakdown of the Constitutional principles; opposing the implementation of laws and promoting resistance against the authorities (including terrorist activities),

and (b) Possession of printed materials and publications that encourage the aforementioned ideas.

6. It is not clear that Mahmoud Soliman Abu-Rayya, Mahmoud Al-Sayid Abu-Rayya and Sabe Hamid Ibrahim have been charged with any crime yet.

7. Following the imprisonment of Hamdien Sabbahi, Mohamed Abdu, Mohamed Soliman Fayad and Harudi Heikal, a prison officer ordered them into a cell, stripped off their clothes, made them stand with their faces against the wall and ordered soldiers to beat them. They were beaten until they suffered temporary paralysis. Their personal belongings and medicines were confiscated, their heads were shaved, and they were forced to wear prison uniforms.

Complaint

8. The author alleges violation by the government of the Arab Republic of Egypt of articles 2, 3, 4, 5, 6, 7, 9 and 11 of the Charter.

Procedure

9. Communication 201/97, sent by the Egyptian Organisation for Human Rights was received at the Secretariat on 22 June 1997.

10. An addendum to the communication regarding measures taken by the public prosecutor's office was received at the Secretariat on 26 June 1997.

11. At the 22nd ordinary session, the Commission decided to be seized of the communication and postponed taking a decision on admissibility to the 23rd session.

12. At subsequent sessions, the Commission reviewed the issue of exhaustion of local remedies by the complainant. To this end, parties were requested to submit all the information at their disposal to the Secretariat.

13. At the 27th session, the Commission took a decision on the admissibility of the communication.

Law

Admissibility

14. Article 56(5) of the Charter provides: 'Communications shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.'

15. The Commission observed that on the surface of the communication, the complainant did not exhaust domestic remedies. It noted further that, despite repeated demands, parties have not responded to its requests for additional information on the issue of exhaustion of local remedies and that the complaint had been pending for a long time. In the absence of

such information, the Commission declared the case closed because conditions for admissibility had not been satisfied.

For the above reasons, the Commission:

[16.] Declares the communication inadmissible.

EQUATORIAL GUINEA

Courson v Equatorial Guinea

(2000) AHRLR 93 (ACHPR 1997)

Communication 144/95, *William A Courson v Equatorial Guinea*
Decided at the 22nd ordinary session, Nov 1997, 11th Annual Activity
Report

Admissibility (amnesty, 16)

Evidence (burden on complainant to furnish evidence, 18-23)

Personal liberty and security (no reasons given for arrest, 21)

Fair trial (defence — access to legal counsel, 22)

Complainant's allegations — facts submitted by the author

1. The complainant alleges that one Mr Moto Nsa, along with 12 others, both military and civilian personnel, was tried and sentenced on charges of attempting to overthrow the government of Equatorial Guinea and high treason. He was sentenced to imprisonment rather than the death penalty as an act of lenience on the part of the court.

2. Mr Moto Nsa was officially arrested on 6 March 1995, but had already been imprisoned for two and a half years on charges of insulting the President. At the time of his arrest, Mr Moto Nsa was planning to participate in Equatorial Guinea's planned May 1995 municipal elections, after having led an opposition boycott of the country's first multiparty national elections, which were criticised by United Nations and European Union observers for lack of transparency and impartial administration.

3. From the time of his arrest until the trial he was denied the right to consult with the defence counsel and not permitted to examine the evidence against him.

4. Although the victim has now been released as a result of a presidential pardon, the complainant wishes the Commission to declare that Mr Nsa's conviction and imprisonment were violations of the African Charter.

The government's version

5. In its response to the accusations levelled against it, the Equatorial Guinean government asserts that human rights are fully protected by the country's constitution and according to the government, the complainant's accusations are based on unfounded information. It agrees that

Equatorial Guinea has legislation governing the activities of political parties, freedom of religion, freedom of assembly and freedom of the press.

6. Furthermore, the government maintains that all ethnic groups in Equatorial Guinea live in harmony, without any discrimination; the Prime Minister as well as other members of the government belong to ethnic groups different from that of the Head of State. The impartiality of the courts, according to him, is fully guaranteed by the laws of Equatorial Guinea. He further asserted that the law on the press and information was recently revised by the Parliament. It henceforth authorises private individuals and associations to possess their own papers and radio and television stations. According to the government, all political parties have access to the media during electoral campaigns and political meetings are freely organised throughout the country.

7. According to the government, Mr Moto was assisted by three 'great' lawyers during his trial. And pursuant to the practice in Equatorial Guinea, when there are loopholes in the domestic law, to ensure a proper administration of justice, the courts resort to Spanish law. It further asserted that in spite of being the leader of The Progress Party, one of the 14 recognised political parties in Equatorial Guinea, Mr Moto was tried as an ordinary citizen and convicted for 'insults and endangering state security and the form of government'. Finally, the government emphasised that Mr Moto Nsa appealed against the sentence of 28 years imprisonment imposed on him, and after serving only three months in prison he was granted an amnesty. In view of the foregoing, the government concludes that the complainant's accusations have no legal basis.

The procedure before the Commission

8. The communication is dated 5 May 1995. It was filed by Mr William Andrew Courson, member of Magnus F Hirschfeld Centre for Human Rights, an organisation based in the USA. The matter was brought before the Commission on 23 May of the same year and on 30 May, it wrote to the Equatorial Guinean government to inform it of the communication.

9. On 22 September 1995, the complainant wrote to the Secretariat of the Commission to inform it that Mr Moto Nsa had been released following a presidential amnesty. He, however, requested that his qualification of the facts, that is that the arrest and detention of Mr Moto constitute a violation of the provisions of the Charter, be maintained. In other words, he requested the Commission not to close the matter. He further requested that the Commission orders the payment of damages to Mr Moto for the period spent in detention.

10. At its 19th session held in March 1996, the Commission declared the communication admissible and decided to rule on its merits at its 20th session; the complainant and government were informed accordingly.

11. At its 20th session, after hearing from an official delegation from

Equatorial Guinea, the Commission deferred the consideration of the case on its merits to its 21st session and requested additional information on the exhaustion of local remedies.

12. During its 21st session, the Commission decided to postpone the consideration of the case on its merits pending the outcome of the appeal that Mr Moto, according to the government, is reported to have lodged against the decision sentencing him to a prison term.

13. At its 22nd session held from 2 to 11 November 1997 in Banjul (Gambia), the Commission ruled on the merits of the communication.

Law

Admissibility

14. Article 56(5) of the Charter requires that communications be brought before the Commission only 'after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

15. What the complainant is seeking is a ruling by the Commission that Mr Moto's arrest and detention constitute a violation of the Charter. As for the government, it maintains that Mr Moto has appealed against the two charges for which he was prosecuted. The Commission notes that the outcome of this appeal remains unknown.

16. Moreover, given that Mr Moto has been granted amnesty, it appears most unlikely for any domestic court to entertain this appeal as this would only be a purely theoretical exercise. However, certain elements of the case seem to indicate procedural flaws during the trial and the Commission would like these issues clarified to enable it come to a valid decision on the case. On these grounds, the Commission declares the communication admissible.

Merits

17. The complainant invokes the violation of articles 2 (enjoyment of the rights and freedoms recognised and guaranteed in the Charter without discrimination), 9(2) (the right to express and disseminate opinions), 10 (the right to free association), 13(1) (the right to participate freely in the government of his country) and 20(1) (the right to self-determination).

18. All these allegations are founded on the assertion that Mr Moto Nsa was arrested, detained, tried and sentenced because of his political opinion. The Commission is of the view that, although this could be the case, the communication does not however contain elements likely to reasonably lead to such a conclusion.

19. The information relating to the arrest of another opposition leader contained in the complainant's submission is rather circumstantial and does not enable the Commission to clearly establish that Mr Moto was arrested because of his political opposition to the government of the day.

The information does not also indicate how Mr Moto allegedly tried to express his political opinions or set up associations with other persons. In view of the foregoing, the Commission is of the view that the violation of the above provisions of the Charter has not been established.

20. The complainant then goes on to base his complaint on certain provisions of article 7 of the Charter, which stipulates that:

(1) Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

21. The Commission notes that the submission made by the complainant contains certain elements outlining the circumstances of the trial of Mr Moto. It notes that as regards the right to defence that the latter includes the right to be informed of the charges against him, as well as the evidence of the said charges; all sorts of elements required to prepare his defence. If all these elements were not brought to the knowledge of the accused (as alleged by the complainant) then article 7(1)(c) of the Charter had been violated.

22. The Commission recalls that the right to defence, including the right to a counsel is exercised not only during the trial, but also during detention. Unfortunately, once again, the information at its disposal does not allow it to clearly establish whether article 7(1)(c) has been violated.

23. Moreover, the Commission deplores the silence maintained by the parties in spite of its repeated request for information relating to the exhaustion of local remedies and other procedural aspects of the case. It is of the view that such lack of cooperation does not help the Commission to have a clear and precise understanding of the case brought before it.

On these grounds, the Commission:

[24.] Decides that no provision of the African Charter on Human and Peoples' Rights has been violated.

GABON

Diakité v Gabon

(2000) AHRLR 97 (ACHPR 1994)

Communication 73/92, *Mohamed L Diakité v Gabon*
7th Annual Activity Report
(See also *Diakité v Gabon* (ACHPR 2000), below)

[1.] Communication on wrongful expulsion and deprivation of property.

Final decision

[2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;

[3.] Meeting at its 15th ordinary session held in Banjul, The Gambia, from 18 to 27 April 1994;

[4.] Recalling the provisions of article 57 of the Charter and those of rules 110 and 115 of the Rules of Procedure which stipulate that prior to any substantive consideration, all communications must be brought to the attention of the State concerned;

[5.] Notes that the said communication was brought to the knowledge of the state of Gabon on 11 November 1992 and 12 April 1993;

[6.] Decides to enquire from the author of the complaint, pursuant to the decision of the 13th session, whether he intends to take up this matter with the Gabonese judicial authorities and requests him to submit a response within four months of the receipt of this decision;

[7.] Directs that substantive consideration of the matter be undertaken during the 16th session.

* * *

Diakité v Gabon

(2000) AHRLR 98 (ACHPR 2000)

Communication 73/92, *Mohammed Lamine Diakité v Gabon*
Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report
Rapporteur: Nguema
(See also *Diakité v Gabon* (ACHPR 1994), above)

Admissibility (failure to exhaust local remedies, 16-17)

Summary of facts

1. The complainant is a citizen of Mali who lived in Gabon for 17 years, and was expelled on 4 November 1987, leaving his wife and five children who were all born in Gabon. According to the complainant, the reason for his expulsion is that his friend (a certain Mr Coulibaly Hamidou) was accused of having a sexual relationship with the first wife of a Gabonese government minister, Mr Mba Eyoghe, former member of government. Consequently, the latter, using his connections with certain Gabonese [authorities] humiliated the complainant, his family and friend. The complainant also claims that Mr Mba Eyoghe owes him money. The complainant and his friend were expelled from Gabon on 27 August 1989, following expulsion order no 182/MATCLI-DGAT-DDF-SF. A second order no 126/MAT/CLD/SE/SG/DGAT/DDF/SF of 22 June 1992 nullified the first order, therefore the complainant and his friend were authorised to come back to Gabon.

Complaint

2. Though the complainant does not indicate specific violations of the provisions of the Charter to substantiate his communication, it appears that articles 12(4), 14 and 18(1) and (2) [may] have been violated.

Procedure

3. The communication is dated 10 April 1992. The Commission was seized of it at its 12th session.

4. The Secretariat of the Commission exchanged many correspondences with the parties on the issue of exhaustion of local remedies and reparation by the Gabonese authorities to the complainant for the prejudice suffered.

5. The complainant responded and indicated that he had exhausted local remedies and that the Gabonese authorities were yet to remedy the violations occasioned.

6. At its 14th session held in Banjul, The Gambia from 25 October to 3 November 1994, the communication was declared admissible.
7. At its 16th session held in October 1995, the Commission directed that a letter be sent to the government of Gabon to find out what steps had been taken to deal with the complainant's case.
8. At the 17th session in March 1996, it was decided that Commissioner Nguema would take the matter up with the foreign minister of Gabon.
9. On 30 March 1995, a *note verbale* was received from the Ministry of Foreign Affairs of Gabon stating that Commissioner Nguema had met the Minister of Foreign Affairs for discussions. The case of Mr Diakit  had been discussed but a resolution had not been reached. However the Gabon authorities promised to work on a solution.
10. The case was deferred on many occasions to allow parties to settle the matter amicably with the assistance of Commissioner Isaac Nguema. Unfortunately, these attempts did not succeed.
11. On 11 May 1999, the Secretariat received a letter sent by the complainant and addressed to the Chairman of the Commission. The said letter was soliciting his intervention *ex qualitate* to the Gabonese Head of State. The content of the letter was brought to the attention of the Chairman. He then wrote to the President of Gabon, on 10 June 1999, requesting him to help find a lasting solution to the matter. The latter is yet to react.
12. On 30 March 2000, the Secretariat received a letter from the complainant acknowledging receipt of the letter conveying the decision of the Commission to postpone consideration of the communication to the 27th session. At the same time he expressed his wishes that a final decision would be taken at the said session.
13. On 30 April 2000, the respondent state submitted fresh evidence thereby throwing more light on the matter and the way the complainant and his friend had returned to Gabon.

Law

Admissibility

14. According to the provisions of article 56 of the African Charter on Human and Peoples' Rights, communications received at the Commission concerning human and peoples' rights must be:

- (5) . . . sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- (6) . . . submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.

15. Mr Mohamed Lamine Diakit  was expelled from Gabonese territory on 22 August 1989, pursuant to a warrant issued by the administrative

authority of the state. Though he had returned to his country of origin, Mali, he undertook démarches with a view to causing the revocation of his warrant of expulsion, as well as obtaining compensation for the injury suffered due to the expulsion. He was later on authorised to return to Gabon where he has been residing since 9 December 1997.

16. However, the focus of the Commission's attention is really on the fact that the condition regarding the exhaustion of internal remedies before seizing an international forum is based on the principle that the defendant state should have had the opportunity to redress the injury caused to the victim by its own means, within the framework of its own judicial system. This principle does not however mean that the complainant should necessarily exhaust remedies, which, in practical terms, are not available.

17. The respondent state by correspondence dated 30 April 2000 has submitted fresh evidence from which it essentially appears that Mr Mohammed Lamin Diakité had never contested the decision of expulsion no 182/MATCLIDGAT-DDF-SF issued against him. His return to the Gabonese territory is based on a political decision by the Gabonese Head of State following talks with his Malian counterpart during an official visit to Mali.

For the above reasons, the Commission:

[18.] Declares the communication brought by Mr Mohammed Lamin Diakité inadmissible for non-exhaustion of local remedies.

THE GAMBIA

Manjang v The Gambia

(2000) AHRLR 101 (ACHPR 1994)

Communication 131/94, *Ousman Manjang v The Gambia*
7th Annual Activity Report

Admissibility (failure to exhaust local remedies, 2)

[1.] Communication on wrongful detention and confiscation of papers.

Final decision

[2.] Article 56(6) requires that the author exhausts local remedies before the Commission takes up his complaint. In the absence of that, the communication is declared inadmissible.

* * *

Ceesay v The Gambia

(2000) AHRLR 101 (ACHPR 1995)

Communication 86/93, *MS Ceesay v The Gambia*
8th Annual Activity Report

Admissibility (failure to exhaust local remedies, 4)

Facts

[1.] The complainant was a corporal in the Gambian National Army and was on 14 June 1991 — according to the complainant — randomly selected as one of seven men to see the commander in order to discuss the problems of the contingent sent to Liberia under ECOMOG. When the seven men had gathered they were immediately surrounded by armed personnel who attempted to arrest them. They managed to flee to the

State House but were arrested, subsequently suspended and discharged allegedly because of state mutiny but without charge or trial.

[2.] According to the Attorney-General, Mr Ceesay and others were marching in the streets protesting because of lack of payment. The protesters were disrupting the peace and were charged with mutiny. A commission of enquiry was set up to decide on the cases and the mutineers were eventually dismissed, the most inferior sanction available against mutiny.

Complaint

[3.] The complainant asks the Commission to order reinstatement or to compel the Gambian authorities to issue the complainant with a certificate of discharge.

Decision

[4.] The government notified the Commission that the complainant had not had recourse to the local remedies. At its 16th session the Commission declared the communication inadmissible.

* * *

Haye v The Gambia

(2000) AHRLR 102 (ACHPR 1995)

Communication 90/93, *Paul S Haye v The Gambia*
8th Annual Activity Report

Admissibility (failure to exhaust local remedies, 4)

Facts

[1.] In November 1987, the complainant hired Edward Gomez, an attorney, to register a company for him. The complainant paid to Mr Gomez a sum of D7150 in fees, but the company was never registered. In March 1990, the complainant sued Mr Gomez for the return of the money. Mr Gomez filed a counter claim, but before the suit could be heard the judge who had been scheduled to hear the case resigned. After inquiries to discover when the suit would be heard, the complainant was told to await notice by the court.

[2.] On 2 October 1991, a mini-van belonging to the complainant was

seized. He was informed that after failure to appear in court on 28 May 1991, a default judgment was entered in favour of Mr Gomez, and the mini-van was seized to satisfy the judgment. The complainant filed a motion for leave to appeal the judgment to the Gambian Court of Appeal on the grounds that he never received notification of the 28 May court date. This motion was heard by the same judge who made the original judgment, and was denied. Therefore the complainant alleges that he has no further domestic remedies available.

Argument

[3.] Complainant alleged violation of his rights under article 7 to have his cause heard. The Supreme Court judge had absolute discretion to disallow an appeal of his own judgment. Questions also arise over the adequacy of the procedure of service (notification of hearing date).

Decision

[4.] At its 16th session the Commission declared the case inadmissible for non exhaustion of local remedies. The complainant by reason of his own default and/or negligence, did not seek to appeal to the Court of Appeal of The Gambia against the decision of the Supreme Court referring his application for leave to appeal to the Court of Appeal. Upon the complainant being notified of this decision he wrote back urging the Commission to review its decision on the same grounds he had advanced before. As no new grounds are raised or shown, the Commission finds no reason to disturb its previous decision which is accordingly re-affirmed.

* * *

Dumbuya v The Gambia

(2000) AHRLR 103 (ACHPR 1995)

Communication 127/94, *Sana Dumbuya v The Gambia*
8th Annual Activity Report

Admissibility (loss of contact with complainant, failure to exhaust local remedies, 2)

Facts

[1.] Mr Dumbuya complains that he was working as a registry clerk for the Ministry for Local and Lands from January to July 1992. In July 1992 he was

dismissed under unclear circumstances, allegedly for leaking official secrets.

Decision

[2.] The complainant has failed or neglected to respond to two requests by the Commission for information whether all local remedies have been exhausted. In the circumstances the Commission during its 16th session declared the communication inadmissible on account of lack of exhaustion of local remedies.

* * *

Peoples' Democratic Organisation for Independence and Socialism v The Gambia

(2000) AHRLR 104 (ACHPR 1996)

Communication 44/90, *Peoples' Democratic Organisation for Independence and Socialism v The Gambia*

Decided at the 20th ordinary session, Oct 1996, 10th Annual Activity Report

Admissibility (exhaustion of local remedies — change of laws outside jurisdiction of courts, 17-19)

Political participation (voter registration, 1-11, 23)

State responsibility (agreement to resolve dispute, 21-23)

Amicable settlement (24)

Report on an amicable resolution

Facts

[1.] The complainant alleged that voter registration in the constituencies of Serrekunda West, Serrekunda East and Bakau is defective because those registering are not required by the law to give an address or identification. It argued that there is no control over voter registration since no documents have to be shown to the registration officer. The voter may be asked his name and citizenship, but there is no requirement to produce an address or compound number. Furthermore, the witness is not required to identify himself. The complainant argues that the absence of a requirement to produce an address or compound number makes it possible for

the voter to forge his right to vote in the constituency, or to vote several times.

[2.] In the rural areas the registration of the voters and the voting procedure itself are controlled by the headman, the registration officer, representatives of different political parties, and village elders. In the urban areas the control is only done by the registration officer, who does not know the people. Without the street address or compound number it is impossible for the registration officer to control the identity of the voter, even though they must sign a form of registration and enclose a photograph, because the signature could be forged and the lack of communication between different constituencies could make it possible for the voter to register in several stations.

[3.] The complainant argued that the registration by street address/compound number is possible, since most urban areas in The Gambia have street addresses or compound numbers.

[4.] The complainant argued that, based on its observations of voter registration, there is widespread fraud.

According to the government

[5.] The government argued firstly that the case was inadmissible because it could be taken through the courts to the level of the (British) Privy Council.

[6.] The complainant pointed out that the (Gambian) Elections Act, section 22(5), states that the judgment of the Gambian Supreme Court shall be final and conclusive; thus, appeal to the Privy Council is impossible.

[7.] As to the merits, the state originally claimed that The Gambia does hold free and fair elections. In the urban areas a form was signed and address/compound number, occupation, constituency and photo were included wherever possible. These were checked by the registration officer both at registration and at the elections, providing adequate protection against fraud. Likewise, in the rural areas, the personal identification by the village headman took place both at registration and at the elections.

[8.] The state claimed that it is almost impossible in a developing country like The Gambia to ensure control by street addresses/compound numbers. Many dwellings in The Gambia, including in the urban areas, do not have street addresses/compound numbers, but are registered in the names of the owners. It is therefore impossible to make this requirement absolute.

[9.] The state further argued that it is impossible to require the showing of identity papers at the time of registration and election as a high percentage of the population does not have identification papers. It was not before 1985 that a National Identity Card was introduced and now not more than 50% of the population has been registered.

[10.] In July 1994 there was a change of government in The Gambia. The present government strongly condemns the claims of the previous government that the streets of Serrekunda were not named with sufficient specificity to permit making a street address a mandatory requirement for voter registration. The present government calls this claim 'inexcusable and indefensible'.

[11.] The present government, by its 'Admission of Communication no 44/90 from the Peoples' Democratic Organisation for Independence and Socialism — PDOIS — against the State of The Gambia' concedes that the grievances expressed by the complainants are valid and logical. It expressed its intent to change the current system to correct the present 'anomalies'.

Procedure

[12.] The communication is dated 19 June 1990. The Commission was seized of the communication at the 8th session and the government of The Gambia was notified on 6 November 1990. From 1990 to 1995, the Commission proceeded to verify the exhaustion of local remedies.

[13.] At the 17th session the communication was declared admissible on the basis that exhaustion of local remedies had been unduly prolonged.

[14.] On 20 April 1995 a letter was sent to the complainants and the Gambian government, stating that the communication was admissible.

[15.] The Commission received a letter from the Attorney-General's chambers and the Ministry of Justice of The Gambia, conceding that the grievances expressed by the complainants are valid and logical, and that the present electoral law is being reviewed with the objective of curing the present anomalies.

[16.] On 20 December 1995, the complainant was informed of this response with the specification that if the Secretariat does not receive arguments to the contrary before 1 February 1996, the Commission would consider the communication to have been resolved amicably.

Law

Admissibility

[17.] The PDOIS argued that it was beyond the jurisdiction of the judiciary to order Parliament to change defective procedures and laws; thus, recourse to the courts was not an option. The complainant alleged that, while the Elections Act provides for objections to voter lists to be made before a revising officer appointed by the Supervisor of Elections, the fact that the voter lists posted did not include a list of addresses made effective scrutiny impossible. The complaint noted that numerous letters had been addressed to the Supervisor of Elections and the President of the Republic as early as 1987, with no response.

[18.] The government noted that in July 1990, the complainant did file a Notice of Objection and sent it to the Commissioner of Western Division. The document was forwarded to the revising court. No action appeared to have been taken by the court.

[19.] On the basis of these facts the communication was declared admissible.

Law

[20.] Article 13 of the African Charter reads:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

[21.] In 1994 there was a change of government in The Gambia. The present government recognises that it has inherited the previous government's rights and obligations under international treaties.

[22.] The present government has a different view of voter registration. It concedes that the grievances expressed by the complainants are valid and logical. It describes that it is in the process of establishing an independent electoral commission and has commissioned a team of experts to review the present electoral law.

[23.] The African Commission welcomes the acceptance of the complainant's contentions and the government's stated determination to review the current electoral law, in order to ensure that elections are regular, free and fair.

For these reasons, the Commission:

[24.] Holds that the above communication has reached an amicable resolution.

* * *

Jawara v The Gambia

(2000) AHRLR 107 (ACHPR 2000)

Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*
Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report
Rapporteurs: 19th session: Kisanga; 20th–21st sessions: Umozurike; 22nd–27th sessions: Dankwa

Admissibility (media reports used as evidence, 23-27; exhaustion of local remedies — jurisdiction of courts ousted, exile, local remedies must be available, effective and sufficient, 28-40; compatibility with the Charter, 41; individual cases can be considered also where serious or massive violations not alleged, 42)

State responsibility (duty to give effect to rights in the Charter in national law, 43-50)

Evidence (burden on complainant to furnish evidence, 52-56)

Personal liberty and security (arbitrary arrest and detention, 57-59)

Limitations of rights ('previously laid down by law' must be consistent with obligations under the Charter, 58, 59)

Interpretation (international standards, 59, 68)

Fair trial (impartial court — detention determined by executive, 61; retroactive legislation, 63; independence of courts — ousting of jurisdiction of ordinary courts, 74)

Expression (persecution of journalists, public's right to receive information, 65)

Political participation (prohibition to stand for public office, 67)

Association (banning of political parties, 66, 68)

Movement (right to leave and return to home country, 66, 70)

Peoples' right to self-determination (military *coup* grave violation of right to freely choose government, 72-73)

Summary of facts

Communication 147/95

1. The complainant is the former Head of State of the Republic of The Gambia. He alleges that after the military *coup d'état* of July 1994 that overthrew his government, there has been 'blatant abuse of power by . . . the military junta'. The military government is alleged to have initiated a reign of terror, intimidation and arbitrary detention.
2. The complainant further alleges the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree no 30/31, ousting the competence of the courts to examine or question the validity of any such decree.
3. The communication alleges the banning of political parties and of ministers of the former civilian government from taking part in any political activity. The communication alleges restrictions on freedom of expression, movement and religion. These restrictions were manifested, according to the complainant, by the arrest and detention of people without charge, kidnappings, torture and the burning of a mosque.
4. He further alleges that two former ministers of the Armed Forces Provisional Ruling Council (AFPRC) were killed by the regime, asserting that the

restoration of the death penalty through Decree no 52 means 'the arsenal of the AFPRC is now complete'.

5. He also alleges that not less than 50 soldiers were killed in cold blood and buried in mass graves by the military government during what the complainant terms 'a staged-managed attempted *coup*'. Several members of the armed forces are alleged to have been detained some for up to six months without trial, following the introduction of Decree no 3 of July 1994. This decree gives the Minister of Interior the power to detain and to extend the period of detention *ad infinitum*. The decree further prohibits the proceedings of *habeas corpus* on any detention issued under it.

6. The complainant alleges further that Decree no 45 of June 1995, the National Intelligence Agency (NIA) Decree empowers the Minister of Interior or his designate to issue search warrants and authorise interference with correspondence, be it wireless or electronic.

7. Finally, the communication alleges disregard for the judiciary and contempt of court following the regime's disregard of a court order; the imposition of retroactive legislation following the Economic Crimes (Specified Offences) Decree of 25 November 1994, thus infringing on the rule and the due process of law.

Communication 149/96

8. Communication 149/96 alleges violation of the right to life, freedom from torture and the right to a fair trial. The complainant alleges that not less than 50 soldiers have been summarily executed by the Gambian military government and buried in mass graves following an alleged attempted *coup d'état* on 11 November 1994.

9. The complainant attaches the names of 13 of the 50 soldiers alleged to have been killed and further alleges that a former Finance Minister, Mr Koro Ceesay, was killed by the government. He attaches a document from a former member of the AFPRC, Captain Sadibu Hydara, to support this allegation.

10. He goes further to state that a former AFPRC member and former Interior Minister did not die from high blood pressure as claimed by the government but was tortured to death.

Government's response

11. In its submission on the question of admissibility, the government raised the following objections:

12. The first point raised is what the government called lack of 'proofs in support', claiming that a communication should only be received by the Commission if the individual alleges, 'with proofs in support' serious or massive cases of violations of human and peoples' rights.

13. The government asserts that the decrees complained of may on their face value be seen to be contrary to the provisions in the Charter, but claims that they must be 'studied and placed in the context of the changed circumstances in The Gambia'. Commenting on the freedom of liberty, the government claimed it was acting in conformity with laws previously laid down by domestic legislation. The government claims that the decrees do not prohibit the enjoyment of freedoms, they are merely there to secure peace and stability and only those who want to disrupt the peace will be arrested and detained.

14. The submission further claims that since the take over, not a single individual has been deliberately killed; and that during the counter-coup of 11 November 1994, soldiers of both sides lost their lives due mainly to the fact that the rebels were fighting back with soldiers loyal to the government.

15. The government also claims that Mr Koro Ceesay and Mr Sadibu Hydara, alleged to have been killed by the government, died from an accident and natural causes respectively. Post-mortem reports on the two deaths are attached.

16. The government further pointed out that the communication does not fulfil some of the conditions laid down in article 56 of the Charter. Specifically, that the communication fails to meet the conditions set down in paragraphs 4 and 5 which [require that communications]:

... Are not based exclusively on news disseminated through the mass media; ...
Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged ...

Complaint

17. The complainant alleges violation of the following articles of the Charter: articles 1, 2, 4, 5, 6, 7(1)(d) and (2), 9(1) and (2), 10(1), 11, 12(1) and (2), 20(1) and 26.

Procedure

18. Communication 147/95 is dated 6 September 1995 and was received on 30 November 1995 at the Secretariat of the Commission.

19. Communication 149/96 was received on 12 January 1996 at the Secretariat of the Commission.

20. At the 19th session in March 1996, the Commission decided to be seized of the communication and to notify the government accordingly and stated that a decision on admissibility would be taken at the 20th session in October 1996.

21. At its 21st session in April 1997, the Commission decided to renumber the communication as 147/95 to reflect the length of time it had been with the Commission. It also decided to join the communication with 149/

96 and declare both of them admissible. The Commission also requested further information from both sides and stated that a decision on the merits would be taken at its 22nd session.

Law

Admissibility

22. The admissibility of communications by the Commission is governed by article 56 of the African Charter. This article lays down seven conditions that, under normal circumstances, must be fulfilled for a communication to be admissible. Of the seven, the government claims that two conditions have not been fulfilled, namely article 56(4) and 56(5).

23. Article 56(4) of the Charter requires that communications: 'Are not based exclusively on news disseminated through the mass media.'

24. The government claims that the communication should be declared inadmissible because it is based exclusively on news disseminated through the mass media, and specifically made reference to the attached letter of Captain Ebou Jallow. While 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. This is borne out of the fact that the Charter makes use of the word 'exclusively'.

25. 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 violations is always obtained from the media. The genocide in Rwanda, the human rights abuses in Burundi, Zaire, Congo, to name but a few, were revealed by the media.

26. The issue therefore should not be whether the information was obtained from the media, but whether the information is correct. Did the complainant try to verify the truth about these allegations? Did he have the means or was it possible for him to do so, given the circumstances of his case?

27. The communication under consideration cannot be said to be based exclusively on news disseminated through the mass media, because the communication is not exclusively based on Captain Jallow's letter. The complainant alleges extrajudicial execution and has attached the names of some of those he alleges have been killed. Captain Jallow's letter made no mention of this fact.

28. Article 56(5) of the Charter states that: 'Communications . . . shall be considered if they: . . . Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .'

29. The government also claims that the author has not attempted to exhaust local remedies. The government claims that the author should

have sent his complaint to the police who would in turn have investigated the allegations and prosecuted the offenders 'in a court of law'.

30. This rule is one of the most important conditions for admissibility of communications, no doubt therefore, in almost all the cases, the first requirement looked at by both the Commission and the state concerned is the exhaustion of local remedies.

31. The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the state concerned must have had the opportunity to remedy matters through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort (see communications 25/89 [*Free Legal Assistance Group and Others v Zaire*], 74/92 [*Commission Nationale des Droits des l'Homme et des Libertés v Chad* (ACHPR 1995)] and 83/92 [*Degli and Others v Togo*]). Three major criteria could be deduced from the practice of the Commission in determining this rule, namely: the remedy must be available, effective and sufficient.

32. A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

33. The government's assertion of non-exhaustion of local remedies will therefore be looked at in this light. As aforementioned, a remedy is considered available only if the applicant can make use of it in the circumstance of his case. The applicants in communications 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*], 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*], 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] and 129/94 [*Civil Liberties Organisation v Nigeria*] had their communications declared admissible by the Commission because the competence of the ordinary courts had been ousted either by decrees or the establishment of special tribunals.

34. The Commission has stressed that, remedies, the availability of which is not evident, cannot be invoked by the state to the detriment of the complainant. Therefore, in a situation where the jurisdiction of the courts has been ousted by decrees whose validity cannot be challenged or questioned, as is the position with the case under consideration, local remedies are deemed not only to be unavailable but also non-existent.

35. The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of a generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.

36. The complainant in this case had been overthrown by the military, he was tried *in absentia*, former ministers and members of parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies.

37. There is no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right-thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant.

38. According to the established case law of the Commission, a remedy that has no prospect of success does not constitute an effective remedy. The prospect of seizing the national courts, whose jurisdiction has been ousted by decrees, in order to seek redress is nil. This fact is reinforced by the government's response of 8 March 1996, *note verbale* no PA 203/232/01/(97-ADJ) in which it stated that 'The Gambian government . . . does not intend to spend valuable time responding to baseless and frivolous allegations by a deposed despot . . .'

39. As to whether there were sufficient remedies, one can deduce from the above analysis that there were no remedies capable of redressing the complaints of the author.

40. Considering the fact that the regime at that material time controlled all the arms of government and had little regard for the judiciary, as was demonstrated by its disregard of a court order in the *TK Motors'* case, and considering further that the Court of Appeal of The Gambia in the case of *Pa Salla Jagne v The State*, ruled that: '[There are no longer human rights] or objective laws in the country', it would be reversing the clock of justice to request the complainant to attempt local remedies.

41. It should also be noted that the government also claims that the communication lacks 'proofs in support'. The position of the Commission has always been that a communication must establish a *prima facie* evidence of violation. It must specify the provisions of the Charter alleged to have been violated. The state also claims that the Commission is allowed under the Charter to take action only on cases which reveal a series of serious or massive violations of human rights.

42. This is an erroneous proposition. Apart from articles 47 and 49 of the Charter, which empower the Commission to consider interstate complaints, article 55 of the Charter provides for the consideration of 'Communications other than those of states parties'. Further to this, article 56 of the Charter stipulates the conditions for consideration of such communications (see also chapter XVII of the Rules of Procedure entitled 'Procedure for the Consideration of the Communications Received in Conformity with article 55 of the Charter'). In any event, the practice of the Commission

has been to consider communications even if they do not reveal a series of serious or massive violations. It is out of such useful exercise that the Commission has, over the years, been able to build up its case law and jurisprudence.

43. The argument that the action of the government is in conformity with regulations previously laid down by law is unfounded. The Commission decided in its decision on communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*, paragraph 15], with respect to freedom of association, that:

... competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

And more importantly, the Commission in its Resolution on the Right to Freedom of Association of 1992 had also reiterated that:

The regulation of the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter on Human and Peoples' Rights.

It follows that any law which is pleaded for curtailing the enjoyment of any of the rights provided for in the Charter must meet this requirement. For these reasons, the Commission declared the communications admissible.

Merits

44. The complainant alleges that by suspending the Bill of Rights in the 1970 Gambian Constitution, the government violated articles 1 and 2 of the African Charter.

45. Article 1 of the Charter provides that: 'The member states parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter', while article 2 reads: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter'.

46. Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of article 1. If a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this article. Its violation, therefore, goes to the root of the Charter.

47. The Republic of The Gambia ratified the Charter on 6 June 1983. In its first periodic report to the Commission in 1992, the Gambian government asserted that:

Most of the rights set out in the Charter have been provided for in chapter 3, sections 13 to 30 of the 1970 Constitution ... The Constitution predicts the Gambian accession to the covenants, but in fact gave legal effect to some of the provisions of the Charter.

This therefore means that the Gambian government gave recognition to some of the provisions of the Charter (ie those contained in chapter 3 of its Constitution), and incorporated them into its domestic law.

48. By suspending chapter 3 (the Bill of Rights), the government therefore restricted the enjoyment of the rights guaranteed therein, and, by implication, the rights enshrined in the Charter.

49. It should, however, be stated that the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter. In communication 129/94 [*Civil Liberties Organisation v Nigeria*, paragraph 17], the Commission held that 'the obligation of the . . . government . . . remains, unaffected by the purported revocation of the domestic effect of the Charter.'

50. The suspension of the Bill of Rights and consequently the application of the Charter was not only a violation of article 1 but also a restriction on the enjoyment of the rights and freedoms enshrined in the Charter, thus violating article 2 of the Charter as well.

51. Article 4 of the Charter states that: 'Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.

52. While the complainant alleges that there have been extrajudicial killings, no concrete evidence was adduced to support this allegation. The military government has provided official post-mortem reports on the causes of the deaths of Messrs Koro Ceesay and Sadibu Hydara. The government does not dispute the fact that soldiers died during the counter *coup* in November 1994, but claims that 'soldiers of both sides lost their lives due mainly to the fact that the rebels were fighting back with soldiers loyal to the government'. It also claims that since the takeover, not a single individual has been deliberately killed.

53. It is not for the Commission to verify the authenticity of the post-mortem reports or the truth of the government's defence. The burden is on the complainant to furnish the Commission with evidence of his allegations. In the absence of concrete proof, the Commission cannot hold the latter to be in violation of article 4 of the Charter.

54. Article 5 of the Charter reads: '. . . All forms of . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

55. The complainant alleges that the military perpetrated a reign of terror, intimidation and torture when it seized power. While there is evidence of intimidation, arrests and detentions, there is no independent report of torture.

56. The complainant further alleges that detention of persons *incommunicado* and preventing them from seeing their relatives constitutes torture. The state has refuted this claim and has challenged the complainant to

verify the truth from those who were detained. To date, the Commission has received no evidence from the complainant. In the absence of proof therefore, the Commission cannot hold the government to be in violation of article 5. [*The Commission then cites an unofficial version of an earlier decision, which is omitted here — eds.*]

57. Article 6 of the Charter reads:

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.

58. The military government has not refuted the allegations of arbitrary arrests and detentions, but has defended its position by stating that, its action must be 'studied and placed in the context of the changed circumstances in The Gambia'. It also claims that it is acting within the confines of legislation 'previously laid down by law', as required by the wordings of article 6 of the Charter.

59. The Commission in its decision on communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*, paragraph 15] laid down a general principle with respect to freedom of association that

competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

This principle therefore applies not only to freedom of association but also to all other rights and freedoms. For a state to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter. The Commission finds the arrests and *incommunicado* detention of the aforementioned persons inconsistent with The Gambia's obligations under the Charter. They constitute arbitrary deprivation of their liberty and thus a violation of article 6 of the Charter. Decree no 3 is, therefore, contrary to the spirit of article 6.

60. Article 7(1)(d) of the Charter reads: 'Every individual shall have the right to have his cause heard. This comprises: the right to be tried within a reasonable time by an impartial court or tribunal.'

61. Given that the Minister of Interior could detain anyone without trial for up to six months, and could extend the period *ad infinitum*, his powers in this case are analogous to that of a court, and for all intents and purposes, he is more likely to use his discretion to the detriment of the detainees, who are already in a disadvantaged position. The victims will be at the mercy of the minister who, in this case, will render favour rather than vindicating a right. This power granted to the minister renders valueless the provision enshrined in article 7(1)(d) of the Charter.

62. Article 7(2) of the Charter reads:

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed . . .

63. This provision is a general prohibition on retroactivity. It is to ensure that citizens at all times are fully aware of the state of the law under which they are living. The Economic Crimes (Specified Offences) Decree of 25 November 1994, which was deemed to have come into force in July 1994, is therefore a serious violation of this right.

64. Article 9 of the Charter reads: '(1) Every individual shall have the right to receive information. (2) Every individual shall have the right to express and disseminate his opinion within the law.'

65. The government did not provide any defence to the allegations of arrests, detentions, expulsions and intimidation of journalists, made by the complainant. The intimidation and arrest or detention of journalists for articles published and questions asked deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information. This action is clearly a breach of the provisions of article 9 of the Charter.

66. The complainant alleges that political parties have been banned, and that an independent Member of Parliament and his supporters were arrested for planning a peaceful demonstration. In addition, ministers and members of parliament in the former regime have been banned from taking part in any political activity and some of them restricted from travelling out of the country, with a maximum sentence of three years for any default.

67. The imposition of the ban on former ministers and members of parliament is in contravention of their rights to participate freely in the government of their country provided for under article 13(1) of the Charter. Article 13(1) reads:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

68. Also, the banning of political parties is a violation of the complainants' rights to freedom of association guaranteed under article 10(1) of the Charter. In its decision on communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*, paragraph 15], the Commission stated a general principle on this right, to the effect that:

competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

And more importantly, the Commission in its Resolution on the Right to Freedom of Association of 1992 had also reiterated that: 'The regulation of

the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter on Human and Peoples' Rights.' This principle does not apply to freedom of association alone but to all other rights and freedoms enshrined in the Charter, including the right to freedom of assembly. Article 10(1) provides: 'Every individual shall have the right to free association provided that he abides by the law.'

69. The Commission also finds the ban an encroachment on the right to freedom of assembly guaranteed by article 11 of the Charter. Article 11 reads: 'Every individual shall have the right to assemble freely with others'.

70. The restrictions on travel placed on the former ministers and members of parliament is also a violation of their right to freedom of movement and the right of ingress and egress provided for under article 12 of the Charter. Article 12 provides:

(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.

71. Section 62 of the Gambian Constitution of 1970 provides for elections based on universal suffrage, and section 85(4) made it mandatory for elections to be held within at most five years. Since independence in 1965, The Gambia has always had a plurality of parties participating in elections. This was temporarily halted in 1994 when the military seized power.

72. The complainant alleges that the Gambian peoples' right to self-determination has been violated. He claims that the policy that the people freely choose to determine their political status since independence has been 'hijacked' by the military and that the military has imposed itself on the people.

73. It is true that the military regime came to power by force, albeit, peacefully. This was not through the will of the people who, since independence have known only the ballot box, as a means of choosing their political leaders. The military *coup d'état* was therefore a grave violation of the right of Gambian people to freely choose their government as entrenched in article 20(1) of the Charter. Article 20(1) provides: 'All peoples shall . . . freely determine their political status . . . according to the policy they have freely chosen.' (See also the Commission's Resolution on the Military of 1994).

74. The rights and freedoms of individuals enshrined in the Charter can only be fully realised if governments provide structures which enable them to seek redress if they are violated. By ousting the competence of the ordinary courts to handle human rights cases, and ignoring court judgments, the Gambian military government demonstrated clearly that the

courts were not independent. This is a violation of article 26 of the Charter. Article 26 reads:

State parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

For the above reasons, the Commission:

[75.] Finds the government of The Gambia in violation of the following provisions of the Charter: articles: 1, 2, 6, 7(1)(d) and (2), 9(1) and (2), 10(1), 11, 12(1) and (2), 13(1), 20(1) and 26 of the Charter, for the period within which the violations occurred;

[76.] Urges the government of The Gambia to bring its laws into conformity with the provisions of the Charter.

* * *

Africa Legal Aid v The Gambia

(2000) AHRLR 119 (ACHPR 2000)

Communication 209/97, *Africa Legal Aid v The Gambia*
Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report
Rapporteurs: 23rd–25th sessions: Badawi; 26th session: Pityana; 27th session: Chigovera

Admissibility (failure to exhaust local remedies, 15)

1. The communication was submitted by Africa Legal Aid, an NGO that has observer status with the Commission, on behalf of Mr Lamin Waa Juwara, a Gambian national.

2. The complainant alleges that Mr Juwara left his house on 1 February 1996, but did not return home that day.

3. On the following day, that is 2 February 1996, Mrs Juwara, the complainant's wife, learnt through newspaper reports that her husband had been detained. Mrs Juwara went to the Regional Administrative Office where her husband was reportedly detained and was told by the Officer in Charge of the police station that Mr Juwara had been transferred to the Upper River Division Prison.

4. The complainant also states that Mr Juwara had been an independent candidate during the legislative elections which had taken place before the 1994 military *coup* in The Gambia and that he had been arrested several times since the *coup d'état*.

Complaint

5. The complainant alleges that the following provisions of the African Charter on Human and Peoples' Rights have been violated: articles 6, 9(1) and (2) of the Charter, as well as article 5 of the International Covenant on Civil and Political Rights.

Procedure

6. The communication was sent to the Secretariat of the Commission by fax dated 23 October 1997 and by post.

7. The Secretariat acknowledged receipt of the communication on 27 October 1997 and requested the complainant to provide additional information.

8. On 30 January 1998, the complainant replied, highlighting the allegations that Mr Juwara who had been arrested and was probably detained at the Upper River Division Prison had not been charged or brought before a court of law. Furthermore, no one knew for sure the whereabouts or the condition of Mr Juwara.

9. The complainant therefore argues that the provisions of article 56(5) of the Charter concerning the exhaustion of local remedies is inapplicable in this case since no charges had been brought against the detainee and, consequently, he could not have access to any remedy.

10. At its 23rd session held from 20-29 April 1998, in Banjul (The Gambia), the Commission, having been informed by the respondent state that Mr Lamin Waa Juwara had been released, decided to suspend a decision to be seized of the communication until the 24th session. It further requested the Secretariat to inquire as to the veracity of the statement of the state party, as well as find out whether the petitioner would like to pursue the case, in the event that Mr Juwara's release was confirmed.

11. The Secretariat complied with the directives given by the Commission sitting at its 23rd ordinary session.

12. Consideration of the communication was successively deferred at the 24th, 25th and 26th ordinary sessions and the parties informed accordingly.

13. The matter was taken up by the Secretariat of the Commission in a meeting on 10 March 2000 with the State Counsel in the Department of State for Justice, The Gambia. The State Counsel promised to meet the state party's obligation as requested.

Law

Admissibility

14. Article 56(5) of the Charter provides: 'Communications . . . shall be considered if they: . . . Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.'

15. The Commission reviewed the case and noted that the complainant had not satisfied the requirement for exhaustion of local remedies as stipulated in the aforementioned provision.

For the above reason, the Commission:

[16.] Declares the communication inadmissible.

* * *

Legal Defence Centre v The Gambia

(2000) AHRLR 121 (ACHPR 2000)

Communication 219/98, *Legal Defence Centre v The Gambia*
Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report
Rapporteurs: 24th–25th sessions: Badawi; 26th session: Pityana; 27th session: Chigovera

Admissibility (exhaustion of local remedies — exile, 17)

1. The complainant is an NGO based in Nigeria and has observer status with the African Commission on Human and Peoples' Rights.
2. The complainant alleges the illegal deportation of a Nigerian national from The Gambia.
3. It is alleged that the deportee, Mr Sule Musa, was a journalist with the *Daily Observer*, a Gambian newspaper.
4. It is alleged that Mr Sule Musa was arrested within the premises of his office by Corporal Nyang. After his arrest he was taken to the Bakau Police Station from where he was directed to surrender his international passport. He was then driven home to pick up his passport and afterwards taken to the police headquarters in Banjul, and from there to the Immigration Department, where he was told he was being deported to go and face trials for crimes he committed in Nigeria.

5. It is alleged that on arrival at the airport on 9 June 1998, Mr Sule Musa was neither allowed food, water or a bath until 10 June 1998 after he had been served with his deportation order for being an 'undesirable alien'.

6. The complainant alleges that Mr Sule Musa was deported for his writings in the *Daily Observer* on certain diverse issues concerning Nigeria under the military regime of General Sani Abacha.

7. It is alleged that upon his arrival in Nigeria there was no immigration or police officer to arrest him for the purported crimes he had committed in Nigeria.

8. Furthermore, the complainant alleges that Mr Sule Musa was not allowed to take any of his personal effects before he was deported. Inevitably his property is in The Gambia while he is in Nigeria and cannot return as the deportation order still subsists.

Complaint

9. The complainant alleges that the following articles of the African Charter on Human and Peoples' Rights have been violated: articles 2, 4, 5, 7, 9, 12(4) and 15.

Procedure

10. The complaint is dated 27 July 1998 and was received at the Secretariat of the Commission on 9 September 1998.

11. At the 24th ordinary session, the Commission decided to be seized of the complaint and parties were informed accordingly.

12. The Commission at its 25th ordinary session held in Bujumbura, Burundi, postponed consideration of the communication to the next session while requesting the Secretariat to investigate whether the complainant could have recourse to the local courts in The Gambia.

13. Letters were sent to the parties by the Secretariat requesting for additional information on the availability of local remedies but no response has been received.

14. Furthermore, the Secretariat established contact with the Attorney-General of The Gambia and solicited her assistance. This resulted in a meeting on 10 March 2000, at the Secretariat of the Commission between the State Counsel in the Department of State for Justice and the Legal Officer at the Secretariat. The State Counsel promised to send their submissions on all the complaints but the submissions promised were not sent.

Law

Admissibility

15. Article 56(5) of the Charter provides: 'Communications shall be con-

sidered if they . . . Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged’.

16. The complainant had argued that no domestic remedies are available for Mr Musa inside The Gambia as the deportation order was still subsisting. And in consequence that Mr Musa is disabled in seeking redress by invoking any legal or administrative process.

17. The Commission observed that the victim does not need to be physically in a country to avail himself of available domestic remedies, such could be done through his counsel. In the instant case, it noted that the complaint was filed by a human rights NGO based in Lagos, Nigeria. Rather than approach the Commission first, the complainant ought to have exhausted available local remedies in The Gambia. The Commission therefore concludes that the complainant has failed to comply with the provision of article 56(5) of the Charter.

For the above reasons, the Commission:

[18.] Declares the communication inadmissible.

GHANA

International Pen v Ghana

(2000) AHRLR 124 (ACHPR 1994)

Communication 93/93, *International Pen v Ghana*
7th Annual Activity Report

[1.] Communication on the freedom of expression.

[2.] Upon the request by the author, the communication is marked withdrawn and the file is closed.

* * *

Abubakar v Ghana

(2000) AHRLR 124 (ACHPR 1996)

Communication 103/93, *Alhassan Abubakar v Ghana*
Decided at the 20th ordinary session, Oct 1996, 10th Annual Activity Report

Admissibility (exhaustion of local remedies — exile, 6)

Personal liberty and security (arbitrary arrest and detention, 8-9)

Evidence (burden on complainant to furnish evidence, 14, 15)

Fair trial (trial within reasonable time, 11, 12)

Movement (right to return to home country, 13-15)

[1.] Alhassan Abubakar is a Ghanaian citizen, presently residing in Côte d'Ivoire. He was arrested on 16 June 1985 for allegedly cooperating with political dissidents. He was detained without charge or trial for seven years until his escape from a prison hospital on 19 February 1992.

[2.] After his escape, his sister and his wife, who had been visiting him, were arrested and held for two weeks in an attempt to get information on the complainant's whereabouts. The complainant's brother informed him that the police had been given false information about his return, and had

on several occasions surrounded his house, searched it, and subsequently searched for him in his mother's village. In the early part of 1993 the UNHCR in Côte d'Ivoire informed the complainant that they had received a report on him from Ghana assuring him that he was free to return without risk of being prosecuted for fleeing from prison. The report further stated that all those detained for political reasons had been released.

[3.] The complainant on the other hand holds that there is a law in Ghana which subjects escapees to penalties from six months to two years imprisonment, regardless of whether the detention from which they escaped was lawful or not.

Procedure

[4.] The communication is dated 26 July 1993. The complainant was sent a questionnaire concerning communications on 11 August 1993 and returned it completed. The Commission was seized at the 14th session and the communication was sent to the state concerned on 6 January 1994. No response was forthcoming.

[5.] The Commission tried without success to resolve this communication amicably.

Law

Admissibility

[6.] Article 56(5) of the Charter requires that all local remedies be exhausted before the Commission can consider the communication, unless the procedure is unduly prolonged. In this case the complainant is residing outside the state against which the communication is addressed and thus where the remedies would be available. He escaped to Côte d'Ivoire from prison in Ghana and has not returned there. Considering the nature of the complaint it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities. Accordingly, the Commission does not consider that local remedies are available for the complainant.

[7.] As the communication fulfills all the other requirements of article 56, the Commission declares the communication admissible.

Merits

[8.] Article 6 of the Charter reads:

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.

[9.] The complainant contends he was arrested by the government for alleged collaboration with dissidents to overthrow the administration. He

was arrested under section 2 of the Preventive Custody Law of 1992 (PNDCL 4) in the interest of national security. However, the complainant states he was never charged with this offence nor brought to trial.

[10.] The government failed to provide further details of the relevant laws on request, merely stating that 'if the complainant has violated some laws, he must stand trial for them in the national courts'. It is by now well-established law before the Commission that where no substantive information is forthcoming from the government concerned, the Commission will decide on the facts as alleged by the complainant (see communication 25/89 [*Free Legal Assistance Group and Others v Zaire*]). [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*]

[11.] Article 7(1) of the Charter reads: 'Every individual shall have the right to have his cause heard. This comprises: . . . (d) the right to be tried within a reasonable time . . .'

[12.] The complainant was detained in prison for seven years without trial before his escape. This period clearly violates the 'reasonable time' standard stipulated in the Charter.

[13.] Article 12(2) of the Charter reads:

Every individual shall have the right . . . 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.

[14.] The complainant alleges the existence of a law in Ghana permitting the detention of escapees on their return to the country. The government has denied that the complainant would be imprisoned on grounds of escape on his return, but concedes that he could be tried for any criminal offences that he may have committed. The government has stated that all political prisoners have been released, but the complainant provides evidence of other escapees who were arrested on their return to Ghana and that there is some indication that he would also be subject to the same treatment.

[15.] The facts provided are insufficient to find that the complainant's right to return to his country has been violated.

For these reasons, the Commission:

[16.] Holds there has been a violation of articles 6 and 7(1)(d) the Charter;

[17.] Urges the government to take steps to repair the prejudice suffered.

* * *

Cudjoe v Ghana

(2000) AHRLR 127 (ACHPR 1999)

Communication 221/98, *Alfred B Cudjoe v Ghana*
Decided at the 25th ordinary session, May 1999, 12th Annual Activity Report
Rapporteur: Pityana

Admissibility (failure to exhaust local remedies, decision by national Human Rights Commission not sufficient, 13)

1. The complainant is a Ghanaian citizen, formerly employed at the Embassy of Ghana in Conakry, Guinea.
2. He alleges that his contract as translator/bilingual secretary at the said embassy was wrongly terminated, by letter dated 24 June 1994.
3. He claims that his dismissal was based on a report produced by the Guinean authorities, describing him as the brains behind an attack against the Ghanaian Chancery and the Ghana Airways offices in Conakry, perpetrated by furious Ghanaian residents.
4. The complainant states that he did not have the opportunity of seizing any appellate authority before being dismissed for the above reasons.
5. The complainant presented a decision handed down by the Commission on Human Rights and Administrative Justice of Ghana, dated 18 May 1997, to the effect that the complainant's dismissal without benefits was null and void and that Mr Alfred Cudjoe was entitled to some compensation.
6. He further states that the Ministry of Foreign Affairs refused to comply with this decision.
7. He sent a copy of the said decision to the Commission.

Substance of grievance

8. The complainant alleges violation of articles 7, 4 and 15 of the African Charter on Human and Peoples' Rights.

Procedure before the Commission

9. At the 24th ordinary session held in Banjul, The Gambia, from 22–31 October 1998, the Commission decided to be seized of the communication and requested the complainant to provide it with more information as regards the exhaustion of all internal remedies.

10. On 26 November 1998, letters were dispatched to both parties to inform them of the Commission's decision.

11. At the 25th session, held in Bujumbura, Burundi, from 26 April to 5 May 1999, the Commission deliberated on the admissibility of the communication.

Law

Admissibility

12. In terms of the provisions of article 56 of the African Charter on Human and Peoples' Rights:

Communications relating to human and peoples' rights ... received by the Commission, shall be considered if they ... (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged ...

13. The African Commission observes that while the complainant has attached to his dossier the decision granted in his favour by the Ghanaian Human Rights Commission, he does not give any indication (despite the request made to him in this regard following deliberations at the 24th session) as to the procedure he has followed before the courts. For, it should be clearly stated, the internal remedy to which article 56(5) refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not. From the African Commission's point of view, seizing the said Commission can be taken as a preliminary amicable settlement and should, in principle, considering the employer's failure to react, be followed by an action before the law courts.

For these reasons, the Commission:

14. In conformity with the above provisions of the Charter, declares the communication inadmissible due to non-exhaustion of internal remedies.

GUINEA

Dioumessi and Others v Guinea

(2000) AHRLR 129 (ACHPR 1994)

Communication 70/92, *Ibrahima Dioumessi, Sekou Kande, Ousmane Kaba v Guinea*
7th Annual Activity Report
(See also *Dioumessi and Others v Guinea* (ACHPR 1995), below)

[1.] Communication on detention without trial.

Final decision

[2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;

[3.] Meeting at its 15th ordinary session held in Banjul, The Gambia, from 18 to 27 April, 1994;

[4.] Recalling the provisions of article 57 of the Charter and those of rules 110 and 115 of the Rules of Procedure which stipulate that prior to any substantive consideration, all communications must be brought to the knowledge of the state concerned;

[5.] Notes that the said communication was brought to the attention of the state of the Republic of Guinea on 13 November 1992, 12 April 1993 and 12 March 1994;

[6.] Requests the Guinean government to submit additional information relating to the issue within two months of the receipt of a new notification, [failing] which this matter shall be considered during the 16th session.

* * *

Dioumessi and Others v Guinea

(2000) AHRLR 130 (ACHPR 1995)

Communication 70/92, *Ibrahima Dioumessi, Sekou Kande, Ousmane Kaba v Guinea*

Decided at the 18th ordinary session, Oct 1995, 9th Annual Activity Report

(See also *Dioumessi and Others v Guinea* (ACHPR 1995), above)

Admissibility (loss of contact with complainant, 11-12)

1. The communication was submitted by Ibrahima Dioumessi, Sekou Kande and Ousmane Kaba, and received by the Commission on 15 November 1991. It contains no mailing address for the complainants.

2. The communication alleges that following the *coup d'état* of 4 July 1984 in Guinea, the complainants were arrested, tortured and incarcerated for three years without charge or trial.

3. The complainants allege violation of the right to security of persons and the right to fair trial. The former detainees request compensation for the moral and material prejudice they have suffered.

Procedure before the Commission

4. The Commission was seized of the communication at its 12th session in November 1992.

5. The Ministry of Foreign Affairs of Guinea was notified on 13 November 1992. The Secretariat also requested the complainants' address.

6. In 1993 and 1994, numerous reminders were sent by the Secretariat to the government of Guinea, but no response was received.

7. On 21 October 1994, the Guinean government sent a *note verbale* to the Commission requesting that the Commission delay consideration of the communication until the 17th session, in order to allow the government to submit its memorandum in response.

8. At the 17th session in March 1995, the memorandum of the government of Guinea had not been received, but it was decided to wait for it, and in the meanwhile to ask the complainants if they had exhausted all domestic remedies.

9. All attempts to get the addresses of the complaints were of no avail.

10. At the 18th session, the memorandum of the government of Guinea still had not been received.

Law

11. The problem posed here is one of admissibility. To be admissible, a communication must fulfill all the conditions of article 56 of the Charter, in particular, the identity of the complainants so that they may be sent notifications.

12. In the present case, the Secretariat has not been able to remedy this lack of the complainants' address.

For these reasons, the Commission:

[13.] Declares the communication inadmissible.

KENYA

Njoka v Kenya

(2000) AHRLR 132 (ACHPR 1995)

Communication 142/94, (previously 56/91) *Muthuthirin Njoka v Kenya*
8th Annual Activity Report

Admissibility (compatibility with the Charter, date of violation before ratification of the Charter, 5)

[1.] The communication was submitted by Muthuthirin Njoka who alleges that he was illegally admitted to Mathera Mental Hospital through police duress and pressure. He alleges the wrong implementation of the Police Act 1961 and Mental Treatment Act 1949, which were both enacted by the colonial government. He also alleges wrongful detention and torture, the wrongful imprisonment of his sons and other members of his family, harassment of the members of his family and the confiscation of family property.

[2.] The communication was originally submitted in 1991 and designated no 56/91. On 21 October 1993, the Commission decided that the communication was inadmissible because Kenya was not party to the African Charter on Human and Peoples' Rights at the time it was submitted.

[3.] Mr Njoka was accordingly intimidated but was also informed that he could resubmit his communication since Kenya had subsequently ratified the Charter. This he did.

Applicable law

[4.] The complainant alleges violations of his rights under articles 5, 6, 7 and 21 of the Charter.

Recommendation

[5.] The cause of the complaint arose at a time when Kenya was not a party to the Charter. There is no evidence of a continuing damage in breach of the Charter. The communication is incoherent in several respects: (1) The author alleges in a letter of 14 June 1994 to the Registrar of the High Court of Kenya that his suits had been pending in court for nine years. One was against Kenya claiming the sum of 7.5 billion Kenyan shillings for the wrongful implementation of colonial statutes and another

claiming 12.5 billion British shillings for wrongfully passing that legislation. (2) A letter of 20 March 1991 addressed to the World Health Organization is enclosed. The letter requests 'the definition of mental capacity and the position of a living being'. (3) A letter of 31 May 1993 addressed to the Secretary-General of the OAU requires the organisation 'to intercept this matter . . . quash the sentences imposed on my sons and set them free'. The author is incoherent and his complaints are vague. The communication is inadmissible.

For these reasons, the Commission:

[6.] Declares the communication inadmissible.

* * *

Kenya Human Rights Commission v Kenya

(2000) AHRLR 133 (ACHPR 1995)

Communication 135/94, *Kenya Human Rights Commission v Kenya*
Decided at the 18th ordinary session, Oct 1995, 9th Annual Activity
Report

Admissibility (failure to exhaust local remedies, 16)

1. The university academic staff from the four public universities in Kenya (University of Nairobi, Kenyatta University, Moi University and Egerton University) met and resolved to form an Umbrella Trade Union to represent their interests in negotiations with their respective employers. They decided to call their union, the Universities Academic Staff Union (UASU).

2. On 25 May 1992, they submitted an application for registration to the Registrar of Trade Unions. The Registrar acknowledged the receipt of the application documents the same day. However, there were no further replies from either the Registrar or the Attorney-General.

3. In June 1993, the UASU interim officials wrote to the Attorney-General seeking audience with him to discuss UASU's registration. The Attorney-General did not reply to this letter.

4. Due to the lack of response, the UASU decided in November 1993 to go on strike on 29 November 1993. The notice of the intended strike was issued to the Attorney-General, the Registrar and the Vice-Chancellors of the public universities. A copy of notice was also delivered to Kenya's

President Daniel Moi, who was also the Chancellor of all the public universities.

5. On 24 November 1993 the Registrar refused to register UASU on the grounds that 'the Union is used for unlawful purposes and as such peace, welfare and good order in Kenya would otherwise be likely to suffer prejudice ...'

6. The strike began on 29 November 1993 and court proceedings were initiated on 23 December 1993, challenging the Registrar's decision to reject their application for registration as a trade union.

7. On 27 December 1993, during the swearing in of two newly appointed judges of the High Court of Kenya, President Moi, who was also the Chancellor of the public universities, stated that the government would never register UASU despite the fact that the matter was already in court. He reiterated the government's position on 31 December in a public statement. He again repeated that the government would not allow the registration of UASU on 25 February 1994 and further stated that the government would take stern action against the leaders of the UASU.

8. Justice AB Shah, one of the new judges sworn in on 27 December 1993, and who was previously the President's lawyer, heard an application filed by University of Nairobi UASU chapter officials, seeking to restrain eviction from their university housing until the cases against the Registrar challenging the rejection of registration and their purported dismissal from the university were fully determined. Justice AB Shah rejected the application.

9. All the national officials of UASU have been arrested and harassed since the strike began in November 1993. On 10 December 1993, the national interim officials were arrested while proceeding to Egerton University for a meeting. No charges were pressed and the officials were released the following day. Dr Korwa Adar was again arrested on 25 February 1994 from his house after the President warned that action would be taken against UASU leaders. Dr Adar was charged with inciting students and colleagues to violence.

Procedure before the Commission

10. The communication is dated 8 March 1994 and was received by the Commission on 2 May 1994.

11. The Commission was seized of the communication at its 16th session in October 1994 and it was decided that the government of Kenya should be notified of the complaint against it for comments.

12. On 10 January 1995, a letter was sent to the complainant asking what had been the outcome of the court case concerning the refusal of the government to register the union in question. On the same date a notification was sent to the government informing it of the seizure of the

communication during the 16th session and that the admissibility of the communication would be considered at the 17th session.

13. At the 17th session the three month period given to the government of Kenya to respond to the communication had not yet elapsed. The case was therefore deferred to the 18th session.

14. On the 20 April 1995, letters were sent to both the complainant and the government of Kenya, stating that the case would be considered at the 18th session and requesting the government of Kenya's response to the communication and information from the complainant on the pending court case.

Law

15. Article 56 of the African Charter reads: 'Communications . . . shall be considered if they: . . . (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. . .'

16. The most recent information the Commission has, provided by the complainants themselves, states that the communication is still pending before the courts of Kenya. The complainant has therefore not exhausted all available local remedies.

For the above reasons, the Commission:

[17.] Declares the communication inadmissible without making any judgments as to the merits.

* * *

Ouko v Kenya

(2000) AHRLR 135 (ACHPR 2000)

Communication 232/99, *John D Ouko v Kenya*
Decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual Activity Report
Rapporteur: Ben Salem

Admissibility (exile, 18-19)

Personal liberty and security (arbitrary arrest and detention, 20-21)

Cruel, inhuman or degrading treatment, (22-26)

Evidence (burden on complainant to furnish evidence, 26)

Expression (persecution because of opinions expressed, 27-28; right limited by law of defamation, 28)

Association (student leader forced to flee country, 29-30)

Movement (right to leave and return to home country, 31)

1. The complainant claims to be a students' union leader at the University of Nairobi, Kenya.
2. He alleges that he was forced to flee the country due to his political opinions.
3. He mentions the following as issues which led to his strained relations with the government and to his arrest and detention and eventually to his fleeing the country: (a) The demand for the setting up of a Judicial Commission of Inquiry into the murder of his late uncle and former Kenyan Minister of Foreign Affairs, Mr Robert Ouko; (b) His condemnation of the seeming government involvement in the murder of his predecessor at the students' union, Mr Solomon Muruli; (c) His condemnation of corruption, nepotism and tribalism in government; (d) His condemnation of the frequent closure of public universities.
4. Prior to his fleeing the country, he was arrested and detained without trial for ten months at the notorious basement cells of the Secret Service Department headquarters in Nairobi.
5. The detention facility was a two-by-three-metre basement cell with a 250 watts electric bulb, which was left on throughout his ten months detention.
6. The complainant alleges that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.
7. The complainant claims that he fled the country on 10 November 1997 to Uganda, where he initially sought political asylum but this was denied.
8. The complainant alleges that since he could not obtain any protection in Uganda, he had to leave to the Democratic Republic of Congo (DRC) in March 1998, and has been residing there to date.
9. The complainant claims to be living presently in Aru, in the north-east of the Democratic Republic of Congo.
10. The complainant further alleges that until August 1998, when the war broke out in the DRC, he was under the United Nations High Commissioner for Refugees' (UNHCR) assistance programme.
11. Since the said war started, leading to the evacuation of UNHCR staff, he has been living in a very desperate and despicable situation.

Complaint

The complainant alleges violations of articles 5, 6, 9, 10 and 12 of the African Charter.

Procedure

12. At its 26th ordinary session held in Kigali, Rwanda, the Commission

decided to be seized of the communication and requested the Secretariat to notify the parties.

13. On 18 January 2000, letters were dispatched to the parties notifying them of the Commission's decision.

14. On 23 May 2000, during the 27th ordinary session held in Algeria, the Secretariat of the Commission received a letter from the complainant stating, among other things, that he had been in Kampala for medical reasons since November 1999. In addition, he informed the Commission of his ordeals in the Democratic Republic of Congo, including his being kidnapped and forced to work as a computer operator for the rebels in Kisangani.

15. At its 27th ordinary session held in Algeria, the Commission examined the case and declared it admissible and requested parties to furnish it with arguments on the merits of the case.

16. On 12 July 2000, the Secretariat communicated the Commission's decision to the parties.

Law

Admissibility

17. The admissibility of communications brought pursuant to article 55 of the Charter is governed by article 56 of the Charter. The applicable provision in this particular case is article 56(5) of the Charter, which provides *inter alia*:

Communications relating to human and peoples' rights . . . received by the Commission shall be considered if they: . . . Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .

18. The facts of this case reveal the following: The complainant is no longer in the Republic of Kenya. The above condition is not based on his voluntary will — he has been forced to flee the country because of his political opinions and Student Union activities. An attestation dated 30 October 1999, issued by one Mr Tane Bamba, Head of Sub Office of the United Nations High Commissioner for Refugees, indicates that the complainant 'is recognised as a refugee under UNHCR mandate in accordance with the provisions of the OAU Convention of 10 September 1969, which he satisfied.'

19. Relying on its case law (see communication 215/98 *Rights International v Nigeria*), the Commission finds that the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugee. The Commission therefore declared the communication admissible based on the principle of constructive exhaustion of local remedies.

Merits

20. The complainant alleges that prior to his fleeing the country, he was arrested and detained for ten months without trial at the notorious base-ment cells of the Secret Service Department headquarters in Nairobi.

21. The respondent state party has not contested this claim. In fact, it has not responded to the many requests made by the secretariat of the Commission. In this circumstance and following its well laid down precedent on this, the Commission accepts the facts of the complainant as the facts of the case and finds the respondent state in violation of article 6 of the Charter. Article 6 provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

22. The complainant claims that the detention facility had a 250 watts electric bulb, which was left on throughout his ten months detention. Furthermore, that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.

23. The Commission finds the above condition which the complainant was subjected to in contravention of the respondent state party's obligation to guarantee to the complainant the right to the respect of his dignity and freedom from inhuman and degrading treatment under article 5 in violation of the Charter. Article 5 provides:

Every 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.

24. Such condition and treatment also runs contrary to the minimum standards contained in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly principles 1 and 6.

25. Principle 1 provides: 'All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.' Principle 6 on the other hand states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

26. Although the complainant has claimed a violation of his right to freedom from torture, he has not substantiated on this claim. In the absence of such information, the Commission cannot find a violation as alleged.

27. The complainant alleges that he was forced to flee his country because of his political opinions. He details some of the events that led to his

strained relationship with the government. Article 9 of the African Charter provides: '(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.'

28. The above provision guarantees to every individual the right to free expression, within the confines of the law. Implicit in this is that if such opinions are contrary to laid down laws, the affected individual or government has the right to seek redress in a court of law. Herein lies the essence of the law of defamation. This procedure has not been followed in this particular instance. Rather the government has opted to arrest and detain the complainant without trial and to subject him to a series of inhuman and degrading treatments. The Commission finds this in violation of article 9 of the Charter.

29. The complainant claims that being a victim of political persecution, he has been deprived of his right to freedom of association guaranteed by article 10 of the Charter. The Commission notes that the complainant was a Student Union leader before fleeing the country.

30. The respondent state party has not refuted this fact. The Commission therefore finds the persecution of the complainant and his subsequent flight to the Democratic Republic of the Congo to have greatly jeopardised his chances of enjoying his right to freedom of association guaranteed under article 10 of the Charter. Article 10 states: '(1) Every individual shall have the right to free association provided that he abides by the law.'

31. The complainant claims that his rights to freedom of movement and to egress and ingress have been violated. Taking the circumstances of the case into consideration, the Commission finds this claim to have been substantiated and therefore finds the respondent state in violation of article 12 of the Charter. Article 12 provides:

(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.

For these reasons, the Commission:

[32.] Finds the Republic of Kenya in violation of articles 5, 6, 9, 10 and 12 (1) and (2) of the African Charter on Human and Peoples' Rights;

[33.] Urges the government of the Republic of Kenya to facilitate the safe return of the complainant to the Republic of Kenya, if he so wishes.

LIBERIA

Korvah v Liberia

(2000) AHRLR 140 (ACHPR 1988)

Communication 1/88, *Frederick Korvah v Liberia*
Decided at the 4th ordinary session, Oct 1988, 7th Annual Activity Report

Admissibility (communication not addressed to Commission, 4; compatibility with the Charter, 5)

[1.] Communication on the situation in Liberia including corruption, immorality, etc dated 26 July 1987.

Final decision

[2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;

[3.] Meeting at its 4th ordinary session held from 17 to 26 October 1988;

[4.] Considering that the communication is not addressed to the Commission but to the Liberian government;

[5.] Considering further that the five matters described in this communication do not amount to violations of human rights under the provisions of the Charter;

[6.] Declares the communication inadmissible.

MADAGASCAR

Joana v Madagascar

(2000) AHRLR 141 (ACHPR 1996)

Communication 108/93, *Monja Joana v Madagascar*
Decided at the 20th ordinary session, Oct 1996, 10th Annual Activity Report

Admissibility (loss of contact with complainant, 10-12)

[1.] The complainant was a citizen of Madagascar, who was a prominent political figure and had been a candidate for president. He was arrested on 1 June 1993 under a special decree, which provided for his detention for an indefinite period of time without being told the reason and without the right to appear before a judge. His sons were also arrested.

[2.] According to the court judgment of 17 December 1993, the complainant was guilty of trespassing in government buildings and the acquisition of arms without authorisation. He was given a one-year suspended sentence. His sons were acquitted. The communication does not include his address.

Procedure

[3.] The communication is dated 20 July 1993. The state concerned was notified by mail on 6 January 1994.

[4.] The Commission proceeded to examine the necessary facts in order to be sure that the United Nations Human Rights Committee had not been seized of the same communication and in order to try to know the address of the complainant.

[5.] The information received revealed that this case had not been submitted to the United Nations and that the complainant had died.

The law

Admissibility

[6.] Article 56(1) of the Charter requires that communications presented pursuant to article 55 indicate their author, even if the author has requested anonymity. The Commission must be in communication with the author, to know his identity and status, to be assured of his continued interest in the communication and to request supplementary information

if the case requires it. This is reflected in rule 104 of the Rules of Procedure of the Commission.

[7.] In the past, the Commission made decisions on the admissibility in the case where the requirements of article 56(1) had not been fulfilled.

[8.] The Commission closed communication 62/91 [*Committee for the Defence of Human Rights (in respect of Madike) v Nigeria*] because two letters of reminder to the complainant had gone unanswered. The Commission interpreted this prolonged silence on the part of the complainant as 'loss of contact with the complainant'.

[9.] In its decision on communication 70/92 [*Dioumessi and Others v Guinea*], the Commission declared the communication inadmissible because the complainant had included no address and the address could not be located through other means.

[10.] In the present case, the Commission has not had contact with the complainant since the case was brought.

[11.] The Commission has tried various means in an attempt to contact the complainant through other individuals. The address of the complainant's family reached the Commission in the same letter as news of the complainant's death. Efforts made to contact the deceased's legal successor have not borne results.

For these reasons, the Commission:

[12.] Declares the communication inadmissible.

MALAWI

Congress for the Second Republic of Malawi v Malawi

(2000) AHRLR 143 (ACHPR 1994)

Communication 63/92, *Congress for the Second Republic of Malawi v Malawi*
7th Annual Activity Report

[1.] A communication on the general political situation in Malawi.

Final decision

[2.] The information is noted and no further action is necessary. Accordingly the matter is closed.

* * *

Achuthan and Another (on behalf of Banda and Others) v Malawi

(2000) AHRLR 143 (ACHPR 1994)

Communications 64/92, 68/92 and 78/92, *Krischna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*
7th Annual Activity Report
(See also *Achuthan and Another (on behalf of Banda and Others) v Malawi* (ACHPR 1995), below)

Serious or massive violations (2)

[1.] Communication on alleged wrongful detentions and denial of rights.

Final decision

[2.] The Commission finds that the state is in breach articles 4, 5 and 7 of

the African Charter on Human and Peoples' Rights and decides to refer the situation to the Assembly of Heads of State and Government under article 58(1) of the Charter on Human and Peoples' Rights.

* * *

Achuthan and Another (on behalf of Banda and Others) v Malawi

(2000) AHRLR 144 (ACHPR 1995)

Communications 64/92, 68/92 and 78/92, *Krischna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*

8th Annual Activity Report

(See also *Achuthan and Another (on behalf of Banda and Others) v Malawi* (ACHPR 1994), above)

Life (extrajudicial executions, 6)

Torture (7)

Cruel, inhuman or degrading treatment (conditions of detention, 7)

Personal liberty and security (arbitrary arrest and detention, no legal remedies to challenge detention 8-10)

Fair trial (trial within reasonable time, defence — access to legal counsel, 9, 10)

State responsibility (change of government does not extinguish claim, 11, 12)

1. In communication no 64/92 Krishna Achuthan appealed to the Commission on behalf of his father-in-law, Aleke Banda, a prominent political figure who at the time of the communication had been imprisoned for over 12 years without legal charge or trial. Mr Achuthan had met with two successive heads of intelligence of Malawi who said there was no case pending against Mr Banda, but that he was being held 'at the pleasure of the Head of State'.

2. In communications nos 68/92 and 78/92 Amnesty International petitioned the Commission on behalf of Orton and Vera Chirwa. Orton Chirwa had been a prominent political figure in Malawi before independence, but had been living in exile in Zambia with his wife since 1964 because of differences with Malawi's President Banda. In 1981, the Malawi security

officials took them into custody and they were subsequently sentenced to death for treason at a trial in the Southern Regional Traditional Court. They claimed at this trial that they had been abducted from Zambia. They were denied legal representation. The sentences were upheld by the National Traditional Appeals Court, although the Appeals Court criticised many aspects of the conduct of the trial.

3. After international protest, the sentences were commuted to life imprisonment. The Chirwas were held in almost complete solitary confinement, given extremely poor food, inadequate medical care, shackled for long periods of time within their cells and prevented from seeing each other for years.

4. In its supplemental communication consisting of a report on Malawi for March to July 1992, Amnesty International described the arrests of many office workers in 1992 because of suspicions that the equipment used in their work, such as computers and fax machines, could be used to disseminate the propaganda of the pro-democracy movement. The report also described extremely poor prison conditions, including overcrowding and torture consisting of beatings and electric shocks.

5. The communication also described the detention and intimidation of Roman Catholic bishops. Trade union leaders were imprisoned, and peacefully striking workers were shot and killed by the police. Police also raided student dormitories and arrested students who were beaten and tortured.

Law

6. Article 4 of the African Charter reads: '... Every human being shall be entitled to respect for his life. . .' Shootings by police officers are a violation of this right.

7. Article 5 of the African Charter provides as follows: '... All forms of . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.' The conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened this article. Aspects of the treatment of Vera and Orton Chirwa such as excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care, were also in contravention of this article.

8. Article 6 of the African Charter reads: 'Every individual shall have the right to liberty and to the security of his person. . .' The massive and arbitrary arrests of office workers, trade unionists, Roman Catholic bishops and students violated this article. The arbitrary detention Mr Aleke Banda suffered is likewise a violation of article 6.

9. Mr Banda was not allowed recourse to the national courts to challenge the violation of his fundamental right to liberty as guaranteed by article 6

of the African Charter and the constitution of Malawi. Furthermore, Aleke Banda was detained indefinitely without trial. The Commission finds that Mr Banda's imprisonment violated article 7(1)(a) and (d) of the African Charter.

10. Vera and Orton Chirwa were tried before the Southern Region Traditional Court without being defended by a counsel. This constitutes a violation of article 7(1)(c) of the African Charter.

11. The Commission notes that Malawi has undergone important political change after the submission of the communications. Multiparty elections have been held, resulting in a new government. The Commission hopes that a new era of respect for the human rights of Malawi's citizens has begun.

12. Principles of international law stipulate, however, that a new government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses.

For these reasons, the Commission:

[13.] Holds that there has been a violation of articles 4, 5, 6, and 7(1)(a), (c) and (d) of the African Charter.

MAURITANIA

SOS-Eslaves v Mauritania

(2000) AHRLR 147 (ACHPR 1999)

Communication 198/97, *SOS-Eslaves v Mauritania*
Decided at the 25th ordinary session, May 1999, 12th Annual Activity
Report
Rapporteur: Ondziel-Gnelenga

Admissibility (failure to exhaust local remedies, 15-17)

1. *SOS—Eslaves* alleges that slavery remains a common practice in Mauritania, regardless of its prohibition under the law. According to this NGO, in a considerable number of cases, the Mauritanian government is informed about these practices, and in some of those cases, it occasionally supports the authors of these practices. *SOS-Eslaves* cites some concrete examples in support of its allegations.

2. In its report of March 1996, *SOS-Eslaves* provided the following illustrations:

- Ten Mauritanian adults sold and bought as slaves (M'barka mint Said, Temrazquint mint M'Barek, Nema mint Ramdane, Aïchana mint Abeid Boïlil, Mbarka mint Meriéme, Zgheilina, Bakary, Abeid, Aïcha mint Soélim, Kneïba).
- Children from four families enslaved by the masters of their parents (the daughter of M'barka mint Meriéme, the five children of Aïchana mint abeid Boïlil, the daughter of Messaoud ould Jiddou, and the two sons of Fatma mint Mama).
- Four other children sold as slaves (Baba ould Samba, Houssein, Mohamed ould Maouloud, Sidi ould Matallah).
- Two Mauritanian women married to their masters against their will (Aïchetou mint M'Boyrik and Temrazquint mint M'Bareck).
- Finally, six Maritaniens and their families dispossessed of their ancestral property by the masters of their parents, following the death of the latter (Mohamed ould Bilal, Oum El Hella mint Bilal, Bah ould Rabahl, Biram ould Abd Elbarka and M'Boyrik ould Maouloud).

3. *SOS-Eslaves* requested the Mauritanian government to carry out investigations into these acts and to take the necessary measures for their eradication. However, its request was never followed up.

The complaint

4. The communication alleges violation of articles 2, 3, 4, 5, 6, 7, 9, 11 and 15 of the African Charter.

Procedure

5. The communication is dated 11 April 1997 and was received by the Commission meeting at its 21st ordinary session, which was seized of the matter.

6. On 7 July 1997, a letter of notification was addressed to the Mauritanian government informing it of the content of the communication and requesting it to give its reaction.

7. On 7 July 1997, a letter was sent to the complainant acknowledging receipt of the complaint.

8. At the 22nd ordinary session held from 2–11 November 1997, the Commission decided to defer action on all communications submitted against Mauritania until the 23rd session. This was due to the fact that it was still awaiting the reaction of the government to the mission report that had been given to it during the 21st session.

9. At the 23rd session, the Commission determined that some of the information contained in the report submitted in conjunction with the communication did not help it to establish conclusively whether internal remedies had been exhausted. In particular, the Commission emphasised that *SOS-Esclaves* should supply copies of all judicial decisions on all the cases that it mentioned in its report, and point out those cases that were still pending before Mauritanian jurisdictions. This would enable it to decide on a firm basis of knowledge as to the admissibility of the communication.

10. On 25 April 1998, a copy of the communication and the letters requesting additional information on internal procedure were given to the Mauritanian representative at the 23rd session.

11. On 19 August 1998, correspondence was dispatched to the complainant communicating the Commission's position to it.

12. At its 24th ordinary session, the Commission deferred consideration of the communication to the following session.

13. On 12 November 1998, the Secretariat addressed letters to both parties informing them of this decision.

Law**Admissibility**

14. In terms of the provisions of article 56(5) of the African Charter on Human and Peoples' Rights,

Communications . . . relating to human and peoples' rights . . . received by the Commission, shall be considered if they . . . are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .

15. The facts alleged in the communication submitted by *SOS-Eslaves* are very grave and, from all appearances, contrary to the provisions of the African Charter on Human and Peoples' Rights, in particular articles 2, 3 and 5. However, the complainant, having indicated that there are internal procedures initiated by the supposed victims, does not say anything regarding the status of those procedures. Hence, the Commission is unable to determine whether the said procedures have been concluded or otherwise; nor whether they have allowed the supposed victims to have their rights restored.

16. To enable it to reach an objective determination, the Commission requested the complainant to supply the additional information it required. Faced with the silence observed by the latter, it is unable to form a precise opinion regarding the facts of which it has been seized. This would seem to indicate that the internal remedies have not been exhausted; the Commission is of the view that if they had been, the complainant would have made it known.

For these reasons, the Commission:

17. Declares the communication inadmissible due to non-exhaustion of internal remedies;

18. It however acknowledges that the complainant still enjoys the opportunity to seize the Commission again once the conditions of article 56(5) have been fulfilled.

* * *

Malawi African Association and Others v Mauritania

(2000) AHRLR 149 (ACHPR 2000)

Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v Mauritania*

Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report

Rapporteurs: 17th session: Blondin Beye; 18th–27th sessions: Ondziel-Gnelenga

Mission by Commission (mission to state party, 33-37, 86, 87)

Admissibility (compensation to victims does not preclude admission of the case, 61; exhaustion of local remedies — government sufficiently informed to redress situation, amnesty, serious or massive violations 81-83, 85; continuing violation, 91; violations before the Charter entered into force for the state party, 104, 109)

Locus standi (non-victims, 78-79)

Amnesty (effect of, 83)

Derogation (derogation not possible under the Charter, 84)

State responsibility (duty to give effect to rights in the Charter in national law, 84, 134; responsibility for actions of non-state actors, 134, 140)

Serious or massive violations (58, 114, 143)

Fair trial (appeal, 93-94; defence — access to legal counsel, translation not available, 95-97; impartial court — military tribunal, 98; independence of courts — special court controlled by executive, 98-100)

Expression (persecution because of opinions expressed, 101-105)

Limitation of rights ('within the law' must be consistent with obligations under the Charter, 102, 104, 113; onus on state to prove limitations of rights justified, 111)

Association (persecution based on political opinions, 106-107)

Assembly (permission required to assemble, 108-111)

Personal liberty and security (arbitrary arrest and detention, disappearances, 113-114)

Torture (115-118)

Cruel, inhuman or degrading treatment (conditions of detention, 115-118)

Life (arbitrary deprivation, death penalty, extrajudicial executions, 120)

Health (detainees denied medical care, 122)

Family (deprivation of prisoners' right to see family, 124)

Movement (eviction and loss of citizenship, 125-126)

Property (expropriation, confiscation and looting, 127-128)

Equality, non-discrimination (discrimination on the ground of ethnicity, 129-131)

Interpretation (international standards, 113, 131)

Slavery (practices analogous to slavery, 132-135)

Work (conditions of employment, 135)

Cultural life (language an integral part of culture, 136-138)

Peoples' right to peace (unprovoked attacks on villages, 139-140)

Peoples' right to equality (141-142)

1. These communications relate to the situation prevailing in Mauritania between 1986 and 1992. The Mauritanian population, it should be

remarked, is composed essentially of Moors (also known as 'Beidanes') who live in the north of the country, and various black ethnic groups, including the Soninke, Wolofs and the Hal-Pulaar in the south. The Haratines (freed slaves) are closely associated with the Moors, though they physically resemble the black population of the south.

2. Following a *coup d'état* that took place in 1984, and which brought Colonel Maaouya Ould Sid Ahmed Taya to power, the government was criticised by members of the black ethnic groups for marginalising black Mauritians. It was also criticised by a group of Beidanes who favoured closer ties with the Arab world.

3. Communication 61/91 alleges that in early September 1986, over 30 persons were arrested in the aftermath of the distribution of a document entitled *Le Manifeste des Negro-Mauritaniens Opprimés* (*Manifesto of the Oppressed Black Mauritians*). The document provided evidence of the racial discrimination to which the black Mauritians were subjected and demanded the opening of a dialogue with the government. Twenty-one persons were found guilty of holding unauthorised meetings and pasting and distributing publications that were injurious to the national interest, and of engaging in racial and ethnic propaganda. They were convicted and imprisoned, after a series of trials that took place in September and October 1986. The accused had been held in custody for a period that was longer than provided for in the Mauritanian law. They did not have access to their lawyers before the trials started. The lawyers, therefore, did not have time to prepare the cases, for which reason they withdrew, leaving the accused without defence counsel. The president of the tribunal considered that the refusal of the accused to defend themselves was tacit acknowledgement of their guilt. The trial was conducted in Arabic, even though only three of the accused were fluent in the language. The accused were thus found guilty on the basis of statements made to the police during their time in custody. They, however, pointed out to the tribunal that some of these statements had been given under duress. The sentences ranged from six months to five years imprisonment with fines, and five to ten years of house arrest.

4. The accused filed an appeal, claiming unfair trial, stating that they were not charged in due time; and that they did not have the opportunity to be defended. On 13 October 1986, the Court of Appeal upheld the sentences, even though the public prosecutor had not contested the appeal.

5. In September 1986, another trial against Captain Abdoulaye Kébé took place before a special tribunal presided by a military officer; and no appeal was permitted. Captain Kébé was charged with violating military regulations by providing statistics on the racial composition of the army command, which were then quoted in the *Manifeste des Negro-Mauritaniens Opprimés*. He was held in solitary confinement before his trial, with no access to lawyers, and did not have sufficient time to prepare his defence. He was sentenced to two years imprisonment and 12 years house arrest.

6. In October 1986, a third trial relating to the *Manifesto* was brought against 15 persons. They were charged with belonging to a secret movement, holding unauthorised meetings and distributing tracts. Three of them were given suspended sentences and the others were acquitted.

7. After the 1986 trial, there were protests against the conviction of the authors of the *Manifesto*. These brought about further arrests and trials.

8. In March 1987, 18 persons were charged before a criminal court for arson. They were not allowed family visits during the five months that their detention lasted. Many of them were alleged to be members of the support committee, established after the first trial relating to the *Manifesto*, to provide material and moral support to the families of the detainees. Most of the detainees were beaten during their detention. After the trial, nine accused were found guilty and sentenced to prison terms ranging from four to five years. The evidence was based almost exclusively on statements made to the police during their time in custody. They tried in court to retract these statements, arguing that they had been given under duress. Apparently, the tribunal did not try to clarify these facts.

9. At the end of April 1987, six persons were charged with the distribution of tracts. Just before their trial, arson charges were added to the list of offences of which they were being accused. The lawyers, once again, did not have sufficient time to prepare the defence of their clients. All the accused were found guilty by the court and sentenced to four years imprisonment. The Supreme Court later confirmed the sentences, regardless of the irregularities that occurred during the course of the trial.

10. On 28 October 1987, the Mauritanian Minister of Interior announced the discovery of a plot against the government. In reality, all those accused of taking part in this plot belonged to the black ethnic groups from the south of the country. Over 50 persons were tried for conspiracy by the special tribunal presided by a senior army officer who was not known to have a legal training. He was assisted by two assessors, both of them army officers. No appeal was provided for. The accused were kept in solitary confinement in military camps and deprived of sleep during their interrogation. They were charged with 'endangering state security by participating in a plot aimed at deposing the government and provoking massacres and looting among the country's inhabitants'. A special summary procedure was applied, under the pretext that they had been caught *in flagrante delicto*. This procedure provides for a trial without any prior investigation by an investigating magistrate. It restricts the rights of the defence as well as access to lawyers and allows the court to pass judgment without any obligation on the part of the judges to indicate the legal bases for their conclusions. Such a procedure is not normally applied in cases relating to a conspiracy or an attempted crime. It is applicable to an already consummated crime. Those who were convicted on 3 December 1987 did not have the right to file appeal. Three lieutenants were sentenced to death and executed three days later. The executions were said

to have been stretched out in a manner so as to subject those convicted to a slow and cruel death. To put an end to their suffering, they had to provoke the executioners to kill them as quickly as possible. The other accused were sentenced to life imprisonment.

11. Some presumed members of the Ba'ath Arab Socialist Party were also imprisoned for political cause. In September 1987, 17 supposed members of the party were arrested and charged with belonging to a criminal association, participating in unauthorised meetings and abduction of children. Seven of the accused were sentenced to a seven-month suspended term of imprisonment. On 10 September 1988, in another trial before the state security section of the special tribunal, 16 presumed Ba'athists were charged with disturbing the internal security of the state, having contacts with foreign powers and recruiting military personnel in a time of peace. Thirteen of them were found guilty, mainly on the basis of statements that they sought to withdraw during the trial, claiming that they had been made under duress. The accused were held in solitary confinement in a police camp and did not have the right to consult their lawyers until three or four days before the trial. Communication 61/91 avers that the accused were arrested and imprisoned for their non-violent political opinions and activities.

12. Communication 61/91 also alleges that their conditions of detention were the worst and cites many examples to prove these allegations. Thus, from December 1987 to September 1988, those detained at Ouatala prison received only a small amount of rice per day, without any meat or salt. Some of them had to eat leaves and grass. The prisoners were forced to carry out very hard labour day and night and they were chained in pairs in windowless cells. They received only one set of clothes and lived in very bad conditions of hygiene. As from February 1988, they were regularly beaten by their guards. From the time of their arrival in the detention camp, they only received one visit. Only the guards and prison authorities were authorised to approach them. Between August and September 1988, four prisoners died of malnutrition and lack of medical attention. After the fourth death, the civilian prisoners in Ouatala were transferred to the Aïoun-el Atrouss Prison, which had a medical infrastructure. Some of them were so weak that they could only move on all fours. In the Nouakchott Prison, the cells were overcrowded. The prisoners slept on the floor without any blankets, even during the cold season. The cells were infested with lice, bedbugs and cockroaches, and nothing was done to ensure hygiene and provision of health care. The black prisoners, from the south of the country, complained of discrimination by the guards and security forces, who were mainly of the Beidane or Moorish ethnic group, supposedly whites. They could not receive visits from their families, doctors or lawyers, except when the Ba'ath party supporters, all them Beidanes, were in the same prison.

13. All these communications describe the events that took place in April

1989, simultaneously with the crisis that nearly caused a war between Senegal and Mauritania. The crisis was caused by Mauritania's expulsion of almost 50 000 people to Senegal and Mali. The government claimed that those expelled were Senegalese, while many of them were bearers of Mauritanian identity cards, which were torn up by the authorities when they were arrested or expelled. Some of them seemed to have been expelled mainly because of their relationship with the political prisoners or due to their political activities. Many of those who were not expelled were on the run to escape the massacres. Though the borders were later reopened, no security was assured those who desired to return, and they had no means by which to prove their Mauritanian citizenship. Many had been living in refugee camps since 1989, in extremely difficult conditions.

14. The main victims were black Mauritanian government employees suspected of belonging to the black opposition, and black villagers from the south, mainly from the Hal-Pulaar or Peul ethnic group. The Hal-Pulaars traditionally live in the River Senegal valley where the land is fertile.

15. The complainants allege that thousands of people were arbitrarily detained. They state that the detentions were followed by expulsion, such as in the case of political opponents, people who had resisted the confiscation of their property, not to mention the cases that followed the incursions of (returning) refugee groups. This last category of arrests seems to have been carried out as a generalised reprisal, to the extent that there was no evidence of contacts between the detainees and the refugees who were returning to Mauritania. This type of retaliation and reprisal is contrary to Mauritanian law. Some of the detainees were released in early July 1990.

16. The communications allege also that there was daily persecution of villagers in the south between 1989 and 1990. There were also many identity card checkpoints where the Hal-Pulaar had to show their identity cards and prove they were of Mauritanian origin. Their goats and sheep were confiscated by the security forces. Sometimes the villagers had to obtain military authorisation to take out their livestock to pasture, to go fishing or to work their fields. Nevertheless, such authorisation did not protect them from arrest.

17. The security forces are accused of surrounding the villages, confiscating land and livestock belonging to the black Mauritians and forcing the inhabitants to flee towards Senegal, leaving their property for the Haratines to take or to be destroyed. The Haratines who possessed the land of those who had been expelled were armed by the authorities and were expected to arrange their own defence. So they formed their own militia, which had no foundation in law, but which seemed to work in close collaboration or under the supervision of the army and internal security forces. Communication 96/93 provides a list of villages all or almost all of whose inhabitants were expelled to Senegal. Communication 98/93 provides a list of villages that were destroyed.

18. These communications also point to various incidents and extrajudicial executions of black Mauritians in the south of the country. Following the mass expulsions, some refugees in Senegal carried out incursions into the villages inhabited by the Haratines. Generally, after these raids, the Mauritanian army, the security forces and the Haratine militia would invade the villages reoccupied by the original inhabitants, and identified victims, generally Hal-Pulaar. The communications mention many cases of summary executions. On 10 and 20 April, for instance, military and Haratine patrols arrested 22 people. They were later found dead, with their arms tied up. Some of them had been shot, others had had their skulls smashed with stones. On 7 May 1990, Dia Bocar Hamadi, for example, was killed while he was searching for livestock taken from him by Haratines. When his brothers protested to the police, they were arrested and detained until early July. On 12 April 1990, Thierno Saibatou Bâ, a religious leader, was shot dead on his way to meet his pupils.

19. A curfew was imposed on all villages in the south. Anyone who broke it was shot at sight, even if there was not proof that they were engaged in acts that endangered the lives of other inhabitants. Communication 61/81 mentions a specific case where the victims were arrested, tied up, and taken to a location where they were executed. According to the complainants, the army, security forces and Haratines enjoy total impunity. Many villagers who were not expelled had to flee in order to escape the massacres.

20. Whenever the villagers protested, they were beaten and forced to flee to Senegal or were simply killed. Many villagers were arrested and tortured. A common form of torture was known as 'jaguar'. The victim's wrists are tied to his feet. He is then suspended from a bar and thus kept upside down, sometimes over a fire, and is beaten on the soles of his feet. Other methods of torture involved beating the victims, burning them with cigarette stubs or with a hot metal. As for the women, they were simply raped.

21. In September 1990, a wave of arrests took place, ending between November and December 1990. Thousands of people were arrested. These were essentially Hal-Pulaar members of the armed forces or civil servants. All those arrested were from the south of the country. Later, the authorities alleged that there had been an attempt to unseat the government; but no proof was ever given. The accused were never put on trial, but were kept in what communication 96/93 describes as 'death camps', in extremely harsh conditions.

22. Communication 61/91 contains a list of 339 persons believed to have died in detention. Some detainees were said to have been executed without trial. Thirty-three soldiers were hanged, without trial, on 27 and 28 November 1990. Others were buried in sand to their necks and left to die a slow death. Many however died as a result of the torture they under-

went. The methods used include the so-called 'jaguar' mentioned above, electric shocks to the genital organs, as well as burns all over their bodies.

23. In February 1991, detainees in the J'Reida military camp were undressed, hands tied behind their backs, sprayed with cold water and beaten with iron bars. The 'jaguar' torture was also utilised. The detainees were burned with coal embers, or they had some powder spread on their eyes, causing a terrible burning sensation. Their heads were plunged in dirty water to the point of suffocation; some were buried in sand to their necks. They were permanently chained in their cells, without toilet facilities. Some were kept in underground cells or dark cells where it got very cold at night.

24. In March 1991, the government announced the release of a number of political prisoners who had been convicted, as well as of other persons detained since November and December 1990. In April, other detainees were released, and President Maaouya Ould Taya announced that all those arrested had been released. However, there was never any response to the reports referring to people who had been killed in detention, or to the unknown fate of many detainees. Communication 61/91 provides a list of 142 peoples whose deaths are confirmed and another 197 who were not released and are probably dead.

25. According to communication 61/91, the government set up a Commission of Inquiry, but did not indicate either its prerogatives or the extent of its field of action. It is essentially composed of military men. And even if one were to believe that the Commission has finished its work, no report ever made its conclusions public.

26. Communication 54/91 alleges that there are over 100 000 black slaves serving in Beidane houses. And that though 300 000 had bought their freedom, they remain second-class citizens. Besides, blacks do not have the right to speak their own languages. According to communication 98/93, a quarter of the population (500 000 out of 2 000 000 inhabitants in the country) are either slaves or Haratines (freed slaves). The freed slaves maintain many traditional and social links with their former masters, which constitutes a more subtle form of exploitation.

27. Amnesty International, *Union Interafricaine des Droits de l'Homme* and *Rencontre Africaine pour la Défense des Droits de l'Homme* made statements at the 19th session, reiterating the facts already presented. Amnesty International stated in writing that an amicable settlement could only be possible if the government set up an independent Commission of Inquiry to shed light on these violations, brought the authors to justice according to the internationally respected rules regarding fair trial, without using the death penalty; tried all other political prisoners according to international norms, and compensated the victims in a satisfactory manner.

The government's response

28. The government's response to these allegations was that Amnesty International had taken sides in the conflict between Senegal and Mauritania. The government admits that there had been what it calls 'incidents' in late 1990, but that the 'necessary measures had been taken to restore order as soon as possible and to limit the damage'. It also declares that administrative sanctions were imposed on some army officers. The government maintains that a new pluralist constitution was adopted, and that Mauritania is now a democratic state that respects the norms of the African Charter on Human and Peoples' Rights.

29. At the 19th session of the Commission, the Mauritanian government representative in attendance did not contest the complainants' allegations, claiming that grave and massive human rights violations had been committed between 1989 and 1991. He expressed his government's wish to work together with the Commission to assist the victims, making it clear that the country's economy could not allow them all to be compensated. He further declared that it would be difficult to verify the situation of each one prior to the 1989 events, which would make their resettlement impossible. He continued, saying that all those displaced could return to their native villages. Further, the Mauritanian government representative categorically denied that the black ethnic groups did not have the right to speak their languages. He reiterated his government's official position, that slavery had been abolished in Mauritania during French colonial days.

Provisions of the Charter alleged to have been violated

The communications allege violation of articles 2, 4, 5, 6, 7, 9, 10, 11, 12, 14, 16, 18, 19 and 26 of the African Charter on Human and Peoples' Rights.

Procedure

30. Communication 54/91 is dated 16 July 1991 and was submitted by Malawi African Association, a non-governmental organisation.

31. The Commission was seized of it on 14 November 1991 and the Mauritanian government was notified and called upon to make its observations known. No response was received from it.

32. At the 19th session held in March 1996, the Commission heard Mr Ahmed Motala, representative of Amnesty International, Mr Halidou Ouédraogo of UIDH, Mr Alioune Tine and Mr C Faye of RADDHO, as well as the representative of the Mauritanian government. Mr Ahmed Motala then sent the Commission a letter dated 31 March 1996.

33. At the end of the hearings, the Commission held the view that the government did not seriously contest the allegations brought against it. The Mauritanian delegate admitted that human rights violations had indeed been committed. He did not try to explain the circumstances in

which they had taken place. He requested the Commission to give its assistance in finding a solution to the problem. He further added that his government was ready to receive a delegation from the Commission to that end. Following this, the Commission reiterated its decision to send a mission to Mauritania to try to obtain an amicable settlement. It was also decided that the mission would be composed of the Chairman of the Commission and Commissioners Rezag-Bara and Ondziel-Gnelenga, as well as the Secretary to the Commission.

34. The mission was effected from 20 to 27 June 1996.

35. At the 20th session held in Grand Bay, Mauritius, the Commission considered the mission's report and deferred the decisions on the communications to its 21st session.

36. On 7 February 1997, the Secretariat wrote to the complainants explaining to them that the mission report would be sent to the government for its observations by the end of February and that they would subsequently have the chance to make comments on the said report.

37. At the 21st session held in Nouakchott in April 1997, the Commission deferred its decision on this communication to the 22nd session, pending its receipt of the Mauritanian government's reaction to the mission report.

38. Communication 61/91 was submitted by Amnesty International on 21 August 1991.

39. The Commission was seized of it at its 10th session, held in October 1991.

40. The Mauritanian government was notified about it by the Secretariat on 14 November 1991.

41. At the 15th session, the Commission decided to compile all the communications filed against Mauritania.

42. From that date, the procedure for the present communication became identical to that for communication 54/91.

43. Communication 96/93 was submitted on 12 March 1993 by Ms Sarr Diop on behalf of the victims.

44. The Commission was seized of it at its 13th session held in April 1993. Notification of it was sent to the accused state, asking it to forward its observations to the Secretariat. No response was received.

45. At the 15th session held in March 1994, it was decided to combine all the communications filed against Mauritania.

46. From that date, the procedure for the present communication became identical to that for the above communication 54/91.

47. Communication 98/93 was submitted on 30 March 1993 by two NGOs, *Rencontre Africaine pour la Défense des Droits de l'Homme* (RADDHO,

African Association for the Defence of Human Rights) and *Union Inter-africaine des Droits de l'Homme* (UIDH, Inter-African Human Rights Union).

48. The Commission was seized of these at its 13th session.

49. On 12 April 1993, notification of it was sent to the accused state, asking it to address its observations to the Secretariat of the Commission.

50. At the 15th session held in March 1994, it was decided to combine all the communications filed against Mauritania.

51. From that date, the procedure for the present communication became identical to that for the above communication 54/91.

52. At the 22nd session held in Banjul from 2–11 November 1997, the representative of Mauritania pointed out that his government was in the process of considering the mission report of the Commission and expected to have its observations ready before the 23rd session. The Commission thus decided to defer consideration of all the communications filed against Mauritania to its following session, while bearing in mind that they had been pending before the Commission for quite a long time.

53. At the 23rd session held in Banjul (The Gambia) from 20–29 April 1998, the Commission decided to combine [the pending communication] with the procedure ongoing for communications 164/97 to 196/97 as well as no 210/98. In addition, three *notes verbales* were addressed on 25 April, 9 and 10 July 1998 respectively to the Mauritanian Ministry of Foreign Affairs to inquire about the government's reaction. They have remained without reply to date.

54. Communications no 164/97–196/97 allege that between September and December 1990, there was a wave of arrests in Mauritania directed at specific sectors of the population. Those arrested were mostly military men and public servants belonging to the Hal-Pulaar ethnic group and other ethnic groups from the south of the country. Some time after this wave of arrests, the government announced, without providing any proof, that there had been an attempted *coup d'état*.

55. The accused were never brought before a court of law according to communications 164/97–196/97, about a dozen of the accused were tortured and executed in the military camps of Inal, J'réida, Tiguint and Aleg between November and December 1990. Most remarkably, most of the communications allege that the victims were beaten to death.

56. The widows and mothers behind the present communications have previously brought their complaints before the Mauritanian national authorities, both civilian and military, in particular the Minister of Interior, the head of the national army, the National Assembly, the Senate, the special Court of Justice, the Nouakchott Criminal Court, the President and the Minister of National Defence. In all these cases they were either ignored or chased away.

57. On 14 June 1993, the Mauritanian government issued an enactment, no 023 93, granting amnesty to those accused of perpetrating the series of murders for which the beneficiaries of the victims are hereby claiming compensation of injuries suffered.

Provisions of the Charter alleged to have been violated

58. The communications allege a series of grave and massive violations of articles 2, 3, 4, 5, 6, 7, 16 and 26 of the African Charter.

Procedure

59. Communications 164/97–196/97 were received by the Secretariat in April 1997. They were all submitted by the beneficiaries of the alleged victims.

60. On 6 October 1997, the Secretariat received a *note verbale* dated the 1st of the same month, with reference number 075/MAEC communicating the Mauritanian government's reaction to the accusations made against it. The gist was that Mauritania called on the Commission not to be seized of the said communications for the reason that they 'deal with a naturally deplorable, but peculiar and exceptional situation . . . that has in any case since been surmounted. . . '

61. On 9 October 1997, the Secretariat acknowledged receipt of the said note, pointing out that the fact that the Mauritanian state had paid compensation to the beneficiaries of the victims of the alleged violations (which are in any case not denied by the state) cannot invalidate the Commission's deliberations.

62. At the 23rd session, the Commission adjudged on the admissibility of the communications, decided to combine the procedure followed for the present communications with those for communications 54/91, 61/91, 96/93, 98/93, 198/97 and 210/98 and referred the dossiers for consideration as to merit to its 24th session.

63. Communication 210/98 was submitted by the *Association Mauritanienne des Droits de l'Homme* (AMDH, Mauritanian Human Rights Association), on behalf of the *Collectif des Rescapés, Anciens Détenus Civils Torturés* (CRADPOCIT, Collective of Survivors, Ex-Civilian Detainees and the Tortured) v *Mauritania*. It alleges that during the bloody political events that troubled Mauritania between 1986 and 1991, those who have now joined together under the umbrella of CRADPOCIT were arrested, along with other Mauritanian citizens of black African stock and detained in the Nouakchott Civil Prison, and later transferred to various gaols where they were subjected to torture and other inhuman and degrading forms of treatment; this is alleged to have led to the death of some of their co-detainees.

64. After more than 15 days of detention, some of them were released,

while others were charged to appear in court and held in the civilian prisons.

65. Following a number of court cases, some of those on remands were released, others given suspended sentences, while others were sentenced to prison terms varying from three months to five years. These verdicts were aggravated by the loss of civic rights, heavy fines and banishment after release.

66. In 1993, members of the armed forces who had been subjected to the same treatment as those who had come together under CRADPOCIT were granted pension benefit coupons. Imbued with the hope raised by this measure, they addressed a letter to the President of the Republic on 3 November 1993 in which they demanded their rehabilitation, in line with what had been provided to their compatriots of Arabo-Berber origin and the military personnel of black African origin. This move yielded no results.

67. Two years later, they addressed a second letter to the Head of State, with the same demands, without achieving any better results than in 1993. It was after this second failure that they decided to constitute themselves into a collective in order to defend their rights better. Application for the official recognition of the said collective (CRADPOCIT) was addressed to the Ministry of Interior. At the same time, its founding documents were sent to the Head of State, the Presidents of the Senate and the National Assembly, as well as the Mediator of the Republic, with the same demands annexed in all cases.

68. The complainant claims that as of the time of the arrest of the members of CRADPOCIT, the majority of them were civil servant who had each accumulated ten to twenty years of service. And that at present they are subject to the most precarious living conditions, aggravated by unemployment and onerous family responsibilities; some of them have seen their homes broken following divorces that they were unable to prevent.

Procedure

69. The communication was received by the Secretariat of the Commission on 26 January 1998.

70. At the 23rd ordinary session, held from 20-29 April 1998 in Banjul (The Gambia), the Commission decided: (a) — to notify the Mauritanian government representative at the session of the communication (with signed acknowledgement); (b) — to combine it with the ongoing procedure for communications 54/91, 61/91, 96/93, 98/93 and 164/97 to 196/97. It took the view that the reaction of the Mauritanian government to the various *notes verbales* from the Secretariat, as contained in note no 075/MAEC, dated 1 October 1997, was valid for the case under consideration; (c) — to defer the communication to its 24th session for consideration of its merit.

71. At the 24th session held in Banjul, The Gambia, from 22-31 October 1998, it was decided that the members of the Commission who had undertaken the mission to Mauritania should consider the communications, taking into account the response of the government of Mauritania to their mission report. Consideration of these communications was thus deferred to the 25th session.

Provisions of the Charter alleged to have been violated

72. Members of CRADPOCIT are complaining of discriminatory practices on the part of the Mauritanian government, which they accuse of operating 'a policy of double standards', since the officials of Arabo-Berber origin who had been subjected to the same situation had been reintegrated into their various workplaces, while the members of the collective who are of black African origin saw their pleas rejected.

73. They further point out that while they were in detention, in September 1987, when about 15 pro-Iraqi Ba'athist Arabo-Berber military men (charged for belonging to a criminal organisation, participating in unauthorised meetings and kidnapping of children) joined them in the same prison, their arrival led to a notable improvement in their conditions of detention. They claim that they were then allowed to take walks within the prison courtyard, a 'privilege' that was previously denied to them. However, they were still denied visits as a policy, while their Arabo-Berber compatriots had the right to receive anyone, including their spouses.

74. Immediately after the release of the Arabo-Berbers, the black Africans were thrust back to the difficult gaol conditions to which they had previously been subjected, which consisted, remarkably, of keeping them chained in pairs during the whole day, with all inconveniences arising from such a situation, hard labour, fetching water, etc. These inhuman prison conditions, coupled with poor food and lack of hygiene are said to be the cause of the above deaths of four of their co-detainees (two military and two civilian).

75. The Mauritanian Human Rights Association claims violation of the following provisions of the African Charter on Human and Peoples' Rights:

(a) article 2:

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 other status.

(b) article 4: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

(c) article 5:

Every 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.

(d) article 15: 'Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.'

(e) article 16:

(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.

(2) 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.

(f) article 19: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Admissibility

76. Communications 54/91, 61/91, 98/93, 96/93, 164/97-196/97 and 210/98 allege cases of grave and massive violations of human rights attributed to the Mauritanian state.

77. In the African Charter on Human and Peoples' Rights, admissibility is governed by article 56, which defines all the conditions that communications must meet in order to be considered. These criteria are applied with due regard to the specificity of each communication. The case under consideration, of which the Commission was seized through the present procedure, is a combination of four communications which it decided to consider together in view of the similarity of the facts related. The Commission had previously taken the same decision regarding communications submitted against Benin, Zaire and Rwanda (cf decisions on communications 16/88, 17/88, 18/88 [*Comité Culturel pour la Démocratie au Bénin and Others v Benin*], 25/89, [*Free Legal Assistance Group and Others v Zaire*], and 27/89, 46/91, 49/91, 99/93 [*Organisation Mondiale Contre la Torture and Others v Rwanda*]). All these communications were submitted by non-governmental organisation and they all allege various violations that are interrelated and similar.

78. Article 56(1) of the Charter demands that any persons submitting communications to the Commission relating to human and peoples' rights must reveal their identity. They do not necessarily have to be the victims of such violations or members of their families. This characteristic of the African Charter reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims themselves or may be dangerous to pursue.

79. In the above decisions, the Commission recognised that in a situation of grave and massive violations, it may be impossible to give a complete

list of names of all the victims. It will be noted that article 56(1) demands simply that communications should indicate the names of those submitting and not those of all the victims of the alleged violations.

80. Article 56(5) of the Charter demands that the complainants must have exhausted internal remedies, where these exist, before the Commission can be seized of a communication. The Commission maintains that one of the justifications for this demand is that the accused State should be informed of the human rights violations it is being accused of, to provide it with an opportunity to redress them and save its reputation, which would be inevitably tarnished if it were brought before an international jurisdiction. This provision also enables the African Commission on Human and Peoples' Rights to avoid playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself.

81. The Mauritanian state was informed of the worrying human rights situation prevailing in the country. Particular attention, both within the national and international communities, was paid to the events of 1989 and succeeding years. Even if it were to be assumed that the victims had instituted no internal judicial action, the government was sufficiently informed of the situation, and its representative, on various occasions, stressed before the Commission that a law known as the 'general amnesty' law, dealing with the facts arraigned, had been adopted by his country's Parliament in 1993. The Mauritanian government justified the said law with the argument that:

The civilians had benefited from an amnesty law in 1991, and consequently the military wanted to obtain the same benefits; especially as they had given up power after allowing the holding of presidential (1992) and legislative (1993) elections.

82. The Commission notes that the amnesty law adopted by the Mauritanian legislature had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs are complaining; and that the said law also had the effect of leading to the foreclosure of any judicial actions that may be brought before local jurisdictions by the victims of the alleged violations.

83. The Commission recalls that its role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter.

84. Also, the Islamic Republic of Mauritania, being a party to the African Charter on Human and Peoples' Rights, has no basis to deny its citizens those rights that are guaranteed and protected by an international con-

vention, which represents the minimum on which the states parties agreed, to guarantee fundamental human freedoms. The entry into force of the Charter in Mauritania created for that country an obligation of consequence, deriving from the customary principle *pacta sunt servanda*. It consequently has the duty to adjust its legislation to harmonise it with its international obligations. And, as this Commission has previously had to emphasise,

the African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a situation of civil war cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

(Cf communication 74/92 [*Commission Nationale des Droits de l'Homme et des Libertés v Chad*, paragraph 21]).

85. Finally, the Commission interprets the provisions of article 56(5) in the light of its duty to protect human and peoples' rights as stipulated in the Charter. The Commission 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. The gravity of the human rights' situation in Mauritania and the great number of victims involved renders the channels of remedy unavailable in practical terms, and, according to the terms of the Charter, their process is 'unduly prolonged'. In addition, the amnesty law adopted by the Mauritanian Parliament rendered obsolete all internal remedies. For these reasons, the Commission declares the communications admissible.

Merits

86. In June 1996, the Commission sent a good-offices mission to Mauritania. The delegation met with members of the government and non-governmental organisations to discuss the overall human rights situation in the country.

87. The mission was undertaken at the initiative of the Commission in its capacity as promoter of human and peoples' rights. It was not an enquiry mission; and while it enabled the Commission to get a better grasp of the prevailing situation in Mauritania, the mission did not gather any additional specific information on the alleged violations, except on the issue of slavery. The present decision is therefore based on the written and oral declarations made before the Commission over the past six years.

88. In the case under consideration, no indication from the government, with the exception of the issue of slavery, seeks to refute the facts adduced in the communications. The representative of the government, who appeared before the Commission at the 19th session and subsequent sessions, admitted that the communications of which the Commission was

seized 'deal with a naturally deplorable, but peculiar and exceptional situation . . . that has in any case since been surmounted . . . ' And according to the government, 'most of the issues raised have already been resolved, others are in the process of being settled'. It claims, as regards the ex-prisoner civil servants, that 'the démarches undertaken by those who have constituted themselves into a collective are the result of manipulations of the opposition', with the aim of countering government action.

89. Though the above declaration by the government representative could have constituted a basis for an amicable solution, such a solution could only take place with the agreement of the parties. However, at least one of the complainants has clearly indicated that a resolution can only be reached on the basis of some specific conditions, of which none has so far been met to its satisfaction. While it appreciates the government's good will, and hopes to collaborate with it in the future to ensure the effectiveness of the settlement of the damages suffered by all the victims of the events described above, the Commission has an obligation to adjudge on the clearly stated facts contained in the various communications. More so as it does not consider acceptable the position of the government that the atrocities and other assassinations committed within the military institution were 'an internal affair of the army; that the army had conducted its own inquiry, following which appropriate sanctions were meted out to those military men who were found guilty'.

90. Article 7(1) of the Charter stipulates that:

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights . . . ; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

91. Mauritania ratified the African Charter on 14 June 1986, and it came into force on 21 October 1986. The September trials, thus, took place prior to the entry into force of the Charter. These trials led to the imprisonment of various persons. The Commission can only consider a violation that took place prior to the entry into force of the Charter if such a violation continues or has effects which themselves constitute violations after the entry into force of the Charter. [*The Commission then cites an unofficial version of an earlier decision, which is omitted here — eds.*] The Commission should therefore have the competence to consider these trials with a view to ascertaining whether the incarcerations that resulted from them constitute a violation of article 6 of the Charter.

92. The government did not give any substantial response to the allegations that the said trials were arbitrary. Consequently, in conformity with its well-established jurisprudence, the Commission shall adjudge based on the elements provided by the complainants. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*]

93. The state security section of the special tribunal does not provide for any appeal procedure. Two specific cases mentioned in the communications took place in September and October 1987 (see paragraphs 10 and 11) and no appeals were authorised. One of the trials ended in the execution of three army lieutenants.

94. Furthermore, even when an appeal was allowed, as in the first case relating to the *Manifesto* (paragraphs 3 and 4), on 13 October 1986, the Court of Appeal confirmed the verdicts, even though the accused had contested the procedure of the initial trial, and the Public Prosecutor's office did not contest the complaints of the accused. From all indications, the Court of Appeal simply confirmed the sentences without considering all the elements of fact and law. Such a practice cannot be considered a genuine appeal procedure. For an appeal to be effective, the appellate jurisdiction must, objectively and impartially, consider both the elements of fact and of law that are brought before it. Since this approach was not followed in the cases under consideration, the Commission considers, consequently, that there was a violation of article 7(1)(a) of the Charter.

95. In the judgment of early September 1986 (paragraph 3), the presiding judge declared that the refusal of the accused persons to defend themselves was tantamount to an admission of guilt. In addition, the tribunal based itself, in reaching the verdicts it handed down, on the statements made by the accused during their detention in police cells, which statements were obtained from them by force. This constitutes a violation of article 7(1)(b).

96. In most of the cases brought up in these communications (paragraphs 3, 4, 5, 9, 10, 11), the accused either had no access or had restricted access to lawyers, and the latter had insufficient time to prepare the defence of their clients. This constitutes a violation of article 7(1)(c) on the right to defence.

97. The right to defence should also be interpreted as including the right to understand the charges being brought against oneself. In the trial regarding the September *Manifesto* (paragraph 3), only three of the 21 accused persons spoke Arabic fluently, and this was the language used during the trial. This means that the 18 others did not have the right to defend themselves; this also constitutes a violation of article 7(1)(c).

98. The section responsible for matters relating to state security in the special tribunal is headed by a senior military officer who is not required to have a legal training. He is assisted by two assessors, both military men. The special tribunal is itself presided over by an army officer. In the joint procedure on communications 139/94, 154/96 and 161/97 [*International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, paragraph 86], the Commission reached the conclusion that the 'special tribunals violate article 7(1)(d) of the African Charter because their composition is at the discretion of the executive branch'. Withdrawing criminal procedure

from the competence of the courts established within the judicial order and conferring it to an extension of the executive necessarily compromises the impartiality of the courts, to which the African Charter refers. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary and, thereby, of article 7(1)(d).

99. Article 26 of the Charter states that: 'States parties to the present Charter shall have the duty to guarantee the independence of the courts...'

100. By establishing a section responsible for matters relating to state security within the special tribunal, the Mauritanian state was reneging on its duty to guarantee the independence of the courts. The Commission therefore concludes that there has been a violation of article 26.

101. Article 9(2) of the Charter stipulates that: 'Every individual shall have the right to express and disseminate his opinions within the law.'

102. Communication 61/91 alleges that the trials regarding the *Manifesto* (paragraphs 3, 4, 5 and 6) and the other related cases (paragraphs 8 and 9) violate the right to freedom of expression and dissemination of one's opinions, to the extent that the accused were charged with distributing a *Manifesto* which provided statistics on racial discrimination and were calling for a dialogue with the government. The expression 'within the laws' must be interpreted with reference to the international norms. To the extent that the *Manifesto* did not contain any incitement to violence, it should be protected under international law.

103. Once again, the government did not contest the facts adduced by the complainants. In view of the foregoing, the Commission shall base its argumentation on the elements provided by the complainants.

104. Considering that the trials in question in paragraphs 3, 4 and 5 took place prior to the entry into force of the African Charter, the Commission finds no violation of article 9(2) as regards these cases. However if the indictments constituted a violation of the African Charter, the detention which ensued from them would be arbitrary and violates article 6. The Commission is of the view that these cases would have led to violation of article 9(2) had they taken place after the entry into force of the Charter, and consequently the detention of the accused would have been a violation of article 6.

105. The cases mentioned in paragraphs 8, 9 and 10, which were heard after the entry into force of the Charter, are a violation of the rights stated and protected in article 9(2).

106. Article 10(1) of the Charter stipulates that: 'Every individual shall have the right to free association provided that he abides by the law.'

107. Some presumed supporters of the Ba'ath Arab Socialist Party were

imprisoned for belonging to a criminal association. The accused in the third case relating to the *Manifesto* (paragraph 6) were charged for belonging to a secret movement. The government did not provide any argument to establish the criminal nature or character of these groups. The Commission is of the view that any law on associations should include an objective description that makes it possible to determine the criminal nature of a fact or organisation. In the case under consideration, the Commission considers that none of these simply rational requirements was met and that there was violation of article 10(1).

108. Article 11 of the Charter stipulates that:

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

109. The accused in the *Manifesto* case were charged for holding unauthorised meetings (paragraphs 3 and 6). The trial in question in paragraph 3 took place before the entry into force of the African Charter. Consequently, the Commission cannot consider that there was a violation of article 11 as regards this particular case. However, had the indictments constituted a violation of article 11, the detention that ensued from it would have been a violation of article 6, which prohibits arbitrary detention.

110. The presumed supporters of the Ba'ath Arab Socialist Party are equally accused of holding unauthorised meetings.

111. The government did not come up with any element to show that these accusations had any foundation in the 'interest of national security, the safety, health, ethics and rights and freedoms of others', as specified in article 11. Consequently, the Commission considers that there was violation of article 11 in the cases in question in paragraphs 3 and 11.

112. Article 6 of the Charter stipulates 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.

113. There were recurring violations of this article. The indictments and trials of September 1986 (paragraphs 3, 4 and 5) were not in conformity with the provisions of the Charter. All those who were incarcerated in its wake were denied their rights as guaranteed in article 6. The imprisonment resulting from the other cases (paragraphs 6 and 8), and the two cases from November 1987 (paragraph 10) as well as the cases against the presumed members of the Ba'ath Arab Socialist Party (paragraph 11) are arbitrary, for the fact that they were not in conformity with international norms relating to fair trial.

114. The complainants allege that hundreds of people were detained in connection with the 1989 events (paragraph 15). They allege, further, that a wave of arrests at the end of 1990 resulted in the detention of hundreds of people without charge or trial. According to the complainants, some, and not all, of the detainees were released, adding however that the fate of many people remains unknown. The government did not deny that these arrests and detentions took place, but it maintained that such arbitrary detentions no longer exist. Even if that were the case, it would not annul the previous violations. The Commission considers, therefore, that there was massive violation of article 6.

115. Article 5 of the African Charter prohibits torture, cruel, inhuman or degrading punishment and treatment. This article also stipulates that: 'Every individual shall have the right to the respect of the dignity inherent in a human being'. All the communications detail instances of torture, and cruel, inhuman and degrading treatments. During their time in custody, the detainees were beaten (paragraph 8), they were forced to make statements (paragraphs 8 and 11), and they were denied the opportunity of sleeping (paragraph 10). Both during the trial as well as the period of arbitrary detention, some of the prisoners were held in solitary confinement (paragraphs 5, 8, 10, 11 and 12).

116. The conditions of detention were, at the very least, bad. The prisoners were not fed; they were kept in chains, locked up in overpopulated cells lacking in hygiene and access to medical care (paragraph 12). They were burnt and buried in sand and left to die a slow death. Electrical shocks were administered to their genital organs and they had weights tied on to them. Their heads were plunged into water to the point of provoking suffocation; pepper was smeared on their eyes and some were permanently kept in small, dark or underground cells which got very cold at night (paragraph 23).

117. Both within and outside the prisons, the so-called 'jaguar' position was the form of torture utilised (see paragraphs 20 and 22). The prisoners were beaten (paragraphs 12 and 20) and their bodies burnt using various instruments (paragraphs 20 and 22). The women were raped (paragraph 20).

118. The government did not produce any argument to counter these facts. Taken together or in isolation, these acts are proof of widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of article 5. The fact that prisoners were left to die slow deaths (paragraph 10) equally constitutes cruel, inhuman and degrading forms of treatment prohibited by article 5 of the Charter.

119. Article 4 of the Charter stipulates that:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

120. Following the November 1987 trial, which already violated the provisions of article 7, three army lieutenants were sentenced to death and executed (paragraph 10). The trial itself constituted a violation of the African Charter. Furthermore, the Commission is of the view that the executions that followed the said trial constitute a violation of article 4. Denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death, point to a shocking lack of respect for life, and constitutes a violation of article 4 (see paragraph 12). Other communications provide evidence of various arbitrary executions that took place in the villages of the River Senegal valley (see paragraphs 18 and 19) and stress that people were arbitrarily detained between September and December 1990 (see paragraph 22). The Commission considers that there were repeated violations of article 4.

121. Article 16 of the Charter states that:

- (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health;
- (2) 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.

122. The state's responsibility in the event of detention is even more evident to the extent that detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritanian state is directly responsible for this state of affairs and the government has not denied these facts. Consequently, the Commission considers that there was violation of article 16.

123. Article 18(1) states that: 'The family shall be the natural unit and basis of society. It shall be protected by the state.'

124. Holding people in solitary confinement both before and during the trial, and during such detention, which is, on top of it all, arbitrary, (paragraphs 5, 8, 10, 11 and 12) depriving them their right to a family life constitutes a violation of article 18(1).

125. Article 12(1) states that: 'Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.'

126. Evicting black Mauritians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of article 12(1). The representative of the Mauritanian government described the efforts made to ensure the security of all those who returned to Mauritania after having been expelled. He claimed that all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth. He affirmed that his

government had established a department responsible for their resettlement. The Commission adopts the view that while these efforts are laudable, they do not annul the violation committed by the state.

127. Article 14 of the Charter reads as follows:

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

128. The confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in article 14.

129. Article 2 of the Charter 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 . . .

130. The representative of the government as well as the authors of the communications declared that many black Mauritians were forced to flee or were detained, tortured or killed because of the colour of their skin, and that the situation in Mauritania became explosive due to the extreme positions adopted by the francophone and arabophone factions that were in opposition to each other in the country.

131. Article 2 of the Charter lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective underpins the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the General Assembly of the United Nations in resolution 47/135 of 18 December 1992. Article 1(1) of this document indeed stipulates that:

States shall protect the existence and national or ethnic, cultural, religious and linguistic identity of the minorities within their respective territories and shall encourage conditions conducive for the promotion of that identity.

From the foregoing, it is apparent that international human rights law and the community of states accord a certain importance to the eradication of discrimination in all its guises. Various texts adopted at the global and regional levels have indeed affirmed this repeatedly. Consequently, for a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its article 2.

132. Article 5 of the Charter states that: ' . . . All forms of exploitation and degradation of man particularly slavery shall be prohibited.'

133. Communications 54/91 and 98/93 allege that a majority of the

Mauritanian population is composed of slaves. The government states that slavery had been abolished under the French colonial regime. The communications also allege that freed slaves maintain traditional and close links with their former masters and that this constitutes another form of exploitation.

134. During its mission to Mauritania in June 1996, the Commission's delegation noted that it was still possible to find people considered as slaves in certain parts of the country. Though Edict no 81-234 of 9 November [1981] had officially abolished slavery in Mauritania, it was not followed by effective measures aimed at the eradication of the practice. This is why, in many cases, the descendants of slaves find themselves in the service of the masters, without any remuneration. This is due either to the lack of alternative opportunities or because they had not understood that they had been freed of all forms of servitude for many years. From all appearances, some freed slaves chose to return to their former masters. From the Commission's point of view, the state has the responsibility to ensure the effective application of the edict and thus ensure the freedom of its citizens, to carry out inquiries and initiate judicial action against the perpetrators of violations of the national legislation.

135. Independently from the justification given by the defendant state, the Commission considers, in line with the provisions of article 23(3) of the Universal Declaration of Human Rights, that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. These provisions are complemented by those of article 7 of the International Covenant on Economic, Social and Cultural Rights. In view of the foregoing, the Commission deems that there was a violation of article 5 of the Charter due to practices analogous to slavery, and emphasises that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore considers that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man; both practices condemned by the African Charter. However, the African Commission cannot conclude that there is a practice of slavery based on these evidences before it.

136. Article 17 of the Charter stipulates that:

- (2) Every individual may freely take part in the cultural life of his community.
- (3) The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.

137. Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression *par excellence*. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.

138. The government made it known that there is in the country an institute of national languages, for over ten years now, and that this institute teaches those languages. However, a persisting problem is the fact that many of these languages are exclusively spoken in small parts of the country and that they are not written. Communication 54/91 alleges the violation of linguistic rights but does not provide any further evidence as to how the government denies the black groups the right to speak their own languages. Information available to the Commission does not provide it a sufficient basis to determine if there has been violation of article 17.

139. Article 23 of the Charter states that: '(1) All peoples shall have the right to national and international peace and security ...'

140. As advanced by the Mauritanian government, the conflict through which the country passed is the result of the actions of certain groups, for which it is not responsible. But in the case in question, it was indeed the Mauritanian public forces that attacked Mauritanian villages. And even if they were rebel forces, the responsibility for protection is incumbent on the Mauritanian state, which is a party to the Charter (cf the Commission's decision in communication 74/92 [*Commission Nationale des Droits de l'Homme et des Libertés v Chad*]). The unprovoked attacks on villages constitute a denial of the right to live in peace and security.

141. Article 19 provides that: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

142. At the heart of the abuses alleged in the different communications is the question of the domination of one section of the population by another. The resultant discrimination against black Mauritians is, according to the complainants (cf especially communication 54/91) the result of a negation of the fundamental principle of the equality of peoples as stipulated in the African Charter and constitutes a violation of its article 19. The Commission must however admit that the information made available to it does not allow it to establish with certainty that there has been a violation of article 19 of the Charter along the lines alleged here. It has nevertheless identified and condemned the existence of discriminatory practices against certain sectors of the Mauritanian population (cf especially paragraph 164).

For these reasons, the Commission:

[143.] Declares that, during the period 1989-1992, there were grave or massive violations of human rights as proclaimed in the African Charter; and in particular of articles 2, 4, 5 (constituting cruel, inhuman and degrading treatments), 6, 7(1)(a),(b),(c) and (d), 9(2), 10(1), 11, 12(1), 14, 16(1), 18(1), [23(1)] and 26;

[The Commission] recommends to the government:

[144.] To arrange for the commencement of an independent inquiry in order to clarify the fate of persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned;

[145.] To take diligent measures to replace the national identity documents of those Mauritanian citizens which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation of the deprivations of the victims of the above events;

[146.] To take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above violations;

[147.] To reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all the legal consequences appertaining thereto;

[148.] As regards the victims of degrading practices, carry out an assessment of the status of such practices in the country with a view to identifying with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication;

[149.] To take appropriate administrative measures for the effective enforcement of Ordinance no 81-234 of 9 November 1981, on the abolition of slavery in Mauritania;

[150.] The Commission assures the Mauritanian state of its full cooperation and support in the application of the above measures.

NIGER

Union des Scolaires Nigériens and Another v Niger

(2000) AHRLR 176 (ACHPR 1994)

Communication 43/90, *Union des Scolaires Nigériens and Union Générale des Etudiants Nigériens au Bénin v Niger*
7th Annual Activity Report

Admissibility (loss of contact with complainant, 6)

- [1.] Communication on alleged denial of right to life, etc.
- [2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples Rights;
- [3.] Meeting at its 15th ordinary session held in Banjul, The Gambia, from 18 to 27 April 1994;
- [4.] By petition dated 14 February 1990 registered at the Secretariat of the Commission under no 43/90, the *Union des Scolaires Nigériens and Union Générale des Etudiants Nigériens au Bénin* wrote to the Commission to denounce human rights violations allegedly committed by the state of Niger during the events of 9 February 1990 in that country, pursuant to the provisions of article 55 of the Charter;
- [5.] Considering that the communication had been brought to the knowledge of the state of Niger, *vide* letters of 6 November 1990 and 12 August 1993, pursuant to article 57 of the Charter;
- [6.] Considering that since the matter was referred to the Commission, no additional information has been received by the Secretariat, in spite of several reminders;
- [7.] Considering that the four-month deadline given to the parties at the 14th session of the Commission held in Addis Ababa, Ethiopia, in December 1993, has expired;
- [8.] Considering that none of the conditions relating to form, time limit or procedure laid down under article 56 of the Charter and rule 114 of the Rules of Procedure has been complied with;
- [9.] Considering that the communication is therefore inadmissible;
- [10.] Decides to declare the communication of the *Union des Scolaires*

Nigériens and Union Générale des Etudiants Nigériens au Bénin against the state of Niger inadmissible pursuant to article 55 of the Charter and rule 114 of the Rules of Procedure of 1988.

NIGERIA

Civil Liberties Organisation v Nigeria

(2000) AHRLR 178 (ACHPR 1994)

Communication 45/90, *Civil Liberties Organisation v Nigeria*
7th Annual Activity Report

Admissibility (failure to exhaust local remedies, 2)

[1.] Communication on wrongful eviction of inhabitants.

Final decision

[2.] The Commission decides that local remedies have not been exhausted as required by article 56 of the Charter and [rule] 114 of the Rules of Procedure and declares the communication inadmissible.

* * *

Bariga v Nigeria

(2000) AHRLR 178 (ACHPR 1994)

Communication 57/91, *Tanko Bariga v Nigeria*
7th Annual Activity Report

Admissibility (compatibility with the Charter, 2)

[1.] Communication on demand of sums of money and other privileges.

Final decision

[2.] The demand is incoherent and uncoordinated and is inadmissible under article 55(2) of the African Charter on Human and Peoples' Rights.

* * *

Civil Liberties Organisation v Nigeria

(2000) AHRLR 179 (ACHPR 1994)

Communication 67/92, *Civil Liberties Organisation v Nigeria*
7th Annual Activity Report

Amicable settlement (2)

[1.] Communication on wrongful detention.

Final decision

[2.] The Commission obtained information that the issue has been settled amicably and therefore closed the file.

* * *

Aturu v Nigeria

(2000) AHRLR 179 (ACHPR 1994)

Communication 72/92, *Bamidele Aturu v Nigeria*
7th Annual Activity Report

Admissibility (failure to exhaust local remedies, 2)

[1.] Communication about denial of right to education.

Final decision

[2.] The author has failed to exhaust local remedies. The Commission considers the application to be inadmissible under article 56(5) of the Charter.

* * *

Academic Staff of Nigerian Universities v Nigeria

(2000) AHRLR 180 (ACHPR 1994)

Communication 107/93, *Academic Staff of Nigerian Universities v Nigeria*
7th Annual Activity Report

Admissibility (failure to exhaust local remedies, 2)

[1.] Communication on breach of agreement, threats, etc.

Final decision

[2.] From the evidence adduced by the author, local remedies have not been exhausted. The communication is therefore inadmissible. The Commission calls the attention of the author to the provisions of article 56 of the Charter.

* * *

Constitutional Rights Project (in respect of Akamu and Others) v Nigeria

(2000) AHRLR 180 (ACHPR 1995)

Communication 60/91, *Constitutional Rights Project (in respect of Wahab Akamu, G Adega and Others) v Nigeria*
8th Annual Activity Report

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 7-9)

Fair trial (right to be heard — jurisdiction of courts ousted, appeal, impartial court — court controlled by executive, 10-12)

Life (death penalty, 11)

1. Communication 60/91 was brought by the Constitutional Rights Project, a Nigerian NGO, on behalf of Wahab Akamu, Gbolahan Adeaga and others sentenced to death under the Robbery and Firearms (Special Provisions) Act no 1 of 1984. This decree creates special tribunals, composed of one serving or retired judge, one member of the armed forces and one member of the police force. The decree does not provide for any judicial

appeal of sentences. Sentences are subject to confirmation or disallowance by the Governor of a state.

2. Wahab Akamu was convicted and sentenced to death on 12 August 1991 and Gbolahan Ageaga was convicted and sentenced on 14 August 1991. Both were sentenced by the Robbery and Firearms Tribunal 1, Lagos. The complainant alleges that both were tortured to extract confessions while they were in custody.

Argument

3. The communication argues that the prohibition on judicial review of the special tribunals and lack of judicial appeals for judgments of these tribunals violates the right to an appeal to competent national organs against acts violating fundamental rights, guaranteed by article 7(1)(a) of the African Charter.

4. The communication also argues that the practice of setting up special tribunals, composed of members of the armed forces and police in addition to judges, violates the right to be tried by an impartial tribunal guaranteed by article 7(1)(d).

Law

Admissibility

5. The case was declared admissible at the 14th session of the Commission on the following grounds:

6. The case raises the question of whether the remedies available are of a nature that requires exhaustion.

7. The act complained of in communication no 60/91 is the Robbery and Firearms (Special Provisions) Act, cap 398, in which section 11(4) provides: 'No appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such a decision by the Governor.'

8. The Robbery and Firearms Act entitles the Governor to confirm or disallow the conviction of the special tribunal. This power is to be described as a discretionary, extraordinary remedy of a non-judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective.

9. Therefore, the Commission is of the opinion that the remedy available is not of a nature that requires exhaustion according to article 56(5) of the African Charter.

Merits

10. The Robbery and Firearms (Special Provisions) Act, section 11(4) pro-

vides: 'No appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such decision by the Governor.'

11. A 'decision of a tribunal constituted under this Act or any confirmation or dismissal of such decision by the Governor' may certainly constitute an act 'violating fundamental rights' as described in article 7(1)(a) of the Charter. In this case, the fundamental rights in question are those to life and liberty provided for in articles 4 and 6 of the African Charter. While punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of appeal to 'competent national organs' in criminal cases bearing such penalties clearly violates article 7(1)(a) of the African Charter, and increases the risk that severe violations may go unredressed.

12. The Robbery and Firearms (Special Provisions) Act, section 8(1), describes the constitution of the tribunals, which shall consist of three persons; one judge, one officer of the army, navy or air force and one officer of the police force. Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, the same branch that passed the Robbery and Firearms (Special Provisions) Act, whose members do not necessarily possess any legal expertise. Article 7(1)(d) of the African Charter requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates article 7(1)(d).

For the above reasons, the Commission:

[13.] Declares that there has been a violation of article 7(a), (c) and (d) of the African Charter and recommends that the government of Nigeria should free the complainants.

[14.] At the 17th session the Commission decided to bring the file to Nigeria for the planned mission in order to verify that the complainants have been released.

* * *

Committee for the Defence of Human Rights (on behalf of Madike) v Nigeria

(2000) AHRLR 183 (ACHPR 1995)

Communication 62/91, *Committee for the Defence of Human Rights v Nigeria, in respect of Ms Jennifer Madike*
8th Annual Activity Report

Admissibility (loss of contact with complainant, 2)

[1.] The case concerned an individual detained on charges of drug dealing. The complainant Committee alleged that the detention was politically motivated. The Commission received information that the detainee had been freed and subsequently inquired of the complainant if it wished to pursue the case.

Finding

[2.] These inquiries went unanswered despite two reminders. The Commission therefore decided that the file be closed because of loss of contact with the complainant.

* * *

Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria

(2000) AHRLR 183 (ACHPR 1995)

Communication 87/93, *The Constitutional Rights Project (in respect of Zamani Lekwot and six Others) v Nigeria*
8th Annual Activity Report

Admissibility (exhaustion of local remedies — discretionary remedy, jurisdiction of courts ousted, 8-10)

Fair trial (right to be heard — jurisdiction of courts ousted, appeal, 12; defence — access to legal counsel, 13; impartial court — court controlled by executive, 14)

1. Communication 87/93 was brought on behalf of seven men from Nigeria — Zamani Lekwot, James Atomic Kude, Yohanna Karau Kibori,

Marcus Mamman, Yahaya Duniya, Julius Sarki Zamman Dabo and Iliya Maza — sentenced to death under the Civil Disturbances (Special Tribunal) Act no 2 of 1987. This decree does not provide for any judicial appeal against the decisions of the special tribunals and prohibits the courts from reviewing any aspect of the operation of the tribunal.

2. The communication also alleges that the accused and their counsel were constantly harassed and intimidated during the trial, ultimately forcing the withdrawal of the defence counsel. Despite the lack of defence, the tribunal condemned the accused to death for culpable homicide, unlawful assembly and breach of the peace.

Argument

3. The communication argues that the prohibition on judicial review of the special tribunals and lack of judicial appeals for judgments of these tribunals violates the right to an appeal to competent national organs against acts violating fundamental rights, guaranteed by article 7(1)(a) of the African Charter.

4. The communication complains that the conduct of the trials before these tribunals, which included harassment of defence counsel and deprivation of defence counsel, violated the right to be defended by counsel of one's choice, guaranteed by article 7(1)(c).

5. The communication finally complains that the practice of setting up special tribunals, composed of members of the armed forces and police in addition to judges, violates the right to be tried by an impartial tribunal guaranteed by article 7(1)(d).

Law

Admissibility

6. The case was declared admissible at the 14th session of the Commission on the following grounds.

7. The case raises the question of whether the remedies available are of a nature that requires exhaustion.

8. The Act complained of in communication no 87/93 is the Civil Disturbances (Special Tribunal) Act, in which part IV, section 8(1) provides:

The validity of any decision, sentence, judgment, . . . or order given or made, . . . or any other thing whatsoever done under this Act shall not be inquired into in any court of law.

9. The Civil Disturbances Act empowers the Armed Forces Ruling Council to confirm the penalties of the tribunal. This power is a discretionary, extraordinary remedy of a non-judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complainant seeking remedies from a source which does not

operate impartially and has no obligation to decide according to legal principles. The remedy is neither adequate nor effective.

10. Therefore, the Commission is of the opinion that the remedy available is not of a nature that requires exhaustion according to article 56(5) of the African Charter.

Merits

11. The Civil Disturbances (Special Tribunal) Act, part IV, section 8(1) provides:

The validity of any decision, sentence, judgment, . . . or order given or made, . . . or any other thing whatsoever done under this Act shall not be inquired into in any court of law.

12. A 'decision, sentence, judgment . . . order given or made . . . or any other thing whatsoever done under' the Civil Disturbances Act may certainly constitute an act 'violating fundamental rights' as described in article 7(1)(a) of the Charter. In this case, the fundamental rights in question are those to life and liberty provided for in articles 4 and 6 of the African Charter. While punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of appeal to 'competent national organs' in criminal cases bearing such penalties clearly violates article 7(1)(a) of the African Charter, and increases the risk that even severe violations may go unredressed.

13. The communication alleges that during the trials the defence counsel for the complainants was harassed and intimidated to the extent of being forced to withdraw from the proceedings. In spite of this forced withdrawal of counsel, the tribunal proceeded to give judgment in the matter, finally sentencing the accused to death. The Commission finds that defendants were deprived of their right to defence, including the right to be defended by counsel of their choice, in violation of article 7(1)(c) as cited above.

14. The Civil Disturbances (Special Tribunal) Act, part II, section 2(2) says that the tribunal shall consist of one judge and four members of the armed forces. As such, the tribunal is composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbances Act. Article 7(1)(d) of the African Charters requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates article 7(1)(d).

For the above reasons, the Commission:

[15.] Finds that there has been a violation of article 7(1)(a), (c) and (d) of the African Charter, and recommends that the government of Nigeria should free the complainants;

[16.] At the 17th session the Commission decided to bring the file to Nigeria for a planned mission in order to make sure that the violations have been repaired.

* * *

Civil Liberties Organisation (in respect of Bar Association) v Nigeria

(2000) AHRLR 186 (ACHPR 1995)

Communication 101/93, *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria*
8th Annual Activity Report

Personal liberty and security (decree providing for retroactive arrests, 11)

Fair trial (retroactive legislation, 11-12; right to be heard — jurisdiction of courts ousted, 13)

Association (Bar Association dominated by representatives of the government, 14-16)

Limitations of rights (limitations should not undermine rights guaranteed by constitution and international standards, 15)

1. The communication is brought by the Civil Liberties Organisation, a Nigerian non-governmental organisation, in protest against the Legal Practitioners' [(Amendment)] Decree [no 21 of 1993]. This decree establishes a new governing body of the Nigerian Bar Association, namely the Body of Benchers. Of the 128 members of this body, only 31 are nominees of the Bar Association. The rest are nominees of the government.

2. The functions of the Body of Benchers are (1) the prescription of practising fees one tenth of which are payable every year to the Body and (2) the disciplining of legal practitioners.

3. The decree excludes recourse to the courts and makes it an offence 'to commence or maintain an action or any legal proceeding whatever relating to or connected with or arising from the exercise of any of the powers of the Body of Benchers.' The decree is retrospective.

Argument

4. The communication argues that the prohibition on litigation violates article 7 of the African Charter.

5. The communication argues that the new governing body for the Nigerian Bar Association, established by governmental decree, violates Nigerian lawyers' freedom of association guaranteed by article 10 of the African Charter.

Law

6. This communication was declared admissible at the 16th session.

7. The Legal Practitioners (Amendment) Decree 1993, section 23A, subsection 1, reads:

No person shall commence or maintain an action or any legal proceeding whatsoever relating to, connected with or arising from (a) the management of the affairs of the Association; or (b) the exercise or preparation by the Body of Benchers for the exercise of the powers conferred upon it by this Act.

8. A decision must be taken as to whether the above decree constitutes a violation of the African Charter.

9. The Commission finds that the present case raises questions concerning article 7, the right to fair trial, and article 10, the right to freedom of association.

10. The above Legal Practitioners (Amendment) Decree 1993, section 23A, subsection 3 reads:

A person who contravenes subsection (1) of this section commits an offence and is liable on conviction to a fine of N 10 000 or to imprisonment for a term of one year or to both such fine and imprisonment.

The decree is retrospective since it was issued 18 February 1993 but was deemed to come into force on 31 July 1992.

11. Article 6 of the African Charter reads: '... No one may be deprived of his freedom except for reasons and conditions previously laid down by law ...' No retrospective law may deprive a person of his liberty. The wording of the decree therefore constitutes a violation of article 6.

12. Article 7(2) of the African Charter reads: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed ...' The Commission is of the opinion that the retrospective effect of the decree constitutes a violation of article 7(2) of the African Charter.

13. Article 7(1) of the African Charter reads: 'Every individual shall have the right to have his cause heard ...'. The powers of the Body of Benchers include financial and disciplinary matters. The prohibition on litigation against these powers infringes the right to appeal to national organs, and violates article 7(1) of the Charter.

14. Article 10 of the African Charter reads: '(1) Every individual shall have the right to free association provided that he abides by the law.' Freedom of association is enunciated as an individual right and is first and foremost

a duty of the state to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without state interference, in associations in order to attain various ends.

15. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

16. The Body of Benchers is dominated by representatives of the government and has wide discretionary powers. This interference with the free association of the Nigerian Bar Association is inconsistent with the preamble of the African Charter in conjunction with UN Basic Principles on the Independence of the Judiciary and thereby constitutes a violation of article 10 of the African Charter.

For the above reasons, the Commission:

[17.] Holds that there has been a violation of articles 6, 7, and 10 of the African Charter on Human and Peoples' Rights. The decree should therefore be annulled.

* * *

Civil Liberties Organisation v Nigeria

(2000) AHRLR 188 (ACHPR 1995)

Communication 129/94, *Civil Liberties Organisation v Nigeria*
Decided at the 17th ordinary session, March 1995, 9th Annual Activity Report

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 8)

Fair trial (right to be heard — jurisdiction of courts ousted, 9-13; independence of courts — jurisdiction of courts ousted, special court controlled by executive, 14, 19)

State responsibility (withdrawal of ratification of Charter cannot be done by domestic law, 12; duty to give effect to rights in Charter in national law, 15-17)

1. The communication is filed by the Civil Liberties Organisation, a Nigerian NGO. The communication alleges that the military government of

Nigeria has enacted various decrees in violation of the African Charter, specifically the Constitution (Suspension and Modification) Decree no 107 of 1993, which not only suspends the Constitution but also specifies that no decree promulgated after December 1983 can be examined in any Nigerian court; and the Political Parties (Dissolution) Decree no 114 of 1993, which in addition to dissolving political parties, ousts the jurisdiction of the courts and specifically nullifies any domestic effect of the African Charter.

2. The communication complains that the ousting of the jurisdiction of the courts in Nigeria to adjudicate the legality of any decree threatens the independence of the judiciary and violates article 26 of the African Charter.

3. The communication also complains that this ouster of the jurisdiction of the courts deprives Nigerians of their right to seek redress in the courts for government acts that violate their fundamental rights, in violation of article 7(1)(a) of the African Charter.

Procedure before the Commission

4. The complaint is dated 31 December 1993.

5. On 29 July 1994 a copy of the communication was sent to the state concerned for its comments.

6. At the 16th ordinary session of the Commission, the communication was declared admissible.

7. On 10 January 1995, the parties were informed of the admissibility decision.

Admissibility

8. The communication meets all the specifications for admissibility set out in article 56 of the Charter. With specific reference to article 56(5), the Commission accepted the complainant's argument that since the decrees complained of oust the jurisdiction of the courts to adjudicate their validity, 'it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results'.

Merits

9. Article 7 of the African Charter provides:

- (1) Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, law, regulations and customs in force . . .

10. The Constitution (Suspension and Modification) Decree 1993, (5) reads:

No question as to the validity of this decree or any other decree made during the period 31 December 1983 to 26 August 1993 or made after the commencement of this decree or of an edict shall be entertained by a court of law in Nigeria.

11. The Political Parties (Dissolution) Decree 1993, 13(1) reads:

Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for or on account of any act, matter or thing done or purported to be done in respect of this decree.

12. The reference in article 7(1)(a) to 'fundamental rights as guaranteed by conventions . . . in force' signifies the rights in the Charter itself, among others. Given that Nigeria ratified the African Charter in 1983, it is presently a convention in force in Nigeria. If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice, which it has not done. Nigeria cannot negate the effects of its ratification of the Charter through domestic action. Nigeria remains under the obligation to guarantee the rights of article 7 to all of its citizens.

13. The ousting of jurisdiction of the courts of Nigeria over any decree enacted in the past ten years, and those to be subsequently enacted, constitutes an attack of incalculable proportions on article 7. The complaint refers to a few examples of decrees which violate human rights but which are now beyond review by the courts. An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed.

14. Article 26 of the African Charter reiterates the right enshrined in article 7 but is even more explicit about states parties' obligations to

guarantee the independence of the courts and . . . allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

While article 7 focuses on the individual's right to be heard, article 26 speaks of the institutions which are essential to give meaning and content to that right. This article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of state power.

15. The communication notes that Nigeria fully incorporated the African Charter upon ratification in 1983. The African Charter (Ratification and Enforcement Act) specified:

(1) As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights . . . shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

It is this Act that is repealed by clause 13(1) of the Political Parties Dissolution Decree.

16. Any doubt that may exist as to Nigeria's obligations under the African Charter is dispelled by reference to article 1 of the Charter, which reads:

The member states . . . parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

17. The African Commission has to express its approval of Nigeria's original incorporation of the Charter, an incorporation that should set a standard for all Africa, and its sadness at the subsequent nullification of this incorporation. The Commission must emphasise, however, that the obligation of the Nigerian government to guarantee the right to be heard to its citizens still remains, unaffected by the purported revocation of domestic effect of the Charter. The Charter remains in force in Nigeria, and notwithstanding the Political Parties Dissolution Decree, the Nigerian government has the same obligations under the Charter as if it had never been revoked. These obligations include guaranteeing the right to be heard.

For the above reasons, the Commission:

[18.] Holds that the decrees in question constitute a breach of article 7 of the Charter, the right to be heard;

[19.] Holds the ouster of the courts' jurisdiction constitutes a breach of article 26, the obligation to establish and protect the courts;

[20.] Finds the act of the Nigerian government to nullify the domestic effect of the Charter constitutes a serious irregularity.

* * *

Constitutional Rights Project and Another v Nigeria

(2000) AHRLR 191 (ACHPR 1998)

Communication 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*
Decided at the 24th ordinary session, Oct 1998, 12th Annual Activity Report
Rapporteurs: 17th, 19th sessions: Umozurike; 18th session: Kisanga; 20th–24th sessions: Dankwa

Expression (proscription of publications, 55-60)
Serious or massive violations (15)
Mission by Commission (mission to state party, 16-35)
Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 40-43)
Political participation (right to vote, elections annulled — declared by international observers as free and fair, 46-50)
Peoples' right to self-determination (right of people to determine political status, 51-53)
Personal liberty and security (arbitrary arrest and detention, 54-55)
Limitations of rights (should not undermine rights guaranteed by constitution and international standards, 57; must be done through laws of general application, 59)
Equal protection of the law (laws made to apply to specifically one individual or legal entity are discriminating, 59)

1. On 12 June 1993, a presidential election was held in Nigeria. Both foreign and local election monitoring groups observed the conduct of the election and were generally satisfied that the election was free and fair.

2. Three days later, the National Electoral Commission began announcing the election results. The National Electoral Commission announced the results from 14 states including the Federal Capital Territory, Abuja, before it was restrained by an Abuja High Court from announcing the election results. On 23 June the federal military government announced the annulment of the 12 June election results. Various reasons were given for this action. The communication alleges that these reasons included the fact that the military government was not happy that [Chief Moshood] Abiola, the Social Democratic candidate, appeared to have won the election.

3. Dissatisfied with the decision of the federal military government to annul the election results, Abiola, together with the Governors of all the states controlled by the Social Democratic Party, went to the Supreme Court to seek redress. Shortly thereafter the federal military government promulgated several decrees ousting the jurisdiction of the courts and restating the decision of the Nigerian government to annul the election results.

4. [The Presidential Election (Invalidation of Court Order Etc)] decree no 41 of 1993 states in part:

Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for, or on account of any act, matter or thing done or purported to be done in respect of this decree.

5. The other decrees promulgated are the Presidential Election (Basic Constitutional and Transitional Provisions) (Repeal) Decree no 39, 1993 and

the Transition to Civil Rule (Disqualification and Prohibition of Certain Presidential Aspirants) (Repeal) Decree no 42 1993. These decrees gave legal backing to the annulment of 12 June election results and ensured that the two presidential candidates were banned from contesting any presidential elections in the country.

6. When activists and journalists protested the annulment of the elections, the government arrested and detained many persons, several of whom are named in the communication.

7. The government also seized thousands of copies of magazines. *The News* magazine was proscribed by military decree in June 1993. Even prior to its proscription, copies of the magazine were seized by security agents and four of its editors declared wanted by the police. Fifty thousand copies of *Tempo*, a weekly news magazine, were seized by security agents and the police.

The state party's response and observations

8. The government has made no written submission in respect of this case. In an oral submission before the Commission (31 March 1996, Ouagadougou, Burkina Faso, Chris Osah, Head of Delegation), the government stated that the elections were held in circumstances that 'the government felt were not propitious'. The representative of the government stated that 'annulling the election and setting up a government, as was done, to all intents and purposes, was a *coup*'. The government admitted that many people were arrested and detained at the time the elections were annulled, but that 'many have now been released'.

9. The government contends that it was within its own constitutional rights to make laws for the order and good governance of the country, which it did in annulling the election results. The government felt that there were irregularities which may not have been detected by the observers and that although the elections may have been adjudged to be free and fair by all, there were fundamental problems which the government could not brush aside. In such circumstances the government decided that rather than put in place a government that was going to create more problems, it should form a different government. The government formed was in any case not a military government but an interim national government in which people from both parties were appointed to serve.

10. The government maintains that these actions were justified because some people abandoned their offices and went to their villages, creating a chaotic situation.

What the government did was to salvage a situation that was bad. And whatever laws it made at that time, I want this Commission to look at it in terms of [the government] holding a solution to the problem, not as if this were geared to any particular group of people or human rights activities . . . The government

felt that it had to avoid chaos and it restored an interim government, rather than even perpetuating its own regime. I think the Commission should look rather carefully into that because it was not an ordinary situation. I could say it was just a military *coup*.

(See above statement of Chris Osah.)

Complaint

11. The complainant alleges violation of the following articles of the Charter: 6 and 13.

Procedure before the Commission

12. The communication was received on 29 July 1993.

13. On 6 January 1994 the Secretariat of the Commission notified the government of Nigeria.

14. On 22 September 1994 the Secretariat of the Commission sent a reminder to the Ministry of Foreign Affairs.

15. At the 16th session, the Commission reiterated the need to send a mission to Nigeria. The Commission also decided to invoke article 58 of the Charter by writing to the Chairman of the OAU, drawing his attention to the grave violations of human rights in Nigeria.

16. At its 16th session, the Commission decided that the communication should be added to the other files that its members going to Nigeria were to discuss with the military authorities of that country.

17. At the 17th session, held in March 1995, it was decided that the communication should be added to the cases to be taken up with the authorities by members of the mission to Nigeria.

18. On 20 April 1995 the Secretariat of the Commission sent letters to both complainants to inform them of this decision.

19. On 7 June 1995 the Secretariat of the Commission sent a letter to this effect to the Ministry of Foreign Affairs.

20. At the 18th session, held in Praia, Cape Verde, the Commission renewed its decision to join this file with those to be considered by the mission to Nigeria.

21. On 20 December 1995 the Secretariat of the Commission sent a letter to each complainant to this effect.

22. On 20 December 1995 a letter was sent to the government of Nigeria to this effect.

23. At the 19th session, held in March 1996, these cases were due for a decision on admissibility. The Commission heard Mr Chidi Anselm Odi-nkalu, who was duly instructed to appear for the complainants in all the

cases except [for] International Pen, and heard Mr Osah and Mr Bello for the Nigerian government in reply.

24. At the end of the hearing the Commission took a general view on the cases and deferred taking a final decision in each case pending the accomplishment of its proposed mission to Nigeria.

25. The Commission declared the communication admissible. It further decided that all ten files on Nigeria in respect of which the parties were heard during this session should be entrusted to its mission to Nigeria for consideration during the proposed visit.

26. On 9 May 1996 a letter was sent to the Nigerian government informing it that at the 19th session it renewed the decision taken at the 17th session to send a mission to the country. It also stated that the communication would be considered on the merits at the 20th session in October 1996.

27. On 9 May 1996 letters were sent to both complainants informing them that the communication had been declared admissible at the 19th session and that the Commission had decided to undertake a mission to Nigeria. The merits of the case would be examined at the 20th session.

28. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the case to the next session, awaiting the result of the planned mission to Nigeria.

29. On 10 December 1996 the Secretariat sent a *note verbale* to this effect to the government.

30. On 10 December 1996 the Secretariat sent letters to this effect to the complainants.

31. On 29 April, the Secretariat received a letter from Mr Olisa Agbakoba entitled preliminary objections and observations to the mission of the Commission which visited Nigeria from 7-14 March 1997. The document was submitted on behalf of Interights with regard to 14 communications, including this one.

32. Among the objections raised and/or observations made were: the neutrality, credibility and relevance; and composition of the mission.

33. At its 21st session held in April 1997, the Commission postponed taking a decision on the merits to the next session, pending the submission of scholarly articles and a court case by the complainants to assist it in its decision. The Commission also awaited further analysis of its report of the mission to Nigeria.

34. On 22 May 1997, the complainants were informed of the Commission's decision, while the state was informed on 28 May 1997.

35. At the 22nd ordinary session, the Commission postponed taking a

decision to the next session pending a discussion of the Nigerian mission report.

36. At the 23rd ordinary session held in Banjul, The Gambia from 20-29 April 1998, the Commission postponed consideration of this case due to lack of time.

37. On 25 June 1998, the Secretariat of the Commission sent letters to the parties involved informing them of the status of the case.

38. During the 24th ordinary session, the complainants furnished the Commission with a 'supplementary submission on pending communications on Nigeria', basically urging the Commission to continue consideration of communications against Nigeria including the instant one because the violations had not abated, and the change in government following the death of General Sani Abacha has not changed any state responsibility of Nigeria.

Law

Admissibility

39. Article 56 of the African Charter reads: 'Communications . . . shall be considered if they: (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .'

40. The annulment of the elections was brought before various Nigerian courts by various parties, as was the seizure of the magazines. None of these actions resulted in a remedy of the prejudice alleged, either reinstatement of the election results or compensation for the confiscated magazines.

41. Additionally, the jurisdiction of the courts to entertain these actions in the first place is in serious question. Decree no [41], like almost all decrees promulgated by the military government, contains an ouster clause which specifies that the decree cannot be challenged in the national courts. The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is 'offensive and utterly hostile to rationality.' (Reprinted in *Constitutional Rights Journal*.) In a unanimous opinion the Court of Appeal held at Lagos on 12 December 1996 in the case of *Chief Gani Fawehinmi v General Sani Abacha, Attorney-General of the Federation, State Security Services, Inspector General of Police*, held that the African Charter being the joint effort of states, no legislative body in Nigeria could oust its operation and application in Nigeria. Dr AH Yadudu, Special Adviser (Legal Matters) to the Head of State of Nigeria underscored the importance of this case in a written address to the members of the Commission to Nigeria on Friday, 14 March 1997. However, it is fair to state that at the time the case came

before the Commission no effective legal remedy existed in Nigeria of which the appellants could avail themselves.

42. Furthermore, the Constitution (Modification and Suspension) Decree specifies that even decrees that may lack an internal ouster clause cannot be challenged. Thus, Nigerians face huge legal obstacles in challenging any new law.

43. The Commission, in its decision on communication 129/94 [*Civil Liberties Organisation v Nigeria*], paragraph 8, decided that in this situation, 'it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results'.

44. For these reasons the Commission declared the communication admissible.

Merits

45. In his presentation at the 19th session, the representative of the complainants expressed his view that an amicable resolution of the alleged violation of article 13, concerning the annulled elections, was impossible because the government had already indicated that the issue was not negotiable. The representative of the complainant requested the Commission to clarify the legal situation by indicating whether there had been a violation of the Charter.

46. The government of Nigeria, through its official representative, referred to 'irregularities that may not have been detected by the [international] observers' and that 'though the elections may have been adjudged free and fair by all', they were held in 'circumstances that the government felt were not propitious' (see statement of Osah above). The government stated that: '[A]nulling the elections and setting up a government, as was done, to all intents and purposes, was a *coup*.' These statements accord with the complainant's argument that the question of the election can no longer be the subject of meaningful negotiation.

47. Although the present government contends that there were 'irregularities' in the elections, it fails to explain what these were. The government acknowledges that international observers of the elections, applying international standards, judged them to be free and fair. Yet it discounted the judgment of these international observers and substituted its own, unsupported, judgment.

48. A basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards. The criteria for what constitutes free and fair elections are internationally agreed upon, and international observers are put in place to apply these criteria. It would be contrary to the logic of international law if a national government with a vested interest in the outcome of an election was the final arbiter of whether the

election took place in accordance with international standards. In this case the government does not even attempt to defend its decision to overrule the judgment of international observers.

49. Article 13(1) of the Charter reads:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

50. To participate freely in government entails, among other things, the right to vote for the representative of one's choice. An inevitable corollary of this right is that the results of the free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless. In the light of this, the annulment of the election results, which reflected the free choice of the voters, is in violation of article 13(1).

51. Article 20(1) of the Charter provides: '[All peoples] shall freely determine their political status ... according to the policy they have freely chosen.'

52. The right of a people to determine their 'political status' can be interpreted as involving the right of Nigerians to be able to choose freely those persons or party that will govern them. It is the counterpart of the right enjoyed by individuals under article 13.

53. The election at issue here, held in conditions adjudged to be free and fair by international observers, was an exercise of the right of Nigerians to freely determine this political status. The subsequent annulment of the results by the authority in power is a violation of this right of the Nigerian people.

54. Article 6 of the African Charter guarantees 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.

55. The government does not dispute that many people, including human rights activists and journalists, were detained without having charges brought against them and without the possibility of bail. The government maintains that 'many' of these individuals have since been released. Where individuals have been detained without charges being brought, particularly since the time of the elections, a period of now over three years, this constitutes an arbitrary deprivation of their liberty and thus violates article 6.

56. In the words of article 9 of the African Charter: '(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.'

57. The government justifies its actions with regard to the journalists and

proscription of publications by reference to the 'chaotic' situation that transpired after the elections were annulled. The Commission decided, in its decision on communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*, paragraph 15], with respect to freedom of association, that:

competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

58. With these words the Commission states a general principle that applies to all rights, not only the freedom of association. Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.

59. Given that Nigerian law contains all the traditional provisions for libel suits, a governmental proscription of a particular publication, by name, is of particular concern. *Ad hominem* legislation, that is laws made to apply to specifically one individual or legal entity, raise the acute danger of discrimination and lack of equal treatment before the law guaranteed by article 2. The proscription of *The News* thus constitutes a violation of article 9. Equally, the seizure of 50 000 copies of *Tempo* and *The News* magazine [are not] justified in the face of article 9 of the Charter.

For the above reasons, the Commission:

[60.] Holds violations of articles 1, 6, 9, 13 and [20(1)] of the African Charter;

[61.] Appeals to the government of Nigeria to release all those who were detained for protesting against the annulment of the elections and to preserve the traditional functions of the courts by not curtailing their jurisdiction.

* * *

Media Rights Agenda and Others v Nigeria

(2000) AHRLR 200 (ACHPR 1998)

Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*

Decided at the 24th ordinary session, Oct 1998, 12th Annual Activity Report

Rapporteurs: 17th session: Janneh; 18th–19th sessions: Umozurike; 20th–24th sessions: Dankwa

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 49-52)

Expression (registration of newspapers required, government discretion, 53-57; government seized critical newspaper, public figures must face a higher degree of criticism than others, 72-75)

Fair trial (retroactive legislation, 58-60; independence of courts — duty of state to respect judgments, 61-62; right to be heard — jurisdiction of courts ousted, 63, 78-82; defence — access to legal counsel, 87, 88)

Interpretation (not to be literal, minimalist, 59, 60)

Limitations of rights (should not undermine rights guaranteed by constitution and international standards, must be proportionate and necessary and not render a right illusory, onus on the state to prove limitations justified, must comply with article 27(2), 64-71)

Derogation (not possible under the Charter, 67)

Equal protection of the law (laws made to apply to specifically one individual or legal entity are discriminating, 71)

Property (premises sealed and publications seized, 76-77)

Peoples' right to self-determination (government by force not compatible with the rights of peoples to freely determine their political future, 80)

Personal liberty and security (arbitrary arrest and detention, 83-86)

Health (detainees denied medical care, 89-91)

1. Communications 105/93, 128/94 and 130/94 state that after the annulment of the Nigerian elections of 12 June 1993, several decrees were issued by the government. These proscribed the publication of two magazines. State officials sealed the premises of the two magazines, embarking upon frequent seizures of copies of magazines critical of its decisions and the arrest of newspaper vendors selling such magazines.

2. By decree, the government also proscribed ten newspapers published by four different media organisations. The complainant alleges that the newspapers and their operators were not previously accused of any

wrongdoing either publicly or before a court of law or given any opportunity to defend themselves before their premises were sealed up on 22 July and they were subsequently outlawed by [the Newspapers, Etc (Proscription and Prohibition from Circulation)] Decree 48 of 1993, which was released on 16 August 1993.

3. The Constitution (Suspension and Modification) Decree no 107 of 17 November 1993 article 5 specifies:

No question as to the validity of this decree or any other decree made during the period 31 December 1983 to 26 August 1993 or made after the commencement of this decree or of an edict shall be entertained by a court of law in Nigeria.

4. On 16 August 1993, the government also announced the promulgation of the Newspaper Decree no 43 of 1993. By virtue of section 7 of the decree, it is an offence, punishable with either a fine of N250 000 or imprisonment for a term of seven years or both for a person to own, publish or print a newspaper not registered under the decree. The registration of existing newspapers under a previously subsisting law (the Newspaper Act) is extinguished by the decree.

5. The decision whether or not to register a newspaper is vested exclusively in the Newspapers Registration Board set up under the decree. Compliance with the formal pre-registration requirements stipulated in the decree does not guarantee registration of a newspaper because the Newspaper Registration Board has total discretion to decide whether the registration of a newspaper is 'justified having regard to the public interest'. There are no procedures for challenging the Board's decision not to register a newspaper.

6. If the Board decides to register a newspaper, N100 000 must be paid as registration fee. Furthermore, N250 000 must be deposited into a fund to meet the amount of any penalty imposed on or damages awarded against the owner, printer, or publisher of the newspaper by a court of law in the future. Under the Newspapers Act (now repealed by Decree 43), a bond for N500 with sureties was sufficient security for possible penalties or damages which might be imposed on or awarded against a newspaper.

7. Although released by the government on 16 August 1993, the decree was given a retroactive commencement date to 23 June 1993 and persons intending to own, print or publish newspapers in Nigeria were obliged to apply for registration within three weeks of the commencement of the decree (ie by 14 July 1993) after complication with pre-registration requirements, thus making all newspapers in Nigeria immediately 'illegal', and owners, printers and publishers liable to be arrested and detained.

8. Communications 128/94 and 130/94 deal specifically with the events of 2 January 1994, when 50 000 copies of *TELL* magazine were seized by heavily armed policemen and other security officers on the printer's premises. In addition, 12 films and 14 plates, used for processing, were also confiscated. *TELL* is a popular weekly magazine whose aim is to promote

and protect human rights in Nigeria. That week's issue was entitled: 'The Return of Tyranny — Abacha bares his fangs.' The story involved a critical analysis of certain legislation enacted by the military government which ousts the jurisdiction of the courts. The complainant stated that no remedies were available at the local level, the jurisdiction of the courts having been ousted in considering the validity of such actions.

9. Communication 152/96 was submitted by the Constitutional Rights Project. It states that on 23 December 1995 Mr Nosa Igiebor, the Editor in Chief of *TELL* magazine was arrested and detained. The Constitutional Rights Project alleges that he was not told the reason for his arrest and that no charge has been made against him. Furthermore, the Constitutional Rights Project alleges that he has been denied access to his family, doctors and lawyers and that he has received no medical help even though his health is deteriorating.

10. The Constitutional Rights Project also claims that *TELL* magazine was declared illegal and in violation of Decree no 43 of 1993 which requires all newspapers to register with the Newspaper Registration Board and to pay a pre-registration fee of N250 000 and a non-refundable fee of N100 000. These payments would be put into a fund for payment of penalties from libel actions against the owner, publisher or printer. The Constitutional Rights Project stated that Decree no 43 of 1993 had been declared null and void by two different courts, namely the Ikeja High Court on 18 November 1993, and the Lagos High Court on 5 December 1993. The Nigerian government did not appeal against these decisions.

11. In his oral arguments before the Commission, the complainants' representative emphasised that the government's prerogative to make laws for peace and good government does not entitle it to evade its obligations under international law.

The state party's response and observations

12. The government has made no written submissions in respect of this communication. At the 19th session, held in March 1995 in Ouagadougou, Burkina Faso, the government sent a delegation of several persons. Mr Chris Osah, Assistant Director General of the Legal and Treaties Department at the Ministry of Foreign Affairs, made the following statements in his presentation on the communication.

13. He stated that:

Decree no 43 of 1993 was made to underscore not only the government's sovereign rights but also its policy of free enterprise. Registration fees are payable to an independent board. It is in the public interest that all newspaper providers or publishers should ensure registration of their enterprises. The government is convinced that such registration fees are reasonable and justifiable in any democratic society. In any case, many newspapers and magazines operate although they have not registered.

14. On the ouster of the jurisdiction of the courts, the government stated that

there is nothing particularly new about this. It is the nature of military regimes to provide for ouster clauses, the reasons being that for a military administration which has come in, the resources of litigation become too cumbersome for the government to do what it wants to do.

15. As for retroactive effect, the government maintained that, although the decree technically did have retroactive effect, not a single newspaper was declared illegal or harassed for violating the decree.

The complaint

16. The communications allege violations of articles 6, 7, 9, 14 and 16 of the Charter.

Procedure

17. Communication 105/93 is dated 1 September 1993. The Commission was seized of the communication at the 14th session. The state concerned was notified on January 1994.

18. Communication 128/94 is not dated but was received at the Secretariat between January and April 1994. The Commission was seized of the communication at the 15th session. The text of the communication was sent to the state concerned on 29 July 1994.

19. Communication 130/94 is dated 5 January 1994. The Commission was seized of the Communication at its 15th session and the text was sent to the state on 29 July 1994. The procedure relating to these three cases is the same.

20. On 14 September 1994 a letter was sent to the complainants concerning communications 105/93, 128/94 and 130/94, asking whether all domestic remedies had been exhausted and whether any further seizures of *TELL* magazine has occurred since 2 January 1994.

21. A reminder was sent by the Secretariat of the Commission to the government of Nigeria on 22 September 1994.

22. At the 16th session, held in October 1994 in Banjul, The Gambia, the Commission declared the communications admissible.

23. At the 17th session, held in March 1995 in Lomé, Togo, it was decided to delay final decision on the cases so that they might be taken up with the Nigerian authorities when the Commission undertook its mission to that country. It was also declared that the Chairman of the OAU should be informed of the situation in Nigeria.

24. On 20 April 1995, a letter was sent by the Secretariat of the Commission to the complainants stating that the communications had been de-

clared admissible, and that a mission would be sent to Nigeria, and that a decision on the merits would be taken at the 18th session.

25. On 7 June 1995, a letter was sent by the Secretariat of the Commission to the government of Nigeria stating that the communications had been declared admissible and that a mission would be sent to Nigeria.

26. On 1 September 1995, a letter was sent to the government of Nigeria stating that the communications would be heard on the merits at the 18th session of the Commission and inviting the government to send a representative.

27. At the 18th session of the Commission it was decided that the communications would be taken up by the mission to Nigeria, and if the government did not facilitate the visit, the Commission would at the next session adopt a decision on the facts available.

28. On 30 November 1995 a letter was sent to the complainants reflecting this decision.

29. On 30 November 1995 a *note verbale* was sent to the government of Nigeria reflecting this decision.

30. At the 19th session, the Commission heard Mr Chidi Anselm Odinkalu, who was duly instructed to appear for all the complainants in all cases against Nigeria, except that brought by International Pen. The Commission heard Mr Osah and Mr Bello for the Nigerian government in reply. At the end of the hearing the Commission took a general view on the cases and deferred taking a final decision in each case pending the accomplishment of its proposed mission to Nigeria.

31. On 9 May 1996 letters were sent to the Nigerian government, the Constitutional Rights Project and Media Rights Agenda informing them of the Commission's renewed decision to take a mission to the country and that the three communications detailed above would be considered on their merits at the 20th session in October 1996.

32. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the communications to the 21st session, pending the result of the planned mission to Nigeria.

33. On 10 December 1996 the Secretariat sent a *note verbale* to this effect to the government.

34. On 10 December 1996 the Secretariat sent letters to this effect to the complainants.

35. Communication 152/96 is dated January, 1996.

36. On 5 February 1996 a letter was sent to the complainant acknowledging receipt of the communication and that the admissibility of the case would be examined at the 20th session in October 1996.

37. At the 19th session the communication was not examined.
38. At the 20th session held in Grand Bay, Mauritius October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. At the same time it was joined with communications 105/93, 128/94 and 130/94.
39. On 29 April, the Secretariat received a letter from Mr Olisa Agbakoba entitled 'Preliminary Objections and Observations to the Mission of the Commission which visited Nigeria from 7-14 March 1997'. The document was submitted on behalf of Interights with regard to 14 communications, including this one.
40. Among the objections raised and/or observations made were the neutrality, credibility and relevance and composition of the mission.
41. At its 21st session held in April 1997, the Commission postponed taking a decision on the merits to the next session, pending the submission of scholarly articles and court cases by the complainants to assist it in its decision. The Commission also awaited further analysis of its report of the mission to Nigeria.
42. On 22 May, the complainants were informed of the Commission's decision, while the state was informed on 28 May.
43. From this date on, the procedure in respect of the communication is identical to that in communications 105/93, 128/94 and 130/94 above.
44. At the 22nd ordinary session the Commission postponed taking a decision on the cases pending the discussion of the Nigerian mission report.
45. At the 23rd ordinary session held in Banjul, The Gambia, the Commission postponed consideration of the case to the next session due to lack of time.
46. On 25 June 1998, the Secretariat sent letters to the parties concerned informing them of the status of the case.

Admissibility

47. Article 56 of the African Charter reads: 'Communications . . . shall be considered if they: . . . (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .'
48. Specifically, in four decisions the Commission has already taken concerning Nigeria, article 56(5) is analysed in terms of the Nigerian context. Communication 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*] concerned the Robbery and Firearms Tribunal; communication 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] concerned the Civil Disturbances Tribunal; communica-

tion 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] concerned the Legal Practitioners [(Amendment)] Decree; and communication 129/94 [*Civil Liberties Organisation v Nigeria*] concerned the Constitution (Suspension and Modification) Decree and the Political Parties (Dissolution) Decree.

49. All the decrees in question in the above Communications contain 'ouster' clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals (communications 60/91 and 87/93). The Legal Practitioners [(Amendment)] Decree specifies that it cannot be challenged in the courts and that anyone attempting to do so commits a crime (communication 101/93). The Constitution Suspension and Modification Decree prohibited them from being challenged in the Nigerian courts (communication 129/94).

50. In all the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is 'offensive and utterly hostile to rationality' (reprinted in the *Constitutional Rights Journal*). It remains to be seen whether any Nigerian courts will be courageous enough to follow this holding, and whether the government will abide by their rulings should they do so.

51. In communication 152/96 the complainant states that the Newspapers Decree no 43 of 1993 has been declared null and void by two different courts, but these decisions have not been respected by the government. This is a dramatic illustration of the futility of seeking a remedy from the Nigerian courts.

52. For these reasons, consistent with its earlier decisions, the Commission declared the communications admissible.

Merits

53. Article 9 of the African Charter reads: '(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.'

54. This article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country. The problem at hand is whether the decrees requiring the registration of newspapers, and prohibiting many of them, violate this article.

55. A payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression. The government has argued that these fees are 'justifiable in any democratic society', and the Commission does not categorically disagree.

56. However, the amount of the registration fee should not be more than necessary to ensure administrative expenses of the registration, and the pre-registration fee should not exceed the amount necessary to secure against penalties or damages against the owner, printer or publisher of the newspaper. Excessively high fees are essentially a restriction on the publication of news media. In this case, the fees required for registration, while high, are not so clearly excessive that they constitute a serious restriction.

57. Of more concern is the total discretion and finality of the decision of the Registration Board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, as protected by article 9(1). There has thus been a violation of article 9(1).

58. Also of serious concern is the retroactivity of the decree. The government bases its defence on the non-enforcement of this aspect of the decree. The government representative offered this defence:

Article 7(2) of the Charter is very specific: 'no one may be condemned', and we are saying that no one has been condemned. Second, it says 'no penalty may be inflicted'. We are also submitting that there has been no penalty inflicted . . . We are even going further to say that more than 3/4 of the newspapers in Nigeria have [not] registered and yet nobody has taken them to court.

59. While it is reassuring to hear that no one has suffered under the retroactivity clause of the Newspapers Decree no 43, the Commission must take a stand on the issue of justice underlying article 7(2) and condemn the literal, minimalist interpretation of the Charter offered by the representative of Nigeria. Article 7(2) must be read to prohibit not only condemnation and infliction of punishment for acts which did not constitute crimes at the time they were committed, but retroactivity itself. It is expected that citizens must take the laws seriously. If laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal. For a law-abiding citizen, this is a terrible uncertainty, regardless of the likelihood of eventual punishment.

60. Furthermore, the Commission unfortunately cannot rest total confidence in the assurance that no one and no newspaper has yet suffered under the retroactivity of Decree no 43. Potential prosecution is a serious threat. An unjust but unenforced law undermines, as above, the sanctity in which the law should be held. The Commission must thus hold that Decree no 43 violates article 7(2).

61. Communication 152/96 states that two different courts have declared Decree no 43 null and void, without any result.

62. This shows not only a shocking disrespect by the Nigerian government for the judgments of the courts, it is also a violation of article 7(1). The right to have one's cause heard by competent and independent courts must naturally comprise the duty of everyone, including the state, to respect and follow these judgments.

63. [The Newspapers, Etc (Proscription and Prohibition from Circulation)] Decree no 48 proscribes approximately ten newspapers published by four different media organisations without having subjected them to the due process of the law. Decree no 48 likewise permitted the newspapers and their operators to have their premises sealed without being given any opportunity to defend themselves and without previously being accused of any wrongdoing before a court of law.

64. The Commission decided, in its decision on communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*, paragraph 15], with respect to freedom of association, that:

competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

65. With these words the Commission states a general principle that applies to all rights, not only to freedom of expression. Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.

66. According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

67. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.

68. The only legitimate reasons for limitations to 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'.

69. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.

70. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.

71. The government has provided no evidence that the prohibition was for any of the above reasons given in article 27(2). Given that Nigerian law contains all the traditional provisions for libel suits, so that individuals may defend themselves where the need arises, for the government to proscribe a particular publication, by name, is disproportionate and uncalled for. Laws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law guaranteed by article 3. The proscription of *The News* [sic] cannot therefore be said to be 'within the law' and constitutes a violation of article 9(2).

72. Communications 128/94 and 130/94 allege that 50 000 copies of *TELL* magazine were seized without any possibility of having the decision judged by a court of law, because of an article critical of the government.

73. In the present case, the government has provided no evidence that seizure of the magazine was for any other reason than simple criticism of the government. The article in question might have caused some debate and criticism of the government, but there seems to have been no information threatening, for example, national security or public order in it. All the legislation criticised in the article was already known to members of the public, as laws must be in order to be effective.

74. The only person whose reputation was perhaps tarnished by the article was the Head of State. However, in the lack of evidence to the contrary, it should be assumed that criticism of the government does not constitute an attack on the personal reputation of the Head of State. People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens, otherwise public debate may be stifled altogether.

75. It is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security. If the government thought that this particular article represented merely an insult towards it or the Head of State, a libel action would have been more appropriate than the seizure of the whole edition of the magazine before publication. The seizure of *TELL* therefore amounts to a violation of article 9(2).

76. Article 14 of the Charter reads:

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

77. The government did not offer any explanation for the sealing up of the premises of many publications. Those affected were not previously accused in a court of law of any wrongdoing. The right to property necessarily includes a right to have access to property of one's own and the right not for one's property to be removed. The decrees which enabled these premises to be sealed and for publications to be seized cannot be said to be 'appropriate' or in the interest of the public or the community in general. The Commission holds a violation of article 14. In addition, the seizure of the magazines for reasons that have not been shown to be in the public need or interest also violates the right to property.

78. In his oral argument, the complainant specifically raised the ouster of the court's jurisdiction over the decrees at issue here, denied the alleged victims the right to challenge the acts which affected them. The government offered the surprising defence that

'[I]t is in the nature of military regimes to provide for ouster clauses', because without such clauses the volume of litigation would make it 'too cumbersome for the government to do what it wants to do.'

79. This argument rests on the assumption that ease of government action takes precedence over the right of citizens to challenge such action. It neglects the central fact that the courts are a critical monitor of the legality of government action, which no lawful government acting in good faith should seek to evade. The courts' ability to examine government actions and, if necessary, halt those that violate human rights or constitutional provisions, is an essential protection for all citizens.

80. It is true that if national tribunals are not deprived of their powers, they will almost certainly eventually pronounce on the legality of military government itself. The government representative's argument implicitly admits what the Commission has already said in its decision on communication 102/93 [*Constitutional Rights Project and Another v Nigeria*], which is that military regimes rest on questionable legal ground. Government by force is in principle not compatible with the rights of peoples to freely determine their political future.

81. A government that governs truly in the best interest of the people, however, should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law.

82. The Commission must therefore reject the defence of 'the nature of military regimes' offered by the government's representative, and holds that the ouster of the court's jurisdiction violates the right to have one's cause heard, under article 7(1).

83. Article 6 of the African Charter reads:

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.

84. Communication 152/96 alleges that Mr Nosa Igiebor was arrested and detained without being told any reason and without any charges being made.

85. The government has offered no substantive response to this allegation.

86. The Commission, in several previous decisions, has set out the principle that where allegations of human rights abuses go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the [complainant and] treat those facts as given. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*] Therefore the Commission finds that there has been a violation of article 6.

87. Article 7 of the African Charter reads:

(1) Every individual shall have the right to have his cause heard. This comprises: . . . (c) the right to defence, including the right to be defended by counsel of his own choice . . .

88. The Constitutional Rights Project alleges that Mr Nosa Igiebor was denied access to lawyers. The government has made no response to this allegation. Therefore the Commission must take a decision on the facts as presented by the complainant. To be denied access to a lawyer is a violation of article 7(1)(c) even if there were no charges against Mr Igiebor. People who are detained in violation of the Charter must not have lesser rights than those detained in conformity with the rules in article 7.

89. Article 16 of the African Charter reads:

(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State 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.

90. The Constitutional Rights Project alleges Mr Nosa Igiebor was denied access to doctors and that he received no medical help even though his health was deteriorating through his detention. The government has made no response to this allegation. Therefore the Commission must take a decision on the facts as presented by the complainant.

91. The responsibility of the government is heightened in cases where the individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the activities of the authorities. To deny a detainee access to doctors while his health is deteriorating is a violation of article 16.

For these reasons, the Commission:

[92.] Holds a violation of article 6, [7(1)] 7(1)(c), 7(2), 9(1), 9(2), 14 and 16 of the African Charter;

[93.] Requests that the government of Nigeria take the necessary steps to bring its law into conformity with the Charter.

* * *

International Pen and Others (on behalf of Saro-Wiwa) v Nigeria

(2000) AHRLR 212 (ACHPR 1998)

Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria*

Decided at the 24th ordinary session, Oct 1998, 12th Annual Activity Report

Rapporteurs: 17th session: Badawi; 18th–20th sessions: Kisanga; 21st–24th sessions: Dankwa

Mission by Commission (mission to state party, 8, 38)

Interim measures (stay of execution, 8-9, 103, 113-115, 122)

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, effect of execution of death penalty, 74-77)

Cruel, inhuman or degrading treatment (78-81)

Personal liberty and security (arbitrary arrest and detention, 82-84)

Fair trial (appeal, 88, 91-93; defence — access to legal counsel, withholding of evidence, 97-101; impartial court — controlled by executive, 86-87, 89-90; presumption of innocence — leading representatives of government pronounced the accused guilty prior to and during trial, 96; independence of courts — special court controlled by executive, 94-95)

Life (death penalty, 103; arbitrary deprivation, 104)

Assembly (accused held responsible for murder because organised rally after which murder took place, 105-106, 110)

Association (organisation and its members declared guilty of charges by authorities without waiting for official judgment, 107-108, 110)

Expression (persecution because of opinions expressed, 109-110)

Health (detainees denied medical care, 111-112)

State responsibility (duty to give effect to rights in the Charter in national law, 114-116)

1. These communications were submitted to the African Commission by International Pen, the Constitutional Rights Project, Interights and the Civil Liberties Organisation respectively. They were joined because they all concern the detention and trial of Kenule Beeson Saro-Wiwa, a writer and Ogoni activist, President of the Movement for the Survival of the Ogoni People. Communications 139/94 and 154/96 also complain of similar human rights violations suffered by Mr Saro-Wiwa's co-defendants, also Ogoni leaders.

2. Communications 137/94 and 139/94 were submitted in 1994 before any trial began. After the murder of four Ogoni leaders on 21 May 1994, following a riot during a public meeting organised by the Movement for the Survival of the Ogoni Peoples (MOSOP), representing the rights of those who lived in oil-producing areas of Ogoni land, Saro-Wiwa and many hundreds of others were arrested, Saro-Wiwa himself on 22 May 1994 and the Vice-President of MOSOP, Ledum Mitee, shortly thereafter. Both communications allege that Mr Saro-Wiwa was severely beaten during the first days of his detention and was held for several days in leg irons and handcuffs. He was also denied access to his lawyer and the medicine he needed to control his blood pressure, at times prevented from seeing his family, and held in very poor conditions.

3. In its communication, submitted on 9 September 1994, the Constitutional Rights Project (CRP) included a list of 16 other Ogonis who had been held without charge or bail for what was at that time over three months. Both communications alleged that Mr Saro-Wiwa had been detained because of his political work in relation to MOSOP. He had been detained five times for brief periods since the beginning of 1993, and released each time without charge, except on one occasion in mid-1993 where he was held for several weeks and charged with unlawful assembly.

4. The State Military Administrator declared that Mr Saro-Wiwa and his co-defendants had incited members of MOSOP to murder four rival Ogoni leaders, but no charges were brought until 28 January 1995. In the months between arrest and the beginning of the trial, the defendants were not allowed to meet with their lawyers, and no information on the charges was provided to the defence.

5. In February 1995 the trial of the defendants began before a tribunal established under the Civil Disturbances (Special Tribunal) Act no 2 of 1987. The three members of this tribunal were appointed directly by General Abacha in November 1994, although counsel for the Rivers State Administrator argued in August that the cases were within the exclusive jurisdiction of the Rivers State High Court, since Rivers State is where the offences occurred.

6. In June 1995 the Constitutional Rights Project submitted a supplement to its communication, alleging irregularities in the conduct of the trial itself: harassment of defence counsel, a military officer's presence at

what should have been confidential meetings between defendants and their counsel, bribery of witnesses, and evidence of bias on the part of the tribunal members themselves. In October 1995 Pen also copied to the Commission a letter it sent to General Abacha protesting the lack of concrete evidence and the unfair conduct of the trial.

7. On 30 and 31 October 1995, Ken Saro-Wiwa and eight of the co-defendants (Saturday Dobe, Felix Nuata, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien and Baribor Bera) were sentenced to death, while six others including Mr Mitee were acquitted. The CRP submitted an emergency supplement to its communication on 2 November 1995, asking the Commission to adopt provisional measures to prevent the executions.

8. The Secretariat of the Commission faxed a *note verbale* invoking interim measures under revised rule 111 of the Commission's Rules of Procedure to the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Adviser (Legal) to the Head of State, the Ministry of Justice of Nigeria, and the Nigerian High Commission in The Gambia. The *note verbale* pointed out that as the case of Mr Saro-Wiwa and the others was already before the Commission, and the government of Nigeria had invited the Commission to undertake a mission to that country, during which mission the communications would be discussed, the executions should be delayed until the Commission had discussed the case with the Nigerian authorities.

9. No response to this appeal was received before the executions were carried out.

10. On 7 November 1995 the Provisional Ruling Council (PRC) confirmed the sentences of death and on 10 November 1995 all the accused persons were executed in secret at the Port Harcourt Prison. By section 7 of the Civil Disturbances (Special Tribunal) Act no 2 of 1987, under which the executed persons were tried, the PRC are required to receive the records of the trial tribunal before confirmation of the decision is possible. These records were not prepared by the tribunal and so were not available for the PRC.

11. In 1996 the Secretariat received a communication from Interights representing Ken Saro-Wiwa Jr. It alleged that the condemned persons had been detained arbitrarily prior to and during the trial and that they had been subjected to torture in the army camp. Furthermore it alleged serious irregularities concerning the conduct of the trial: that the tribunals that convicted the accused persons were not independent; that there was no presumption of innocence; that the accused persons had not been given time or facilities in which to prepare their defence; that they had been denied legal representation by a counsel of their choice; that there was no right of appeal and that following the sentencing the persons were held *incommunicado*. Interights asserted that they were tried, convicted

and sentenced to death for the peaceful expression of their views and opinions on the violations of the rights of the Ogoni people.

12. In December 1996 the Secretariat received a communication from the Civil Liberties Organisation, alleging that the Civil Disturbances (Special Tribunal) Act was invalid because it had been made without participation of the people; that its composition with military officers and members of the Provisional Ruling Council meant that it could not be impartial; and that the lack of judicial review of the decisions of this tribunal amounted to a violation of the right to appeal and fair trial. The communication alleged that the trial, conviction and sentencing of Ken Saro-Wiwa and others violated articles 7(1)(b), (c) and (d) of the African Charter, and that the execution of these 20 persons violated article 4. The communication alleged that the arraignment of 19 more alleged suspects constitutes another potential violation of the Charter.

The complaint

13. The communications allege violation of articles 1, 4, 5, 7, 9, 10, 11, 16 and 26 of the African Charter.

The state's response and observations

14. The government argued that its actions were necessary to protect the rights of the citizens who had been murdered; that the tribunal which tried Saro-Wiwa was competent because two of its three members were lawyers; that the process of confirmation by the government was an adequate appeal; that the Civil Disturbances Act had not been protested upon its enactment in 1987 and that it had been set up to deal with a crisis situation.

Procedure

15. Communication 137/94 is dated 28 September 1994 and was submitted by International Pen.

16. Communication 139/94 was submitted by the Constitutional Rights Project and dated 9 September 1994.

17. The Commission was seized of the communications at its 16th session in October 1994, but deferred its decision on admissibility pending notification and receipt of additional information from the Nigerian government.

18. At the 16th session the Commission decided to merge the communications.

19. On 9 November 1994, a notification of the two communications was sent to the Nigerian government and rule 109 of the Rules of Procedure of 1988 was invoked, requesting the Nigerian government not to cause irreparable prejudice towards Mr Saro-Wiwa.

20. On 6 February 1995 a letter was received from International Pen stating that Mr Saro-Wiwa was being ill-treated and that he was facing the death penalty.

21. On 13 February a letter was sent to the Nigerian government re-emphasising the need for rule 109 to be applied.

22. On 22 February 1995, a letter was received from complainants stating that Ken Saro-Wiwa had been charged and was scheduled to appear before a three-person tribunal from which there was no right of appeal. The tribunal members would be chosen by General Abacha in violation of international fair trial standards. The complainant recognised that local remedies had yet to be exhausted and announced its intention to present an update of the case to the Commission once the trial had been completed.

23. At the 17th session the Commission declared the communications admissible. They were to be heard on their merits at the 18th session.

24. On 20 April 1995, letters were sent to the government of Nigeria and the complainants informing them of this.

25. On 28 June 1995 a letter was received from the Constitutional Rights Project describing developments in the case.

26. On 1 September 1995, a letter was sent to the government of Nigeria stating that the communication would be heard on the merits at the 18th session of the Commission and inviting the government to send a representative.

27. At the 18th session the Commission decided that the communications should be taken up by the mission planned for Nigeria.

28. On 9 October 1995 a letter was received from Pen American Centre expressing concern for the state of health of Mr Saro-Wiwa.

29. On 1 November 1995, upon hearing that a death sentence had been passed on Mr Saro-Wiwa and eight of his co-defendants, the Secretariat faxed a *note verbale* to the government of Nigeria, invoking the revised rule of procedure 111 (formerly 109) and asking that the executions should be delayed until the Commission had taken its mission and spoken with the competent authorities. This *note verbale* was also faxed to the Secretary General of the OAU, the Nigerian High Commission in Banjul, and the Special Adviser (Legal) to the Head of State of Nigeria.

30. On 2 November 1995 a letter was received from the Constitutional Rights Project notifying the Secretariat of the death sentences and requesting that provisional measures be invoked.

31. On 9 November 1995 Commissioner Dankwa, hearing that the death sentence had been confirmed, wrote to the Secretariat requesting such action. He was faxed a copy of the *note verbale*.

32. On 20 November 1995 the Secretariat received a *note verbale* from the Nigerian High Commissioner in Banjul attempting to justify the executions.

33. On 21 November 1995 the Secretariat wrote a *note verbale* to the Nigerian High Commission in Banjul requesting the official judgment in the Saro-Wiwa case, which had been mentioned in the *note verbale*.

34. On 30 November 1995 a letter was sent to the complainants stating that the communications would be taken up by the Commission's mission to Nigeria.

35. On 13 December 1995, the Secretariat received a letter dated 13 November 1995 from the office of the Special Adviser to the Head of State attempting to justify the executions.

36. On 18 and 19 December 1995, the Commission held an extraordinary session on Nigeria in Kampala.

37. On 26 January 1996 a letter was sent to the Constitutional Rights Project informing it of the interim measures taken with regard to Ken Saro-Wiwa.

38. At the 19th session, held in March/April 1996 in Ouagadougou, Burkina Faso, the Commission heard statements from the government of Nigeria and the complainants. Mr Chidi Anselm Odinkalu was duly authorised to appear for the complainants, and Mr Osah and Mr Bello appeared for the Nigerian government. At the end of the hearing the Commission took a general view on the cases and deferred taking a final decision in each case pending the accomplishment of its proposed mission to Nigeria. The Commission proposed May 1996 as the dates for the visit. The Nigerian delegation said they would communicate these dates to the government of Nigeria for confirmation.

39. On 8 May 1996 the Commission wrote to the Nigerian government, the Constitutional Rights Project and International Pen informing them that a decision had been taken at the 19th session to send a mission to the country where the cases would be taken up.

40. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the communications to the next session, pending the result of the planned mission to Nigeria. The Commission also decided to join communication 154/96 with these communications.

41. On 10 December 1996 the Secretariat sent letters to the complainants informing them of the decisions of the Commission.

42. On 10 December 1996 the Secretariat sent a *note verbale* to the government informing it of the decisions of the Commission.

43. On 29 April, the Secretariat received a letter from Mr Olisa Agbakoba

entitled Preliminary Objections and Observations to the Mission of the Commission which visited Nigeria from 7-14 March 1997. The document was submitted on behalf of Interights with regard to 14 communications, including this one.

44. Among the objections raised and/or observations made were the neutrality, credibility and relevance; and composition of the mission.

45. At its 21st session held in April 1997, the Commission postponed taking a decision on the merits to the next session, pending the submission of scholarly articles and court decisions by the complainants to assist it in its decision. The Commission also awaited further analysis of its report of the mission to Nigeria. It must be stated that Mr Chidi Odinkalu did send the article mentioned above.

46. On 22 May, the complainants were informed of the Commission's decision, while the state was informed on 28 May.

47. Communication 154/96 is dated 6 November 1995 and was received at the Secretariat on 4 March 1996.

48. The communication requested the Commission to take interim measures to prevent the executions. A supplementary submission was sent with the communication informing the Commission that the executions had taken place on 10 November but that the communication was reaffirmed.

49. On 13 November 1995 the Nigerian government wrote to the Commission informing it of the government's view of the situation.

50. On 20 November 1995 the High Commission of Nigeria in The Gambia gave its opinion on the matter.

51. On 21 November 1995 the Commission wrote to the High Commission of Nigeria in The Gambia requesting a copy of the justice's judgment in the case.

52. On 12 March 1996 a confirmation was sent to this effect by the complainant.

53. At the 19th session in March 1996 the communication was not considered, but the Commission took a general view of all the communications against Nigeria and deferred any decision on cases pending the accomplishment of its proposed mission to Nigeria.

54. On 13 August 1996 a complete copy of the communication was sent to the government of Nigeria.

55. On 13 August 1996 a letter was sent to the complainant informing him of the status of the case.

56. On 4 February 1997, the Secretariat received a letter entitled Supplementary Submissions with respect to communication no 154/96.

57. On 4 April, the Secretariat acknowledged receipt of the letter.
58. On 29 April, the Secretariat received a letter from Mr Olisa Agbakoba entitled Preliminary Objections and Observations to the Mission of the Commission which visited Nigeria from 7-14 March 1997. The document was submitted on behalf of Interights with regard to 14 communications, including this one.
59. Among the objections raised and/or observations made were the neutrality, credibility and relevance; and composition of the mission.
60. At its 21st ordinary session held in April 1997, the Commission postponed taking a decision on the merits to the next session, pending the submission of scholarly articles and court cases by the complainants to assist it in its decision. The Commission also awaited further analysis of its report of the mission to Nigeria.
61. On 22 May, the complainants were informed of the Commission's decision, while the state was informed on 28 May.
62. On May 27, the Secretariat received a letter from the complainant entitled Additional Information on Ouster Clauses in Nigerian Law in which he promised to furnish the Secretariat with the information requested by the Commission at its 21st session 'within the next three weeks'.
63. From this date the procedure is identical to communications 137/94 and 139/94.
64. Communication 161/97 was received on 10 January 1997.
65. On 14 January 1997 a *note verbale* with a copy of the communication was sent to the Ministry of External Affairs, copy to the Special Legal Adviser to the Head of State, the Nigerian High Commission, and the Embassy of Nigeria in Addis Ababa.
66. On 23 January 1997 an acknowledgement of receipt was sent to the complainant.
67. At its 21st session held in April 1997, the Commission postponed taking a decision on the merits to the next session, pending the submission of scholarly articles and court cases by the complainants to assist it in its decision. The Commission also awaited further analysis of its report of the mission to Nigeria.
68. On 22 May, the complainants were informed of the Commission's decision, while the state was informed on 28 May.
69. At the 22nd ordinary session, the Commission postponed taking a decision on the cases pending the discussion of the Nigerian Mission report.
70. At the 23rd ordinary session held in Banjul, The Gambia, from 20-29

April 1998, the Commission was unable to consider the communication due to lack of time.

71. On 25 June 1998, letters were sent from the Secretariat of the Commission to all parties concerned regarding the status of the communications.

Law

Admissibility

72. Article 56 of the African Charter reads: 'Communications . . . shall be considered if they: . . . (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. . .'

73. This is just one of the seven conditions specified by article 56, but it is that which usually requires the most attention. Because article 56 is necessarily the first considered by the Commission, before any substantive consideration of communications, there are several important precedents in the jurisprudence of the African Commission.

74. Specifically, in four decisions the Commission has already taken concerning Nigeria, article 56(5) is analysed in terms of the Nigerian context. Communication 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*] concerned the Robbery and Firearms Tribunal; communication 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] concerned the Civil Disturbances Tribunal; communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] concerned the Legal Practitioners [(Amendment)] Decree; and communication 129/94 [*Civil Liberties Organisation v Nigeria*] concerned the Constitution (Suspension and Modification) Decree and the Political Parties (Dissolution) Decree.

75. All the decrees in question in the above communications contain 'ouster' clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals (communications 60/91 and 87/93). The Legal Practitioners [(Amendment)] Decree specifies that it cannot be challenged in the courts and that anyone attempting to do so commits a crime (communication 101/93). The Constitution (Suspension and Modification) Decree legally prohibited them from being challenged in the Nigerian Courts (communication 129/94).

76. In all the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illusory. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is

'offensive and utterly hostile to rationality' (reprinted in the *Constitutional Rights Journal*). It remains to be seen whether any Nigerian courts will be courageous enough to follow this holding, and whether the government will abide by their rulings should they do so.

77. In the present case, while the above reasoning was used in the initial decisions on admissibility, it is at the present time unnecessary. In the light of the fact that the subjects of the communications are now deceased, it is evident that no domestic remedy can now give the complainants the satisfaction they seek. The communications are thus admissible.

Merits

78. Article 5 of the Charter reads:

Every 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.

79. Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.

80. International Pen alleges that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty, then denied medical attention, during the first days of his arrest. There was no evidence of any violent action on his part or escape attempts that would justify holding him in irons. Communication 154/96 alleges that all the victims were manacled in their cells, beaten and chained to the walls in their cells.

81. The government has made no written submission in these cases, and has not refuted these allegations in its oral presentation. It is well-established jurisprudence of the Commission that where allegations go entirely unchallenged, it will proceed to decide on the facts presented. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*] Thus, the Commission holds a violation of article 5 of the Charter.

82. Article 6 of the African Charter reads:

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.

83. All the victims were arrested and kept in detention for a lengthy period under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amendment Decree no 14 of 1994 that stipulate that the government can detain people without charge for as

long as three months in the first instance. The decree also states that the courts cannot question any such detention or in any other way intervene on behalf of the detainees. This decree allows the government to arbitrarily hold people critical of the government for up to three months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The decree therefore *prima facie* violates the right not to be arbitrarily arrested or detained as protected in article 6.

84. The government has made no defence of this decree, either for its general validity or its justice as applied in this case. Thus, the Commission holds a violation of article 6.

85. Article 7 of the African Charter reads:

(1) Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights . . . (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

86. As regards the conduct of the trial itself, it is unnecessary for the Commission to delve into the specific circumstances, because by the Commission's own precedent the tribunal was defective. As will be recalled, in its decision on communication 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*], the Commission considered that special tribunals established under the Civil Disturbances Act violate article 7(1)(d) of the African Charter, because their composition is at the discretion of the executive branch. Removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality, which is required by the African Charter. This violation of the impartiality of tribunals occurs in principle, regardless of the qualifications of the individuals chosen for a particular tribunal.

87. The *note verbale* of the Nigerian High Commissioner in The Gambia points out that the tribunal was not a military one, but was presided over by a judge of the Nigerian Court of Appeal, and that tribunals are properly constituted in the Nigerian judicial system to deal with specific issues and for speedier dispensation of justice. The *note verbale* makes other specific points on the conduct of the trial, arguing for its fairness: the placement of evidence, its conduct in public, and the fact that some of the defendants were ultimately acquitted.

88. In its oral presentation at the 19th session, the government argued that the confirmation of sentence given by the state governors was an adequate appeal.

89. The Commission might cite opposing facts, casting doubt upon the fairness of the tribunal. For example, the Head of State personally chose its

members consisting of three instead of the five persons required by the Civil Disturbances Act. When defence counsel wrote to the Chief Judge of the Federal High Court on 27 November 1994 for information on when the trial would begin, the judge responded: 'This court has nothing to do about the tribunal. It is the responsibility of the Presidency.'

90. There is a great deal of information available from Nigerian and international sources on the day-to-day conduct of the tribunal and the significance of its legal rulings. Yet in reaching its decision, the Commission need only rely upon its earlier holding, made in less politically charged circumstances, that the special tribunals established under the Civil Disturbances Act are in violation of the African Charter. As a result, it finds that Ken Saro-Wiwa and his co-defendants were denied the right to a fair trial, in violation of article 7(1)(d).

91. Section 7 of the Civil Disturbances (Special Tribunal) Act no 2 of 1987 states that the confirming authority of judgments given under the act is the Provisional Ruling Council (PRC), that is the Ruling Council of the federal military government, the members of which are exclusively members of the armed forces.

92. Section 8(1) of the same decree stipulates:

The validity of any decision, sentence, judgment, confirmation, direction, notice or order given or made, as the case may be, or any other thing whatsoever done under this Act shall not be inquired into by any court of law.

93. In this case, it is not safe to view the Provisional Ruling Council as impartial or independent. Section 8(1) effectively ousts all possibility of appeal to the ordinary courts. Thus, the accused persons had no possibility of appeal to a competent national organ, and the Commission finds a violation of article 7(1)(a).

94. Article 26 of the African Charter reads: 'States parties to the present Charter shall have the duty to guarantee the independence of the courts ...'

95. As stated above, the special tribunal and the Provisional Ruling Council are not independent. The Commission also finds that there is a violation of article 26 of the African Charter.

96. The government has not contradicted the allegations contained in communication 154/96 that, at the conviction in October 1995, the tribunal itself admitted that there was no direct evidence linking the accused to the act of the murders, but held that they had each failed to establish that they did not commit the crime alleged. Communication 154/96 has also affirmed that prior to and during the trial leading representatives of the government pronounced MOSOP and the accused guilty of the crimes at various press conferences and before the United Nations. As the allegations have not been contradicted, the Commission finds a violation of the right to be presumed innocent, article 7(1)(b).

97. Initially, the accused were defended by a team of lawyers of their own choice. According to communication 154/96 and communication 139/94, this team withdrew from the case because of harassment, both in the conduct of the trial and in their professional and private lives outside. Communication 154/96 alleges that two of the lawyers were seriously assaulted by soldiers claiming to be acting on the instruction of the military officer responsible for the trial. On three occasions defence lawyers were arrested and detained and two of the lawyers had their offices searched. When these lawyers withdrew from the case, the harassment subsided.

98. After the withdrawal of their chosen counsel, the accused were defended by a team assigned by the tribunal. However, this team also resigned, complaining of harassment. After that, the accused declined to accept a new team appointed by the tribunal, and the court proceedings were closed without the accused having legal representation for the duration.

99. Communication 154/96 also claims that the defence was denied access to the evidence on which the prosecution was based and that files and documents which were required by the accused for their defence were removed from their residences and offices when they were searched by security forces on different occasions during the trial.

100. The government claims that:

Their [the accused's] defence team which comprised sly human rights activists such as Femi Falana and Gani Fawehinmi, known to be more disposed towards melodrama than the actual defence of their clients, inexplicably withdrew from the special tribunal at a crucial stage of the trial in order to either play to the gallery or delay and frustrate the process.

101. This statement does not contradict the allegations of communication 154/96, that two different defence teams were harassed into quitting the defence of the accused persons; it merely attributed malicious motives to the defence. The government has not responded to the allegations of withholding evidence from the defence. The Commission therefore finds itself with no alternative but to conclude that a violation of article 7(1)(c) has occurred.

102. Article 4 of the African Charter reads:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

103. Given that the trial which ordered the executions itself violates article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4. The violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any 'irreparable

prejudice' to the subjects of the communications before the Commission had concluded its consideration. Executions had been stayed in Nigeria in the past on the invocation by the Commission of its rule on provisional measures (rule 109, now 111) and the Commission had hoped that a similar situation would obtain in the case of Ken Sarow-Wiwa and others. It is a matter of deep regret that this did not happen.

104. The protection of the right to life in article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of article 4.

105. Article 11 of the African Charter provides: 'Every individual shall have the right to assemble freely with others . . .'

106. Communication 154/96 alleges that article 11 was violated because the murder trial directly followed public meetings of MOSOP. In its judgment, the tribunal held that the condemned persons 'created the fire that consumed the four Ogoni chiefs' by wrongfully organising election campaign rallies and permitting a large crowd of fanatical MOSOP and NYCOP youths to congregate. It appears that the tribunal holds the accused responsible for the murders because they organised the rally after which the murders took place, although Ken Saro-Wiwa for one was prevented by government officials from attending the rally. The Commission has considerable difficulty with this position as it can adversely affect the right to assembly.

107. Article 10(1) of the African Charter reads: 'Every individual shall have the right to free association provided that he abides by the law.'

108. Communication 154/96 alleges that article 10(1) was violated because the victims were tried and convicted for their opinions, as expressed through their work in MOSOP. In its judgment, the tribunal held that by their membership in MOSOP, the condemned persons were responsible for the murders, guilt by association. It would seem furthermore that government officials, at different times during the trial, declared MOSOP and the accused guilty of the charges, without waiting for the official judgment. This demonstrates a clear prejudice against the organisation MOSOP, which the government has done nothing to defend or justify. Therefore the Commission finds a violation of article 10(1).

109. Article 9(2) of the African Charter reads: 'Every individual shall have the right to express and disseminate his opinions within the law.'

110. There is a close relationship between the rights expressed in the articles 9(2), 10(1) and 11. Communication 154 alleges that the actual reason for the trial and the ultimate death sentences were the peaceful expression of views by the accused persons. The victims were disseminating information and opinions on the rights of the people who live in the

oil-producing area of Ogoniland, through MOSOP and specifically a rally. These allegations have not been contradicted by the government, which has already been shown to be highly prejudiced against MOSOP, without giving concrete justifications. MOSOP was founded specifically for the expression of views of the people who live in the oil-producing areas, and the rally was organised with this in view. The government's actions are inconsistent with article 9(2) implicit when it violated articles 10(1) and 11.

111. Article 16 of the Charter reads:

(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State 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.

112. The responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of article 16.

113. Nigeria has been a state party to the African Charter for over a decade, and is thus bound by article 1 of the African Charter.

114. The Commission assists states parties to implement their obligations under the Charter. Rule 111 of the Commission's Rules of Procedure of 1995 aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of rule 111 defeats the purpose of this important rule. The Commission had hoped that the government of Nigeria would respond positively to its request for a stay of execution pending the former's determination of the communication before it.

115. This is a blot on the legal system of Nigeria which will not be easy to erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. That it is a violation of the Charter is an understatement.

116. The Nigerian government itself recognises that human rights are no longer solely a matter of domestic concern. 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 African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must.

For the above reasons, the Commission:

[117.] Decides that there has been a violation of articles 5 and 16 in relation to Ken Saro-Wiwa's detention in 1993 and his treatment in detention in 1994 and 1995;

[118.] Decides that there has been a violation of article 6 in relation to the detention of all the victims under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amendment Decree no 14 of 1994. The government therefore has the obligation to annul these decrees;

[119.] Reiterates its decision on communication 87/93 that there has been a violation of article 7(1)(d) and with regard to the establishment of the Civil Disturbances Tribunal. In ignoring this decision, Nigeria has violated article 1 of the Charter;

[120.] Decides that there has been a violation of articles 4 and 7(1)(a), (b) (c) and (d) in relation to the conduct of the trial and the execution of the victims;

[121.] Holds that there has been a violation of articles 9(2), 10(1) and 11, 16 and 26.

[122.] Holds that in ignoring its obligations to institute provisional measures, Nigeria has violated article 1.

* * *

Constitutional Rights Project and Others v Nigeria

(2000) AHRLR 227 (ACHPR 1999)

Communications 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*
Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity Report

Rapporteurs: 17th session: Badawi; 18th–19th sessions: Umozurike; 20th–26th sessions: Dankwa

Mission by Commission (mission to state party, 22, 23)

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 27-31)

Fair trial (right to be heard — nullification of civil suits, 32-33)

Expression (newspapers banned — premises closed — risk of self-censorship, right to receive information, 34-44)

Limitations of rights ('within the law' must be consistent with obligations under the Charter, 14, 39, 40; must be proportionate and necessary — not render right illusory, 40-43; must comply with article 27(2), 43; onus on state to prove that limitations are justified, 43; must be done through laws of general application, 44)

Derogation (not possible under the Charter, 41)

Equal protection of the law (laws made to apply to specifically one individual or legal entity are discriminating, 44)

Cruel, inhuman or degrading treatment (armed attacks against human rights activists — destruction of homes, 45-48)

Personal liberty and security (arbitrary arrest and detention, 49-51)

Property (premises sealed, 52-54)

1. Communication 140/94 alleges that decrees issued in 1994 by the military government of Nigeria proscribed *The Guardian*, *Punch* and *The Concord* newspapers from publishing and circulating in Nigeria. The decrees are titled: The Concord Newspapers and African Concord Weekly Magazine (Proscription and Prohibition from Circulation) Decree no 6, The Punch Newspapers (Proscription and Prohibition from circulation) Decree no 7 and the Guardian Newspaper and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree no 8, all of 1994. The military government had earlier closed down *The Guardian* and *The Concord* publications whose premises were still being occupied and sealed up by armed security personnel and policemen, in defiance of court orders.

2. Furthermore, the military government of Nigeria arrested and detained six pro-democracy activists, Chief Enahoro, Prince Adeniji-Adele, Chief Kokeri, Chief Abiola, Chief Adebayo and Mr Eno. At the time the communication was brought, they were in detention and no charges had been brought against them, except Chief Abiola, who was charged with treason and treasonable felony. The health of the detainees was deteriorating in detention.

3. The military government allegedly sent armed gangs to the houses of five leading pro-democracy activists, namely Chief Ajayi, Chief Osoba, Mr Nwankwo, Chief Fawehinmi, and Commodore Suleiman. The gangs broke into the houses, destroyed inventory and attacked the alleged victims.

4. Communication 141/94 alleges that the federal government of Nigeria, through Decrees nos 6, 7, and 8 of 1994, restrained and restricted the right of Nigerians to receive information and to express and disseminate their opinions. The complaint also alleges that the government violated proprietary rights of owners of companies by the said decrees.

5. Further objection to Decrees 6, 7 and 8 of 1994 are that they contain clauses which oust the jurisdiction of the courts, thus prohibiting them from entertaining any action in respect of the decrees.

6. Communication 145/95 elaborates on the facts stated above. It alleges that at about 03:00 on Saturday morning, 11 June 1994, scores of heavily armed security operatives, agents of the federal military government of Nigeria, stormed Concord House, the premises of Concord Press Nigeria Limited, and African Concord Limited, publishers of, among others, the weekly *African Concord* news magazine; *Weekend Concord*, a weekly newspaper; *Sunday Concord*, another weekly newspaper, and a community-based weekly published in each state of the Federation, *Community Concord*.

7. The security agents stopped production work on various publications, drove out the workers and sealed up the premises. On the same day, at about the same time, the exercise was repeated by other heavily armed security agents of the federal military government at the premises of Punch Nigeria Limited, publishers of the newspapers *The Punch*, *Sunday Punch*, and *Top Life*. The security agents also stopped production work on *The Punch*, drove out the workers, sealed up the premises and detained the editor, Mr Bola Bolawole, for several days.

8. On 15 August 1994 at about 12:30, about 150 armed policemen stormed Rutam House, the premises of Guardian Newspapers Limited and Guardian Magazines Limited, publishers of the newspapers and news magazines *The Guardian*, *The Guardian on Sunday*, *The African Guardian*, *Guardian Express*, *Lagos Life*, and *Financial Guardian*.

9. The policemen ordered that the production of the Monday edition of *The Guardian*, which was then in progress, be stopped. They ordered all the workers out and sealed up the premises. Later in the day, 15 journalists in The Guardian Group were arrested and detained briefly before being released on bail. Security agents were still searching for senior editorial staff of the newspapers.

10. Acting through their solicitor, Gani Fawehinmi, the publishers of all the newspapers instituted separate legal actions before two Federal High Courts in Lagos against the government of Nigeria over illegal invasion of their premises and closure of their newspapers. They challenged the sealing up of the newspapers premises as a violation of the right to freedom of expression guaranteed by section 36 of the Constitution of Nigeria, 1979, and article 9 of the African Charter incorporated into Nigerian domestic law.

11. Both courts gave judgment in favour of the publishers, after considering the evidence and legal submissions from both the government and the publishers. The courts made monetary awards in damages to the publishers and ordered the security agents to vacate the newspapers' premises. The security men briefly vacated the premises, but returned a few weeks later to reoccupy them. The damages awarded were never paid.

12. While the suits were pending before the courts, on 5 September 1994, the government of Nigeria issued three military decrees, Decrees nos 6, 7

and 8, by which it proscribed over 13 newspapers and magazines published by the three media houses from being published and also prohibited them from circulation in Nigeria or any part thereof for a period of six months which could be further extended.

13. The representative of the complainants, in his oral presentation before the Commission, emphasised that the phrases 'previously laid down by law' and 'within the law' in articles 6 and 9(2), respectively, do not permit Nigeria to derogate from its international obligations by making laws at its whim.

14. The government responded orally that all decrees were necessary due to the 'special circumstances' which brought it to power. It maintained that most of the detainees had been released and most newspapers were permitted to circulate. The government stated that it derogated from provisions of the Constitution of Nigeria 'in view of the situation', justified by public morality, public safety and overriding public interest. With specific regard to article 9, the government argued that 'within the law' must refer to the current law of Nigeria, not to the Nigerian Constitution or an international standard.

Complaint

15. The complainants allege that the following provisions of the African Charter have been violated: articles 5, 6, 7, 9, 14 and 26.

Procedure

16. Communication 140/94 is dated 7 September 1994 and was submitted by the Constitutional Rights Project. The Secretariat acknowledged its receipt on 23 January 1995.

17. At the 16th session the Commission decided to be seized of the communication and to send notification of it to the government of Nigeria. In addition, the Commission called upon the government of Nigeria to ensure that the health of the victims was not in danger. Rule 109 of the Rules of Procedure was therefore invoked.

18. At the 17th session, held in March 1995 in Lomé, Togo, the Commission declared the communication admissible. There was no response from the Nigerian government.

19. Communication 141/94 is dated 19 October 1994 and was filed by the Civil Liberties Organisation. It was received at the Secretariat on 24 October 1994.

20. At the 16th session in October 1994, the Commission was seized of the communication and decided that the state should be notified. It was also decided that the communication be joined with communication 140/94.

21. Communication 145/95 is dated 7 September 1994 and was filed by Media Rights Agenda, a Nigerian NGO.

22. At the 18th session the Commission was seized of the communication. It was also decided that the communication should be taken up along with the others on the Nigeria mission.

23. The Commission decided to send a mission to Nigeria from 7 to 14 March 1997 and the communications were taken up by the mission. The mission report has been adopted by the Commission.

24. The parties were regularly notified of all the procedure.

Law

Admissibility

25. Article 56(5) of the African Charter reads: 'Communications shall be considered if they: Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged ...'

26. This is just one of the seven conditions specified by article 56, but it is that which usually requires the most attention. Because article 56 is necessarily the first considered by the Commission, before any substantive interpretation, there are several important precedents in the jurisprudence of the African Commission.

27. Specifically, in four decisions the Commission has already taken concerning Nigeria, article 56(5) is analysed in terms of the Nigerian context. Communication 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*] concerned the Robbery and Firearms Tribunal; communication 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] concerned the Civil Disturbances Tribunal; communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] concerned the Legal Practitioners' [(Amendment)] Decree; and communication 129/94 [*Civil Liberties Organisation v Nigeria*] concerned the Constitution (Suspension and Modification) Decree and the Political Parties (Dissolution) Decree.

28. All the decrees in question in the above communications contain 'ouster' clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals (communication 60/91 and 87/93). The Legal Practitioners [(Amendment)] Decree specifies that it cannot be challenged in court and that anyone attempting to do so commits a crime (communication 101/93). The Constitution Suspension and Modification Decree legally prohibited it from being challenged in Nigerian courts (communication 129/94).

29. In all the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They cre-

ate a legal situation in which the judiciary can provide no check on the executive branch of the government. A few courts in the Lagos Division have occasionally found that they have jurisdiction; in 1995, the Court of Appeal in Lagos relying on common law, found that courts could examine decrees notwithstanding their ouster clauses, where the decree is 'offensive and utterly hostile to rationality'.

30. Prior to the issue of the decree, the publishers affected had brought suits; two of them had already won monetary damages and an order that the security agents should vacate the premises. Neither of these directives was ever complied with.

31. Because there is no legal basis to challenge government action under these decrees, the Commission reiterates its decision on communication 129/94 [*Civil Liberties Organisation v Nigeria*, paragraph 8] that 'it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results.' Indeed there is no remedy. For these reasons and consistent with its earlier decisions, the Commission declared the communications admissible.

Merits

32. Article 7(1)(a) provides: '(1) Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts violating his fundamental rights ...'

33. To have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs. A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequence for the protection of individual rights. Citizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights. The nullification of the suits in progress thus constitutes a violation of article 7(1)(a).

34. Communication 141/94 alleges that the federal government of Nigeria, through Decrees nos 6, 7 and 8 of 1994, restrained and restricted the right of Nigerians to receive information and to express and disseminate their opinions.

35. Article 9 of the African Charter reads: '(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.'

36. Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and express opinions.

37. The proscription of specific newspapers by name and the sealing of their premises, without a hearing at which they could defend themselves or any accusation of wrongdoing, legal or otherwise, amounts to harassment of the press. Such actions not only have the effect of hindering the directly affected persons in disseminating their opinions, but also poses an immediate risk that journalists and newspapers not yet affected by any of the decrees will subject themselves to self-censorship in order to be allowed to carry on their work.

38. Decrees like these pose a serious threat to the public of the right to receive information not in accordance with what the government would like the public to know. The right to receive information is important: article 9 does not seem to permit derogation, no matter what the subject of the information or opinions and no matter the political situation of a country. Therefore, the Commission finds that the proscription of the newspapers is a violation of article 9(1).

39. The complainant argues that article 9(2) must be read as referring to 'already existing law'. The government argues that the decrees were justified by the special circumstances; the complainant invokes the constancy of international obligations.

40. According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed the whole essence of treaty making.

41. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations 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.'

42. The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.

43. The government has provided no concrete evidence that the proscription was for any of the above reasons given in article 27(2). It has failed to prove that proscription of the newspapers was for any reason but simple criticism of the government. If the newspapers had been guilty of libel, for example, they could have individually been sued and called upon to defend themselves. There was no substantive evidence presented that the newspapers were threatening national security or public order.

44. For the government to proscribe a particular publication, by name, is thus disproportionate and not necessary. Laws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law, guaranteed by article 3. The proscription of these publications cannot therefore be said to be 'within the law' and constitutes a violation of article 9(2).

45. Communication 140/94 alleges that the government sent armed gangs to attack leading human rights activists and to destroy their homes. The government has made no substantive response to this allegation.

46. Article 5 of the Charter states:

Every 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 . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

47. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*] This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights as provided for in the Charter.

48. In view of the foregoing, the Commission finds a violation of article 5.

49. The detention of six human rights activists without charges as alleged in communication 140/94 and the detention of Mr Bola Bolawole and 15 journalists in The Guardian Group as alleged in communication 145/95 have also not been disputed by the government.

50. Article 6 of the Charter reads: 'Every individual shall have the right to liberty and to the security of his person . . . In particular, no one may be arbitrarily arrested or detained.'

51. To detain persons on account of their political beliefs, especially where no charges are brought against them, renders the deprivation of liberty arbitrary. The government has maintained that no one is presently detained without charge. But this will not excuse past arbitrary detentions. The government has failed to address the specific cases alleged in the communications. The Commission therefore finds that there was a violation of article 6.

52. The complainants also allege that the government violated proprietary rights of owners of companies by the said decrees.

53. Article 14 of the Charter reads:

The right to property shall be guaranteed. It may only be encroached upon in

the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

54. The government did not offer any explanation for the sealing up of the premises of many publications, but maintained the seizure in violation of direct court orders. Those affected were not previously accused or convicted in court of any wrongdoing. The right to property necessarily includes a right to have access to one's property and the right not to have one's property invaded or encroached upon. The decrees which permitted the Newspapers premises to be sealed up and for publications to be seized cannot be said to be 'appropriate' or in the interest of the public or the community in general. The Commission finds a violation of article 14.

For these reasons, the Commission:

[55.] Finds that there have been violations of articles 5, 6, 7(1)(a), 9(1) and (2), and 14 of the African Charter; and

[56.] Invites the government to take all necessary steps to comply with its obligations under the Charter.

* * *

Constitutional Rights Project and Another v Nigeria

(2000) AHRLR 235 (ACHPR 1999)

Communications 143/95 and 150/96, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*

Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity Report

Rapporteurs: 18th–19th sessions: Umozurike; 20th session: Kisanga; 21st–26th sessions: Dankwa

Admissibility (exhaustion of local remedies — jurisdiction ousted, 16-18)

Personal liberty and security (arbitrary arrest and detention, no legal remedies to challenge detention, 20-28, 31)

Interpretation (African Charter to be interpreted in a culturally sensitive way, 26; general principles of the common law, 23, 31)

Cruel, inhuman or degrading treatment (conditions of detention, 28)

Fair trial (defence — access to legal counsel, 29; independence of courts — duty of state to respect judgments, jurisdiction of courts ousted, 30, 34)

Personal liberty and security (*incommunicado* detention, 29)
Limitations of rights (state security, 33)

1. Communication 143/95 alleges that the government of Nigeria, through the State Security (Detention of Persons) Amendment Decree no 14 of 1994, has prohibited any court in Nigeria from issuing a writ of *habeas corpus*, or any prerogative order for the production of any person detained under Decree no 2 (1984). The complainant argues that this law violates the African Charter on Human and Peoples' Rights. The decrees were applied to detain without trial several human rights and pro-democracy activists and opposition politicians in Nigeria.

The state party's response and observations

2. The government has presented no written response to this allegation, but in oral statements before the Commission (31 March 1996, 19th ordinary session, Ouagadougou, Burkina Faso, Chris Osah, Head of Delegation) maintains that no individual is presently being denied the right to *habeas corpus* in Nigeria. It has said that the provision of Decree no 14 suspending the right to *habeas corpus* applies only to persons detained in respect of state security, and was implemented only between 1993 and 1995, during the period of political insecurity following the annulled elections of June 1993.

3. The government acknowledges that this provision is still on the statute books in Nigeria, but has suggested that the right to *habeas corpus* would be restored in the future by saying, 'as the democratisation of society goes on, all these [decrees] will become superfluous. They will have no place in society.'

4. Communication 150/96 complains that the State Security (Detention of Persons) Decree no 2 of 1984, which enables a person to be detained for a reviewable period of three months if he endangers state security, violates article 6 of the Charter. It also complains of the amended decree of 1994 prohibiting the writ of *habeas corpus*.

5. The communication alleges that Mr Abdul Oroh, Mr Chima Ubani, Dr Tunji Abajom, Chief Frank Kokori, Dr Fred Eno, Honourable Wale Osun and Mr Osagie Obayunwana were detained under this decree, without charge and also deprived of the right to bring *habeas corpus* actions. The communication alleges that they are detained in dirty, hidden, sometimes underground security cells; denied access to medical care, to their families and lawyers; and not permitted to have journals, newspapers and books. It is alleged that the detainees are sometimes subjected to torture and rigorous interrogations. The communication alleges that these conditions, combined with the courts' inability to order the production of detained persons even on medical grounds, place the detainees' lives in danger. The

communication alleges that these circumstances constitute inhuman and degrading punishment or treatment.

6. The communication complains that the clauses ousting the jurisdiction of the courts to consider the validity of decrees or acts taken thereunder is a violation to the right to have one's cause heard, protected by article 7(1)(a) and 7(1)(d) of the Charter, and undermines the independence of the judiciary in contravention of article 26.

7. The government has presented no response in respect of this communication.

Complaint

8. The communications allege violation of articles 5, 6, 7 and 26 of the Charter.

Procedure

9. Communication 143/95, dated 14 December 1994 and filed by the Constitutional Rights Project, was received at the Secretariat on 2 February 1995.

10. In February 1995, the Commission was seized of the communication, and on 7 February 1995, a notification was sent to the Nigerian government with the attached communication asking the said government to respond within three months.

11. At the 18th session in October 1995, the communication was declared admissible, and was to be brought up by the proposed mission to Nigeria.

12. Communication 150/96 was submitted by the Civil Liberties Organisation and dated 15 January 1996. It was received at the Secretariat on 29 January 1996.

13. At the 20th session held in Grand Bay, Mauritius in October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.

14. The mission went to Nigeria from 7 to 14 March 1997 and a report was submitted to the Commission.

15. The parties were duly notified of all the procedures.

Law

Admissibility

16. Article 56(5) of the Charter requires that a complainant exhausts local remedies before the Commission can consider the case. Section 4(1) of the State Security (Detention of Persons) Decree no 2 of 1984 states:

No suit or other proceedings shall lie against any persons for anything done or

intended to be done in pursuance of this Act. Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question.

17. In its decision on communication 129/94 [*Civil Liberties Organisation v Nigeria*, paragraph 8], the Commission accepted the argument of complainants that the above ouster decrees create a situation in which 'it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results'.

18. The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos Division have occasionally found that they have jurisdiction; in 1995, the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is 'offensive and utterly hostile to rationality'. On their face, ouster clauses remove the right of courts to review decrees.

19. For these reasons, the Commission declared the communications admissible.

Merits

20. Both communications allege that the government has prohibited the issuance by any court of the writ of *habeas corpus* or any prerogative order for the production of any person detained under Decree no 2 of 1984. [The State Security (Detention of Persons) (Amendment)] Decree no 14 denies the right to those detained for acts 'prejudicial to state security or the economic adversity of the nation'. A panel has the power to review the detentions but this is not a judicial body and its members are appointed by the President.

21. Article 6 of the Charter reads:

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.

22. The problem of arbitrary detention has existed for hundreds of years. The writ of *habeas corpus* was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and demand that the authority either release or justify all imprisonment.

23. *Habeas corpus* has become a fundamental facet of common law legal systems. It permits individuals to challenge their detention proactively and collaterally, rather than waiting for the outcome of whatever legal proceedings may be brought against them. It is especially vital in those in-

stances in which charges have not, or may never be, brought against the detained individual.

24. Deprivation of the right to *habeas corpus* alone does not automatically violate article 6. Indeed, if article 6 was never violated, there would be no need for *habeas corpus* provisions. However, where violation of article 6 is widespread, *habeas corpus* rights are essential in ensuring that the individuals' rights in article 6 are respected.

25. The question thus becomes whether the right to *habeas corpus*, as it has developed in common law systems, is a necessary corollary to the protection of article 6 and whether its suspension thus violates this article.

26. The African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding expression through the laws of each country. The government has conceded that the right to *habeas corpus* is important in Nigeria, and emphasised that it will be reinstated 'with the democratisation of society'.

27. The importance of *habeas corpus* is demonstrated by the other dimensions of communication 150/96. The government argued that no one had actually been denied the right to *habeas corpus* under the amended decree. Communication 150/96 provides a list of such individuals who are detained without charges in very poor conditions, some *incommunicado*, and are unable to challenge their detention due to the suspension of this right. The government has however made no specific response.

28. First of all, in accordance with its well-established precedent [*the Commission then cites unofficial versions of earlier decisions, which are omitted here — eds*], since the government has presented no defence or contrary evidence that the conditions of detention are acceptable, the Commission accepts the allegations that the conditions of detention are a violation of article 5 of the Charter, which prohibits inhuman and degrading treatment. The detention of individuals without charge or trial is a clear violation of articles 6 and 7(1)(a) and (d).

29. Furthermore, these individuals are being held *incommunicado* with no access to lawyers, doctors, friends or family. Preventing a detainee access to his lawyer clearly violates article 7(1)(c) which provides for the 'right to defence, including the right to be defended by a counsel of his choice'. It is also a violation of article 18 to prevent a detainee from communicating with his family.

30. The fact that the government refuses to release Chief Abiola, despite the order for his release on bail made by the Court of Appeal, is a violation of article 26 which obliges states parties to ensure the independence of the judiciary. Failing to recognise a grant of bail by the Court of Appeal militates against the independence of the judiciary.

31. These circumstances dramatically illustrate how a deprivation of rights under articles 6 and 7 is compounded by the deprivation of the right to

apply for a writ of *habeas corpus*. Given the history of *habeas corpus* in the common law to which Nigeria is an heir, and its acute relevance in modern Nigeria, the amended decree suspending it must be seen as a further violation of articles 6 and 7(1)(a) and (d).

32. The government argues that *habeas corpus* actions are still available to most detainees in Nigeria, and that the right to bring *habeas corpus* actions is denied only to those detained for state security reasons under Decree no 2. While this does not create a situation as serious as when all detainees were denied the right to challenge their detention, the limited application of a provision does not guarantee its compatibility with the Charter. To deny a fundamental right to a few is just as much a violation as denying it to many.

33. The government attempts to justify Decree no 14 with the necessity for state security. While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that 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 government to operate without such checks as the judiciary can usefully perform.

34. Finally, as noted in the admissibility section of this decision, there is a persistent practice of ouster clauses in Nigeria, that remove many vital matters from the jurisdiction of the ordinary courts. A provision for *habeas corpus* is not of much use without an independent judiciary to apply it. The State Security Decree contains a clause forbidding any court from taking up any matter arising under it. In previous decisions on ouster clauses in Nigeria, the Commission has found that they violate articles 7 and 26 of the Charter, the duty of the government to ensure the independence of the judiciary. (See the Commission's decisions in communications 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*], 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] and 129/94 [*Civil Liberties Organisation v Nigeria*].)

For these reasons, the Commission:

[35.] Finds that there are violations of articles 5, 6, 7(1)(a), (c) and (d), 18 and 26 of the Charter; and

[36.] Recommends that the government of Nigeria brings its laws in line with the Charter.

* * *

Constitutional Rights Project v Nigeria (I)

(2000) AHRLR 241 (ACHPR 1999)

Communication 148/96, *Constitutional Rights Project v Nigeria*
Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity
Report
Rapporteur: Dankwa

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 8-11)

Personal liberty and security (detained for acts for which previously found innocent, 15-16)

1. The communication concerns 11 soldiers of the Nigerian army: WO1 Samson Elo, WO2 Jomu James, Ex WO2 David Umukoro, Sat Gartue Ortoo, LCPI Pullen Blacky, Ex LCPI Lucky Iviero, PVT Fakolade Taiwo, PVT Adelabi Ojejide, PVT Chris Miebi, Ex PVT Otem Anang, and WO2 Austin Ogbeowe. They were arrested in April 1990 on suspicion of being part of a *coup* plot and were tried twice, once in 1990 and once in 1991. They were found innocent on both occasions but still have not been freed. On 31 October 1991 they were granted state pardon by the then Armed Forces Ruling Council. However, they continue to be held at Kirikiri Prison under terrible conditions. The complainant argues that there are no further domestic remedies available, since the jurisdiction of the courts over the matter has now been ousted by military decree.

Complaint

2. The communication alleges violation of article 6 of the Charter.

Procedure

3. The communication is dated 22 August 1995 and was received at the Secretariat on 18 September 1995.

4. At the 20th session held in Grand Bay, Mauritius, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. The mission was undertaken between 7 and 14 March 1997 and the report was submitted to the Commission.

5. The parties were kept informed of all the procedures.

Law

Admissibility

6. Article 56 of the Charter reads: 'Communications . . . shall be considered

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

7. This is just one of the seven conditions specified by article 56, but it is the one that usually requires the most attention. Because article 56 is necessarily the first considered by the Commission, before any substantive consideration of communications, it has already been the subject of substantial interpretation; in the jurisprudence of the African Commission, there are several important precedents.

8. Specifically, in four decisions the Commission has already taken concerning Nigeria, article 56 (5) is analysed in terms of the Nigerian context. Communication 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*] concerned the Robbery and Firearms Tribunal; communication 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] concerned the Civil Disturbances Tribunal; communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] concerned the Legal Practitioners [(Amendment)] Decree; and communication 129/94 [*Civil Liberties Organisation v Nigeria*] concerned the Constitution (Suspension and Modification) Decree and the Political Parties (Dissolution) Decree.

9. All the decrees in question in the above communications contain 'ouster' clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (communications 60/91 and 87/93). The Legal Practitioners [(Amendment)] Decree specifies that it cannot be challenged in the courts and that anyone attempting to do so commits a crime (communication 101/93). The Constitution (Suspension and Modification) Decree prohibited them from being challenged in the Nigerian courts (communication 129/94).

10. In all the cases cited above, the Commission found that the ouster clauses render local remedies non-existent or ineffective. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos Division have occasionally found that they have jurisdiction. For instance, in 1995 the Court of Appeal, Lagos Division, relying on common law, concluded that courts should examine some decrees notwithstanding ouster clauses, where the decree is 'offensive and utterly hostile to rationality'. But this decision has not been followed by any subsequent case.

11. In the instant communication, the jurisdiction of the courts was ousted. Thus, no matter how meritorious the victims' case for freedom may be, it cannot be entertained by the courts. Accordingly, the case was declared admissible.

Merits

12. Article 6 of the African Charter provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

13. The government has not disputed any of the facts as presented by Constitutional Rights Project.

14. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuses go uncontested by the government concerned, especially after repeated notification, the Commission must decide on the facts provided by the complainant and treat those facts as given. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*]

15. As the government has offered no other explanation for the detention of the 11 soldiers, the Commission has to assume that they are still being detained for the acts for which they were found innocent in two previous trials. This is a clear violation of article 6, and shows disrespect by the Nigerian government for the judgments of its own courts.

16. Later (although it was unnecessary because they were found innocent of any crime), the soldiers were granted state pardons, but still not freed. This constitutes a further violation of article 6 of the Charter.

For these reasons, the Commission:

[17.] Finds that article 6 of the African Charter has been violated;

[18.] Urges the government of Nigeria to respect the judgments of its courts and free the 11 soldiers.

* * *

Civil Liberties Organisation v Nigeria

(2000) AHRLR 243 (ACHPR 1999)

Communication 151/96, *Civil Liberties Organisation v Nigeria*
Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity Report
Rapporteurs: 20th session: Kisanga; 21st–26th sessions: Dankwa

Mission of Commission (mission to state party, 8)
Admissibility (exhaustion of local remedies — jurisdiction ousted, 13–15)
Fair trial (appeal, 22; defence — access to legal counsel, 24, 26;

independence of courts — jurisdiction of courts ousted, 17-21, 23)
Cruel, inhuman or degrading treatment (conditions of detention, 5, 25-27)
Family (deprivation of prisoners' right to see family, 27)
Personal liberty and security (*incommunicado* detention, 27)

1. In March 1995, the federal military government of Nigeria announced that it had discovered a plot to overthrow it by force. By the end of the month, several persons including civilians and serving and retired military personnel had been arrested in connection with the alleged plot.

2. A special military tribunal was established under the Treason and Other Offences (Special Military Tribunal) Act, which precluded the jurisdiction of the ordinary courts. The military tribunal was headed by Major General Aziza, and composed of five serving military officers. The tribunal used the rules and procedures of a court martial, and no appeal lay from its judgment. The tribunal's decision was subject only to confirmation by the Provisional Ruling Council, the highest decision-making body of the military government.

3. The trials were conducted in secret, and the suspects were not given the opportunity to state their defence or have access to lawyers or their families. They were not made aware of the charges against them until their trial. The suspects were defended by military lawyers who were appointed by the federal military government.

4. Thirteen civilians tried by the tribunal were convicted for being accessories to treason and sentenced to life imprisonment. These were: Dr Beko Ransome-Kuti, Mallan Shehu Sanni, Mr Ben Charles Obi, Mrs Chris Anyanwu, Mr George Mba, Mr Kunle Ajibade, Alhaji Sanusi Mato, Mr Julius Badejo, Mr Matthew Popoola, Mr Felix Mdamaigida, Miss Rebecca Onyabi Ikpe, and Mr Moses Ayegba. Miss Queenette Lewis Alagoe was convicted as an accessory after the fact and sentenced to six months imprisonment. The life sentences were later reduced to 15 years imprisonment.

5. The communication alleges that since their arrest, the accused have been held under inhuman and degrading conditions. They are held in military detention places, not in the regular prisons, and are still deprived of access to their lawyers and families. They are held in dark cells, given insufficient food and no medicine or medical attention.

Complaint

6. The complainant alleges violations of articles 5, 7(1)(a), (c) and (d) and 26 of the African Charter.

Procedure

7. The communication is dated 19 January 1996 and was received at the Secretariat on 29 January 1996.

8. At the 20th session held in Grand Bay, Mauritius, in October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. The mission took place between 7 and 14 March 1997 and the report was submitted to the Commission.

9. The parties were kept informed of all the procedures.

Law

Admissibility

10. Article 56 of the Charter reads: 'Communications . . . shall be considered if they: . . . (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .'

11. This is just one of the seven conditions specified by article 56, but it is the one that usually requires the most attention. Because article 56 is necessarily the first to be considered by the Commission, before any substantive consideration of communications, it has already been the subject of substantial interpretation in the jurisprudence of the African Commission. There are several important precedents.

12. Specifically, in four decisions the Commission has already taken concerning Nigeria, article 56(5) is analysed in terms of the Nigerian context. Communication 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*] concerned the Robbery and Firearms Tribunal; communication 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] concerned the Civil Disturbances Tribunal; communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] concerned the Legal Practitioners [(Amendment)] Decree; and communication 129/94 [*Civil Liberties Organisation v Nigeria*] concerned the Constitution (Suspension and Modification) Decree and the Political Parties (Dissolution) Decree.

13. All the decrees in question in the above communications contain 'ouster' clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (communication 60/91 and 87/93). The Legal Practitioners [(Amendment)] Decree specifies that it cannot be challenged in the courts and that anyone attempting to do so commits a crime (communication 101/93). The Constitution (Suspension and Modification) prohibited their being challenged in the Nigerian courts (communication 129/94).

14. In all the cases cited, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They create a

legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is 'offensive and utterly hostile to rationality'.

15. In the instant communication, the jurisdiction of the ordinary courts was ousted and the case against the accused persons was brought before a special tribunal. From this tribunal there is no appeal to the ordinary courts.

16. Thus, as dictated both by the available facts and the precedent of the African Commission, the communication was declared admissible.

Merits

17. In all the above cases, the ouster clauses, in addition to being *prima facie* evidence of admissibility, were found to constitute violations of article 7. The Commission must take this opportunity not only to reiterate the conclusions made before, that the constitution and procedures of the special tribunals violate articles 7(1)(a) and (c) and 26, but to recommend an end to the practice of removing entire areas of law from the jurisdiction of the ordinary courts.

18. In oral statements before the Commission, the Nigerian government has claimed that 'as a developing nation, we do not have enough resources to man these law courts very well'. (Examination of State Reports, 13th session, April 1993, Nigeria-Togo, p 35.) This was given as a justification of 'special' tribunals. Another justification given was that a breakdown of law and order had caused a high volume of cases (*id* pp 37 and 39).

19. The government denied that there was anything special at all about these extraordinarily constituted courts and maintained that they respected all the procedures of the regular courts; however, the government did concede that they included military officers, and that from the special tribunals there was no means of appeal to the regular courts.

20. Although the government argues that the procedure before special tribunals offers the same protections for rights as the regular courts (*see id* at 38), this assertion is belied by the very reasons the government gives for the tribunals, as well as the evidence submitted by the complainants.

21. The Commission's previous decisions found that the special tribunals violated the Charter because their judges were specially appointed for each case by the executive branch, and the panel would include at least one, and often a majority, of military or law enforcement officers, in addition to a sitting or retired judge. The Commission here reiterates its previous decisions and declares that the trial of these persons before a special tribunal violates article 7(1)(d) and article 26.

22. The system of executive confirmation, as opposed to appeal, provided for in the institution of special tribunals, violates article 7(1)(a).

23. If the domestic courts are overburdened, which the Commission does not doubt, the Commission recommends that government consider allocating more resources to them. The setting up of a parallel system has the danger of undermining the court system and creates the likelihood of unequal application of the laws.

24. The complainants have alleged that the accused were not permitted to choose their own counsel. This is a question of fact. The government has not responded to this case specifically, neither has it contradicted this accusation. Therefore, in accordance with its established practice, the Commission must take the word of the complainant as proven and thus finds a violation of article 7(1)(c). [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*]

25. Finally, the complainant alleges that the conditions of detention of the convicted persons constitute inhuman and degrading treatment, in violation of article 5. The government has not made any specific response to any of the accusations in the communication, and has not provided any information to contradict the allegations of inhuman and degrading treatment.

26. While being held in a military detention camp is not necessarily inhuman, there is the obvious danger that normal safeguards on the treatment of prisoners will be lacking. Being deprived of access to one's lawyer, even after trial and conviction, is a violation of article 7(1)(c).

27. Being deprived of the right to see one's family is a psychological trauma difficult to justify, and may constitute inhuman treatment. Deprivation of light, insufficient food and lack of access to medicine or medical care also constitute violations of article 5.

For the above reasons, the Commission:

[28.] Finds a violation of articles 5, 7(1)(a), (c) and (d) and 26;

[29.] Appeals to the government of Nigeria to permit the accused persons a civil retrial with full access to lawyers of their choice; and to improve their conditions of detention.

* * *

Constitutional Rights Project v Nigeria (II)

(2000) AHRLR 248 (ACHPR 1999)

Communication 153/96, *Constitutional Rights Project v Nigeria*
Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity
Report
Rapporteur: Dankwa

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 8-10)

Personal liberty and security (arbitrary detention, 12-16; no legal remedies to challenge detention, 17-18)

Fair trial (trial within reasonable time, 19-20)

1. Between May and June 1995 the Nigerian police in the city of Owerri arrested Vincent Obidiozor Duru, Nnemeka Sydney Onyecheaghe, Patrick Okoroafor, Collins Ndulaka and Amanze Onuoha. They were accused of serious offences ranging from armed robbery to kidnapping.

2. The police completed its case and submitted a report on 25 July 1995. In this report the police linked the suspects to various robberies and the kidnapping of young children which had occurred and for which ransoms had been demanded. One of the kidnapped children escaped but the whereabouts of the others is still unknown, although the ransoms have been paid. The report concluded that the suspects should be detained under Decree no 2 of 1984 (which permits detainees to be held for three months without charge) in order to permit further investigations and for the suspects to be charged with armed robbery and kidnapping. At present the suspects are imprisoned and no charges have been brought against them.

Complaint

3. The communication alleges violations of articles 6 and 7 of the Charter.

Procedure

4. The communication is dated 5 February 1996 and was received at the Secretariat on 28 February 1996.

5. At the 20th session held in Grand Bay, Mauritius, in October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. The mission was undertaken between 7 and 14 March 1997 and the report submitted to the Commission.

6. The parties were duly notified of all the procedures.

Law

Admissibility

7. *Prima facie*, the communication satisfies all the requirements for admissibility contained in article 56. The only question that might be raised is with regard to the exhaustion of local remedies required by article 56(5). Article 56(5) requires that the complainants must have exhausted all available local remedies, or else prove that such remedies are unduly prolonged.

8. The very violation alleged in this case is that the victims are detained without charge or trial, thus constituting an arbitrary detention. The normal remedy in such instances is for the victims to bring an application for a writ of *habeas corpus*, a collateral action in which the court may order the police to produce an individual and justify his imprisonment.

9. However, the police report contained in the file recommends that the suspects be detained under [the State Security (Detention of Persons) Act] no 2 of 1984 (Document ref no CR:3000/IMS/Y/Vol. 33/172, p 10). By the State Security (Detention of Persons) Amendment Decree no 14 of 1994, the government has prohibited any court in Nigeria from issuing a writ of *habeas corpus*, or any prerogative order for the production of any person detained under Decree no 2 of 1984.

10. Thus, even the remedy of *habeas corpus* does not exist in this situation. There are consequently no remedies for the victims to resort to, and the communication was therefore declared admissible.

Merits

11. Article 6 of the African Charter reads: '... 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.'

12. The State Security (Detention of Persons) Act provides that the Chief of General Staff may order that a person be detained if he is:

satisfied that any person is or recently has been concerned in acts prejudicial to state security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts.

13. Persons may be detained indefinitely if the detention is reviewed every six weeks by a panel of nine persons, six of whom are appointed by the President, the other three being the Attorney-General, the Director of the Prison Service, and a representative appointed by the Inspector General of Police. The panel does not have to agree that continued detention is necessary; the detention will be renewed unless the panel is satisfied that the circumstances no longer require the continued detention of the person.

14. The detainees were arrested between May and June 1995, nearly two years ago. There is no evidence that they have been tried or even charged.

15. Even if the required reviews of detention as provided for by the Act are being held, the panel which conducts the review cannot be said to meet judicial standards as the majority of its members are appointed by the President (the executive) and the other three are also representatives of the executive branch. The panel does not have to justify the continued detention of individuals, but only issue orders in the case of release.

16. This panel cannot thus be considered impartial. Consequently, even if recommendations from the meetings of this panel are responsible for the detainees' continued detention, this detention must be considered arbitrary, and therefore in violation of article 6.

17. Furthermore, article 7(1) of the Charter provides that every individual shall have the right to an appeal to competent national organs against acts violating his fundamental rights, and the right to be tried within a reasonable time by an impartial court or tribunal.

18. The meetings of the review panel cannot be considered a competent national organ. Since it appears that the right to file for *habeas corpus* is also closed to the accused individuals, they have been denied their rights under article 7(1)(a).

19. A subsidiary issue is the length of time that has elapsed since their arrest. In a criminal case, especially one in which the accused is detained until trial, the trial must be held with all possible speed to minimise the negative effects on the life of a person who, after all, may be innocent.

20. That nearly two years can pass without even charges being filed is an unreasonable delay. Thus, the detainees' rights under article 7(1)(d) have also been violated.

For these reasons, the Commission:

[21.] Finds violations of articles 6, 7(1)(a) and (d) of the Charter;

[22.] Appeals to the government of Nigeria to charge the detainees, or release them.

* * *

Centre for Free Speech v Nigeria

(2000) AHRLR 250 (ACHPR 1999)

Communication 206/97, *Centre for Free Speech v Nigeria*
Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity
Report

Rapporteur: Dankwa

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 10)

Personal liberty and security (arbitrary arrest and detention, 11, 17-18)

Fair trial (appeal, defence — access to legal counsel, 12-14; impartial court-military tribunal, 15, independence of courts — jurisdiction of courts ousted, 16)

1. The complainant alleges the unlawful arrest, detention, trial and conviction of four Nigerian journalists by a military tribunal presided over by one Patrick Aziza.
2. The journalists were convicted for reporting stories on the alleged 1995 *coup d'état* attempt in their various newspapers and magazines. The journalists were: Mr George Mba of *Tell* magazine, Mr Kunle Ajibade of *The News* magazine, Mr Ben Charles Obi of *Classique* magazine and Mrs Chris Anyanwu of *TSM* magazine.
3. The journalists were tried in secret and were not allowed access to counsel of their choice.
4. The journalists were sentenced to various terms of imprisonment.
5. The convicted journalists could not appeal against their sentences because of the various decrees promulgated by the military regime that ousts the jurisdiction of regular courts from hearing appeals on cases decided by a military tribunal.

Complaint

The complainant asserts that the following articles of the African Charter have been violated: articles 6, 7 and 26 and principle 5 of the UN Basic Principles on the Independence of the Judiciary.

Procedure

6. The communication is dated 14 July 1997 and the Secretariat acknowledged receipt on 23 September 1997.
7. Correspondences were exchanged between the Secretariat and the parties for additional information and to keep the latter informed of the procedures.

Law

Admissibility

8. For a communication submitted under article 55 of the Charter to be declared admissible, it must satisfy all the conditions stipulated under

article 56 of the Charter. Such conditions must be assessed based on the circumstances of each particular case. In this case, the communication *prima facie* is in accordance with these requirements. The only issue that might be raised is with regard to the exhaustion of local remedies as provided for under article 56(5) of the Charter.

9. Article 56(5) states:

Communications relating to the human and peoples' rights referred to in article 55, received by the Commission, shall be considered if they: . . . Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .

10. The jurisdiction of the courts is ousted by the Treason and Other Offences (Special Military Tribunal) Act. Applying the decisions of the Commission in communication 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*], which concerned the Robbery and Firearms Tribunal, communication 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] on the Civil Disturbances Tribunal, communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] on the Legal Practitioners [(Amendment)] Decree and communication 129/94 [*Civil Liberties Organisation v Nigeria*] relating to the Constitution (Suspension and Modification) Decree and the Political Parties (Dissolution) Decree, the Commission finds that local remedies in the instant communication were non-existent or ineffective. For the above reasons, the Commission declared the communication admissible.

Merits

11. The complainant alleges the illegal arrest and detention of the journalists as being in violation of their right to liberty and security of the person as provided for in article 6 of the Charter. Article 6 of the Charter provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained.

12. The complainant also alleges violation of article 7 of the Charter and principle 5 of the United Nations Basic Principles on the Independence of the Judiciary in that the journalists were tried in secret, were denied access to counsel of their choice and later sentenced to various terms of imprisonment. Further, that the convicted journalists could not appeal against their sentences because of the various decrees promulgated by the military government that ousts the jurisdiction of the regular courts from hearing such cases. Article 7(1) of the Charter provides:

Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.

Principle 5 of the UN Basic Principles stipulates:

Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

13. It is alleged that the convicted persons were not allowed access to their lawyers, neither were they given the opportunity to be represented and defended by lawyers of their own choice at the trial. Article 7(1)(c) of the Charter provides: 'Every individual shall have . . . the right to defence, including the right to be defended by counsel of his choice.'

14. In its Resolution on the Right to Recourse and Fair Trial of 1992, the Commission, in re-enforcing this right, observed in paragraph 2(e)(i) thus: 'In the determination of charges against individuals, the individual shall be entitled in particular to: (i) . . . communicate in confidence with counsel of their choice.' The denial of this right therefore is in contravention of article 7(1)(c) of the Charter.

15. The issue of the arraignment and trial of the journalists must also be addressed here. The complainant alleges that the journalists were arraigned, tried and convicted by a special military tribunal, presided over by a serving military officer and whose membership also included some serving military officers. This is in violation of the provisions of article 7 of the Charter and principle 5 of the UN Basic Principles.

16. It could not be said that the trial and conviction of the four journalists by a special military tribunal presided over by a serving military officer who is also a member of the Provisional Ruling Council (PRC), the body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the Charter. The above Act is also in contravention of article 26 of the Charter. Article 26 of the Charter states:

States parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

17. Unfortunately, the government of Nigeria has not responded to the several requests from the Commission for the former's reaction to the communication. The African Commission on several previous decisions has set out the principle that where allegations of human rights violations go uncontested by the government concerned, particularly after repeated notifications or request for information on the case, the Commission must decide on the facts provided by the complainant and treat those facts as given. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*]

18. In the circumstances, the Commission finds itself compelled to adopt the position that the facts alleged by the complainant are true.

For the above reasons, the Commission:

[19.] Concludes that violations of articles 6 and 7(1)(a), (c), [(d)] and 26 occurred in this case;

[20.] Urges the government of Nigeria to order the release of the four journalists.

* * *

Rights International v Nigeria

(2000) AHRLR 254 (ACHPR 1999)

Communication 215/98, *Rights International v Nigeria*
Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity Report
Rapporteur: Dankwa

Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, exile, 23-24)

Torture (5-7, 26, 31)

Personal liberty and security (arbitrary arrest and detention, 27, 31)

Fair trial (defence — access to legal counsel, 28-29, 31)

Personal liberty and security (no reason given for arrest, 28-29)

Movement (right to leave and return to home country, 30-31)

1. The complainant is an NGO based in the United States.
2. The complainant alleges that Mr Charles Baridorn Wiwa, a Nigerian student in Chicago, was arrested and tortured at a Nigerian military detention camp in Gokana.
3. The complainant alleges that Mr Wiwa was arrested on 3 January 1996 by unknown armed soldiers in the presence of his mother and other members of his family.
4. It is alleged that Mr Wiwa remained in the said military detention camp from [3]-9 January 1996.
5. While in detention, Mr Wiwa was horsewhipped and placed in a cell with 45 other detainees.
6. After Mr Wiwa had been identified as a relative of Mr Ken Saro-Wiwa, he was subjected to various forms of torture.

7. Enclosed in the communication is medical evidence of Mr Wiwa's physical torture.
8. After five days in the detention camp in Gokana, Mr Wiwa was transferred to the State Intelligence Bureau (SIB) in Port Harcourt.
9. Mr Wiwa was held from 9-11 January 1996, without access to a legal counsel or relatives, except for a five-minute discussion with his grandfather.
10. Mr Wiwa, it is alleged, was not informed of the charges against him nor was he provided with an explanation for his prolonged detention until 11 January 1996.
11. On 9 January 1996, Mr Wiwa was finally allowed to prepare a statement in his own defence but without a legal counsel, and he did not know what to write.
12. On 11 January 1996, Mr Wiwa and 21 other Ogonis were brought before the Magistrate Court 2 in Port-Harcourt and charged with unlawful assembly in violation of section 70 of the Criminal Code Laws of Eastern Nigeria 1963.
13. The charging instrument stated that Mr Wiwa participated in the said unlawful assembly on 4 January 1996, which happened to be a day after he was arrested.
14. Mr Wiwa, however, was granted bail.
15. While Mr Wiwa was out on bail some unknown people, believed to be government agents, abducted him and threatened his life by forcing him into a car in Port-Harcourt.
16. On the advice of human rights lawyers, Mr Wiwa fled Nigeria on 18 March 1996 to Cotonou, Republic of Benin where the UN High Commissioner for Refugees declared him a refugee.
17. On 17 September 1996, the US government granted him refugee status and he has been residing in the United States since then.

Complaint

18. The complainant alleges that the following articles of the African Charter on Human and Peoples' Rights have been violated: articles 5, 6, 7(1)(c) and 12(1) and (2).

Procedure

19. The communication is dated 17 February 1998 and was received at the Secretariat on 19 March 1998.

20. At its 23rd ordinary session held in Banjul, The Gambia from 20-29 April 1998, the Commission decided to be seized of this communication and to notify the state concerned to send its comments on admissibility.

21. At its 24th ordinary session held in Banjul, The Gambia from 22 to 31 October 1998, the Commission declared the communication admissible and invited submissions on the merits of the case during the 25th ordinary session. The Commission also requested the Secretariat to study this communication and communication no 205/97 with a view to consolidating them.

Law

Admissibility

22. Article 56(5) of the Charter provides: 'Communications . . . shall be considered if they: . . . Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.'

23. The Commission declared the communication admissible on grounds that there was a lack of available and effective domestic remedies for human rights violations in Nigeria under the military regime.

24. Relying on its precedents in communications 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*] and 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] (the former was brought on behalf of seven men sentenced to death under a decree which prohibits the courts from reviewing any aspect of the trial, while the latter was brought on behalf of the Nigerian Bar Association based on a decree which infringed upon Nigerian lawyers' freedom of association and also precluded the courts from hearing cases relating to the said decree), the Commission interpreted the standard for constructive exhaustion of domestic remedies to be satisfied where there is no adequate or effective remedy available to the individual. In this particular case, the Commission found that Mr Wiwa was unable to pursue any domestic remedy following his flight for fear of his life to the Republic of Benin and the subsequent granting of refugee status to him by the United States of America.

25. On the issue of consolidation of the communication with no 205/97, the Commission decided that since it is a stage behind and since a decision on admissibility is yet to be taken on communication 205/97, it should not, therefore, delay decision on the merits of communication 215/98.

Merits

26. The complainant alleges that while in detention, he was horsewhipped and subjected to various forms of torture. Article 5 of the Charter states:

Every 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 . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

27. The complainant also alleges the illegal arrest and detention of Mr Wiwa as being in contravention of his rights to liberty and security of person as guaranteed under article 6 of the Charter, which provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

28. It is alleged further that except for the five minutes discussion Mr Wiwa had with his grandfather, he was not allowed access to his relatives or a counsel and was also neither informed of the nature of the offence nor the reasons for his arrest and detention in violation of article 7(1)(c) of the Charter, which provides: 'Every individual shall have the right to have his cause heard. This comprises: the right to defence, including the right to be defended by counsel of his choice'.

29. In its Resolution on the Right to Recourse and Fair Trial of 1992, the Commission had observed that:

(2) the right to fair trial includes, among other things, the following: . . . (b) Persons who are arrested shall be informed at the time of the arrest, in a language which they understand, of the reason for their arrest and shall be informed promptly of any charges against them; . . . (e) In the determination of charges against individuals, the individual shall be entitled in particular to: . . . (i) Have adequate time and facilities for the presentation of their defence and to communicate in confidence with the counsel of their choice . . .

30. The complainant alleged that he was abducted and threatened by persons believed to be agents of the government, an action which led to his fleeing the country for safety. He attests that his flight, as evidenced by the granting of refugee status to him by two countries (Republic of Benin and the United States) was based on a well-founded fear of persecution by the Nigerian government. He attests further that since then he has been living in the US as a refugee. The above acts are in violation of Mr Wiwa's rights to freedom of movement and residence and his right to leave and to return to his country guaranteed under article 12 of the Charter, which states:

(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.

31. Despite invitations to the government of Nigeria for its response to the allegations in this communication, the Commission has received none. The Commission is, therefore, compelled to conclude the complaint on the facts in its possession, which are the allegations of the complainant.

For the above reasons, the Commission:

[32.] Finds the government of Nigeria in violation of articles 5, 6, 7(1)(c) and 12(1) and (2) of the Charter.

* * *

Aminu v Nigeria

(2000) AHRLR 258 (ACHPR 2000)

Communication 205/97, *Kazeem Aminu v Nigeria*
Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report
Rapporteur: Dankwa

Admissibility (exhaustion of local remedies — jurisdiction of court ousted, hiding, fear for life, 12, 13)
Equal protection of the law (rampant arrests — forced to go into hiding, 14-15)
Evidence (burden on complainant to furnish evidence, 16)
Life (death threats, 17-18)
Interpretation (not to be narrow, 18)
Personal liberty and security (arbitrary arrest and detention, 19-21)
Association (persecution based on political opinions, 22-23)

1. The complainant alleges that Mr Ayodele Ameen (hereinafter referred to as 'client'), a citizen of Nigeria was arbitrarily arrested, detained and tortured by Nigerian security officials on several occasions between 1995 and the date of the complaint.
2. The complainant alleges that Mr Ayodele Ameen, while in detention, on one occasion was denied medical treatment and also subjected to inhuman treatment.
3. The complainant alleges that his client is being sought by the Nigerian security agents as a result of his political inclination which manifested itself in his role and involvement in agitation within the Nigerian society for a validation of the previously annulled 12 June 1994 elections by the Nigerian military government.
4. The complainant alleges that his client has resorted to the courts for protection but to no avail, by virtue of the provisions of [the State Security (Detention of Persons) Act] no 2 of 1984, as amended.
5. As of the date of the communication, the complainant alleges that his client is in hiding after escaping arrest at the Aminu Kano International Airport, Kano on his way to Sudan.
6. The complainant states that the matter is not pending in any court of law.

Complaint

7. The complainant asserts that the following articles of the African Charter have been violated: articles 3(2), 4, 6 and 10(1).

Procedure

8. The communication is dated 11 July 1997, and was received at the Secretariat of the Commission on 18 August 1997.

9. At its 23rd ordinary session held in Banjul, The Gambia, the Commission decided to be seized of the matter and to notify the government of Nigeria accordingly. Further information was requested regarding the current situation of the victim.

10. At its 26th ordinary session of the Commission held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit their arguments on the merits of the case.

Law

Admissibility

11. The condition for the admissibility of this case was based on article 56(5) of the Charter. This provision requires the exhaustion of local remedies before its consideration by the Commission.

12. The complainant alleged that his client had resorted to the courts for protection but to no avail, because of the operation of Decree no 2 of 1984, as amended. This decree, it is alleged, contains an ouster clause, which like most other decrees promulgated by the military government of Nigeria excludes the courts from entertaining any matter or proceedings relating to it.

13. Relying on its case law (see communications 87/93 [*Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*], 101/93 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria*] and 129/94 [*Civil Liberties Organisation v Nigeria*]), the Commission held that local remedies would not only be ineffective, but are sure to yield no positive result. Secondly, the Commission noted that the complainant's client is in hiding and still fears for his life. In this regard, the Commission calls in aid the statement of the representative of Nigeria in communication 102/93 [*Constitutional Rights Project and Another v Nigeria*] about the 'chaotic' situation that had transpired after the annulment of the elections (see paragraph 57), the validation of which the complainant's client is agitating for. Given the above situation and [well aware of] the prevailing situation under the Nigerian military regime, [the Commission] decided that it would not be proper to insist on the fulfilment of this requirement. For the above reasons, the Commission declared the case admissible.

Merits

14. The complainant alleges a violation of article 3(2) of the Charter by the respondent state. Article 3(2) provides: 'Every individual shall be entitled to equal protection of the law.'

15. The Commission finds that the rampant arrests and detention of Mr

Kazeem Aminu[’s client] by the Nigerian security officials, which eventually led to his going into hiding for fear of his life, has deprived him of his right to equal protection of the law guaranteed under article 3 of the Charter.

16. The complainant alleged that his client was tortured and subjected to inhuman treatment on several occasions by the Nigerian security operatives. The allegation has not been substantiated. In the absence of specific information on the nature of the acts complained of, the Commission is unable to find a violation as alleged.

17. The complainant alleged that the series of arrests and detention suffered by his client, and his subsequent going into hiding is in violation of his right to life under article 4 of the Charter.

18. The Commission notes that the complainant’s client (the victim) is still alive but in hiding for fear of his life. It would be a narrow interpretation of this right to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one’s life and the dignity of one’s person, which this article guarantees, would be protected in a state of constant fear and/or threats, as experienced by Mr Kazeem Aminu[’s client]. The Commission therefore finds the above acts of the security agents of the respondent state in violation of article 4 of the Charter. Article 4 provides:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

19. It is alleged that Mr Kazeem Aminu[’s client] was arbitrarily arrested and detained on several occasions between 1995 and the date of filing this communication (11 July 1997). In his explanation, the complainant asserts that he has resorted to the courts for protection but to no avail, because of the provisions of Decree no 2 of 1984 as amended. The decree, it is alleged, like other decrees promulgated by the military regime, contains an ouster clause barring courts from entertaining proceedings relating to it.

20. It is the duty of the state party to apprehend persons whom it reasonably believes have committed or are in the process of committing offences recognised by its laws. However, such arrests and/or detention must be in accordance with known laws, which in turn must be in accordance with the provisions of the Charter.

21. In the instant case, the Commission finds the above situation where the complainant’s client is constantly arrested and detained without charge and any recourse to the courts for redress, arbitrary and in contravention of article 6 of the Charter. Article 6 provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

22. The complainant further alleged that the respondent state is in violation of article 10(1) of the Charter, in that his client is being sought by the Nigerian security agents as a result of his political belief which manifested itself in his involvement in the agitation for the validation of the annulled 12 June elections. Article 10(1) provides: 'Every individual shall have the right to free association provided that he abides by the law.'

23. In considering the above, the Commission duly takes cognisance of the problem created as a result of the annulment of the elections in Nigeria and its earlier decision thereon (see decision on communication 102/93 [*Constitutional Rights Project and Another v Nigeria*]). In the circumstance, the Commission finds the acts of the security agents towards Mr Kazeem Aminu[*'s client*] in contravention of his right to free association guaranteed under article 10(1) of the Charter.

24. Unfortunately, the government of Nigeria has not responded to the several requests from the Commission for its reaction to the communication.

25. The African Commission in several previous decisions has set out the principle that where allegations of human rights violations go uncontested by the government concerned, particularly after repeated notification or request for information on the case, the Commission must decide on the facts provided by the complainant and treat those facts as given. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*]

26. In the circumstances, the Commission finds itself compelled to adopt the position that the facts alleged by the complainant are true.

For the above reasons, the Commission:

[27.] Finds the Federal Republic of Nigeria in violation of articles 3(2), 4, 5, 6 and 10(1) of the Charter;

[28.] Requests the government of Nigeria to take necessary measures to comply with its obligations under the Charter.

* * *

Media Rights Agenda v Nigeria

(2000) AHRLR 262 (ACHPR 2000)

Communication 224/98, *Media Rights Agenda v Nigeria*
Decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual
Activity Report
Rapporteur: Ben Salem

State responsibility (change of government does not extinguish
claim, 37, 73)

Personal liberty and security (arbitrary arrest and detention, no rea-
sons given for arrest, 40-44)

Fair trial (appeal, 45-46; presumption of innocence — intense pre-
trial publicity, 47, 48; public trial, 49-54; defence — access to legal
counsel, 55-56; impartial court, independence of courts — military
tribunal controlled by the executive, 57-66)

Interpretation (inspiration drawn from international law, wide inter-
pretation of rights, 36, 51, 71)

Expression (persecution because of opinions expressed, 67-69)

Cruel, inhuman or degrading treatment (70-72)

Limitations of rights ('within the law' must be consistent with ob-
ligations under the Charter, 74, 75)

1. The communication, which was sent through e-mail is dated 25 May 1998, and was received at the Secretariat on 26 May 1998.
2. The complaint is filed by Media Rights Agenda, a Nigerian human rights NGO based in Lagos on behalf of Niran Malaolu, editor of an independent Nigerian daily newspaper, *The Diet*.
3. The author complains that Mr Niran Malaolu was arrested together with three other staff of the newspaper by armed soldiers at the editorial offices of *The Diet* newspaper in Lagos on 28 December 1997.
4. Neither Niran Malaolu nor his three colleagues were informed of the reasons for their arrest or shown a warrant of arrest.
5. The three other colleagues who were arrested along with Malaolu were later released.
6. Niran Malaolu continued to be held without charges until 14 February 1998 when he was arraigned before a special military tribunal for his alleged involvement in a *coup d'état*.
7. Throughout the period of his incarceration, Niran Malaolu was not allowed access to his lawyer, doctor or family members.
8. On 28 April 1998, after a secret trial, Niran Malaolu was found guilty by

the tribunal of the charge of concealment of treason and sentenced to life imprisonment.

9. The complainant further alleges that Niran Malaolu's alleged involvement in the *coup d'état* is connected with the news stories published by his newspaper on the *coup d'état* plot involving the then Chief of General Staff, Lt General Oladipo Diya, as well as other military officers and civilians who have also been convicted by the tribunal and given sentences ranging from prison terms to death by firing squad.

10. One of such stories was an article entitled 'The Military Rumbles Again', which was published in the *Sunday Diet* of 28 December 1997 based upon the announcement by the military government of the alleged *coup d'état* plot it claims to have uncovered.

11. Further, the complainant alleges that Niran Malaolu was denied the right to be defended by lawyers of his choice, and instead assigned a military lawyer by the tribunal in contravention of the right to fair hearing.

12. The special military tribunal which tried Niran Malaolu was neither competent, independent nor impartial in that members of the tribunal were hand-picked by the Head of State, General Sani Abacha, and the Provisional Ruling Council (PRC) against whom the alleged offence was committed. Besides this the president of the tribunal, Major-General Victor Malu was also a member of the Provisional Ruling Council (PRC), which is empowered by the Treason and Other Offences (Special Military Tribunal) Act no 1 of 1986, to confirm the death sentences passed by the tribunal. These are alleged to be in violation of the rules of natural justice and, in particular, article 7(b) of the Charter.

13. The arraignment and trial of Niran Malaolu, a civilian, before the special military tribunal using special procedures is a breach of principle 5 of the United Nations Principles on the Independence of the Judiciary and article 7 of the Charter.

14. The complainant alleges further that under the provisions of the Treason and Other Offences (Special Military Tribunal) Act no 1 of 1986, which established the tribunal that tried and convicted the accused, the right of appeal to a higher judicial authority is completely extinguished and those convicted may only appeal to the Provisional Ruling Council (PRC), whose composition and interests are as indicated in paragraph 12 above.

15. The author also contends that the trial of Niran Malaolu *in camera* was a violation of recognised international human rights standards, to wit: the right to a fair and public hearing.

16. Finally, that the arrest, detention, arraignment, trial, conviction and sentence of Malaolu were in grave breaches of the norms of fair trial as guaranteed in the Charter.

Complaint

17. The author alleges that the following articles of the African Charter on Human and Peoples' Rights have been violated: articles 6, 7, 9 and 26.

Procedure

18. At its 25th ordinary session held in Bujumbura, Burundi, the Commission decided to be seized of the communication, and requested the Secretariat to notify the Nigerian government. It also requested the Secretariat to submit an opinion on the admissibility of the communication, particularly in accordance with article 56(7) of the Charter, *vis-à-vis* Nigeria's current political situation.

19. On 19 August 1999, the Secretariat of the Commission notified the parties of this decision.

20. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit written arguments on the merit of the case.

21. On 17 January 2000, the Secretariat notified parties of the above decision.

22. On 17 February 2000, the Secretariat received a *note verbale* from the High Commission of the Federal Republic of Nigeria in Banjul referring to the above *note verbale* and requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare for appropriate responses to the alleged violations: a) The Draft Agenda for the 27th ordinary session and the letter of invitation to the session from the Secretariat; b) A copy of the complaint that was attached to the Secretariat's note; c) A copy of the report of the 26th ordinary session.

23. Further to the above request, the Secretariat of the Commission, on 8 March 2000, forwarded all the documents as requested, except the report of the 26th ordinary session, together with a copy of the summary and status of all pending communications against Nigeria, a copy each of the three communications (nos 218/98, 224/98 and 225/98) as submitted by their authors, and a copy of the written response of the complainant on the merits of this communication.

24. At its 27th ordinary session held in Algeria, the Commission reviewed the case and postponed its further consideration to the next session to enable the government of Nigeria to respond to its request for arguments on the merits of the case.

25. On 31 May 2000, the Secretariat received a letter from the complainant inquiring about the decision of the Commission at the 27th ordinary session.

26. The above decision was communicated to parties on 6 July 2000. The

Secretariat also acknowledged receipt of the complainant's letter of 31 May 2000.

27. On 27 September 2000, the Secretariat received a response from the High Commission of the respondent state in The Gambia. This was intended to be arguments on the merits of communications 224/98 and 225/98. The facts therein however focused on the former communication.

28. On 3 October 2000, the Secretariat of the Commission acknowledged receipt of *note verbale* and indicated the discrepancy. Also, a copy of the submission was forwarded to the complainant for its observations.

29. During the session of the Commission in Benin, the respondent state submitted additional arguments on the matter.

State party's response

30. The government of Nigeria contends that the trial was conducted under a law which was validly enacted by the competent authority at that time. The Treason and Other Offences (Special Military Tribunal) Act, Cap 444 of the Laws of the Federation of Nigeria, 1990 under which Malaolu was tried arose from the ashes of the Treason and Other Offences (Special Military Tribunal) Act no 1 of 1986 enacted by the military government headed by General Ibrahim Babangida (Rtd). Malaolu was, therefore charged, tried, convicted and sentenced to life imprisonment in accordance with the provisions of a known law.

31. The government argues that Malaolu was tried along with a number of people accused of involvement in an alleged plot to overthrow the late General Sani Abacha. It asserts that without going into the merits or demerits of the trial, it was not an ostensible case of victimisation against Malaolu or his profession. Indeed, one or two other journalists were also sentenced to imprisonment at the same trial.

32. It claims that the whole episode took place during a prolonged military regime. It is well known all over the world that military regimes are abnormal regimes and a painful aberration. There was no way of controlling any wanton acts of abuse of fundamental rights by a military junta determined to stay in power at all costs, no matter whose ox was gored.

33. In respect of the allegation that the trial was not fair, it argued that the right to a fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc.

34. The government of Nigeria affirms and reiterates its capacity and determination to defend and promote the rights of its citizens and intends to provide effective and adequate representation at the hearing of the case.

Additional response by state party

35. Mr Malaolu was arrested, detained, tried and convicted under an existing legislation made by a 'legitimate' military administration, which was imposed on the people of Nigeria. Be that as it may, the military regime of General Abdulsalami Abubakar caused Mr Malaolu to be granted pardon and he can institute an action in the ordinary courts on the violation of his rights and also petition the Judicial Commission of Inquiry of Human Rights Violations. Meanwhile, the obnoxious enactment has been repealed.

Law**Admissibility**

36. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of article 56(7) of the Charter in view of the prevailing political situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well-established principle of international law, a new government inherits the previous government's international obligations, including responsibility for the previous government's misdeeds (see communications 64/92, 68/92 and 78/92 [*Achuthan and Another v Malawi*]).

37. The Commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (see communications 27/89, 46/90 and 99/93 [*Organisation Mondiale Contre la Torture and Others v Rwanda*]). Therefore, even if the situation has improved, so that it leads to the release of the detainees, the repeal of the offensive laws and tackles impunity, it still remains the responsibility of the present government of Nigeria to be engaged for acts of human rights violations which were perpetrated by its predecessors.

38. Furthermore, the Commission noted that although Nigeria is under a democratically elected government, the new Constitution provides in its section 6(6)(d) that no legal action can be brought to challenge 'any existing law made on or after 15 January 1966 for determining any issue or question as to the competence of any authority or person to make any such law'.

39. For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

40. The complainant alleges that the arrest and subsequent detention of Malaolu was arbitrary as he was neither shown any warrant of arrest nor informed of the offences for which he was arrested. Further, that Malaolu was arrested by armed soldiers from the Directorate of Military Intelligence

at his office on 28 December 1997 and detained *incommunicado* at a military facility in Lagos until he was moved to Jos, where his trial took place.

41. This, it is contended, is in contravention of article 6 of the African Charter on Human and Peoples' Rights. The said article provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

42. Further to this, the complainant alleges that until 14 February 1998 (that is, about two months after his arrest) when he was arraigned before a special military tribunal for his alleged involvement in a *coup d'état*, Mr Malaolu was neither informed of the reasons for his arrest nor of any charges against him.

43. In its Resolution on the Right to Recourse and Fair Trial of 1992, the Commission had, in expounding on the guarantees of the right to fair trial under the Charter, observed thus:

(2) . . . the right to fair trial includes, among other things, the following: . . . (b) Persons who are arrested shall be informed, at the time of arrest, in a language which they understand, of the reason for their arrest and shall be informed promptly of any charges against them . . .

44. The failure and/or negligence of the security agents who arrested the convicted person to comply with these requirements is therefore a violation of the right to fair trial as guaranteed under article 7 of the Charter.

45. The complainant alleges a violation of article 7(1)(a) of the African Charter on Human and Peoples' Rights, which states:

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force . . .

46. The complainant contends that the decision of the tribunal which tried and convicted Malaolu is not subject to appeal, but to confirmation by the Provisional Ruling Council, the composition of which is clearly partisan. Non-compliance of the competent authorities of Nigeria to this requirement is in breach of the provision of article 7(1)(a) of the Charter.

47. The complainant alleges a violation of article 7(1)(b) of the Charter which provides that: 'Every individual shall have the right to be presumed innocent until proved guilty by a competent court or tribunal.' The complainant alleges in this respect that prior to the setting up of the tribunal, the military government of Nigeria organised intense pre-trial publicity to persuade members of the public that a *coup d'état* plot had occurred and that those arrested in connection with it were guilty of treason. In this regard, it alleges further, any possible claim to national security in exclud-

ing members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore is in breach of the right to fair trial, particularly the right to the presumption of innocence.

48. The government has not contested the veracity of the complainant's submissions. In this circumstance, the Commission is obliged to accept these as the facts of the case and therefore finds the government of Nigeria in violation of article 7(1)(b) of the Charter.

49. The complainant alleges that the exclusion of the members of the public and the press from the actual trial by the tribunal was not justified, and therefore in breach of the right to fair trial.

50. The government argues that the right to a fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc.

51. Neither the African Charter nor the Commission's Resolution on the Right to Recourse and Fair Trial of 1992 contain any express provision for the right to public trial. That notwithstanding, the Commission is empowered by articles 60 and 61 of the Charter to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine. Invoking these provisions, the Commission [refers to] General Comment 13 of the UN Human Rights Committee on the right to fair trial. Paragraph 6 of the said Comment states:

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons . . .

52. The exceptional circumstances under the International Covenant on Civil and Political Rights, which the above Committee monitors, are to safeguard public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The Commission notes that these circumstances are exhaustive, as indicated by the use of the phrase 'apart from such exceptional circumstances'.

53. The government has presented only an omnibus statement in its defence to the effect that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence,

public safety, public order, etc. It has not specifically indicated which of these circumstances prompted it to exclude the public from such trial. The Commission therefore considers the argument not sufficient to avail the government of Nigeria such defence.

54. Considering the fact that, as alleged by the complainant, prior to the setting up of the tribunal the government had organised intense pre-trial publicity to persuade members of the public of the occurrence of a *coup d'état* and the involvement of those arrested in connection to it, the Commission is constrained to find the exclusion of the same public in the actual trial unjustified and in violation of the victim's right to fair trial guaranteed under article 7 of the Charter.

55. It is alleged that prior to his arraignment, precisely for the 49 days he was detained, Mr Malaolu was not allowed access to his lawyer, neither was he given the opportunity to be represented and defended by a lawyer of his own choice at the trial. Rather, he was assigned a military lawyer by the tribunal. The complainant submits that by refusing Mr Malaolu access to his lawyer, the government of Nigeria was in contravention of article 7(1)(c) of the Charter which provides: 'Every individual shall have . . . (c) the right to defence, including the right to be defended by counsel of his choice.'

56. In its Resolution on the Right to Recourse and Fair Trial of 1992, the Commission in reinforcing this guarantee observed in paragraph 2(e)(i) thus: 'In the determination of charges against individuals, the individuals shall be entitled in particular to: (i) . . . communicate in confidence with the counsel of their choice . . .' The denial of this right therefore is a violation of these basic guarantees.

57. The complainant alleged that the special military tribunal which tried the convicted person was neither competent, independent nor impartial because members of the tribunal were selected by the Head of State, General Sani Abacha, and the Provisional Ruling Council (PRC), against whom the alleged offence was committed. Some members of the tribunal were also serving army officers. For instance, the President of the tribunal, Major-General Victor Malu was also a member of the Provisional Ruling Council, which is empowered by the Treason and Other Offences (Special Military Tribunal) Act no 1 of 1986 to confirm the sentences passed by the tribunal. This is a breach of the right to a fair trial as stipulated in article 7(1)(d) of the Charter. Article 7(1)(d) states: 'Every individual shall have . . . the right to be tried . . . by an impartial court or tribunal.'

58. The government has not refuted this specific claim. It only states that the Treason and Other Offences (Special Military Tribunal) Act, Cap 444 of the Laws of the Federation of Nigeria, 1990 under which Malaolu was tried arose from the ashes of the Treason and Other Offences (Special Military Tribunal) Decree no 1 of 1986 enacted by the then military government

headed by General Ibrahim Babangida (Rtd). Further, it asserts that its submission would not address the merits or demerits of the trial.

59. The Commission is not taking an issue with the history and origin of the laws nor the intention for their promulgation. What is of concern here to the Commission is whether the said trial conforms to the fair hearing standards under the Charter. The Commission is of the opinion that to answer this question, it must necessarily consider the merits or demerits of the trial, an issue the government does not want to be involved in.

60. Consequently, the Commission finds the selection of serving military officers, with little or no knowledge of law as members of the tribunal in contravention of principle 10 of the United Nations Basic Principles on the Independence of the Judiciary. The said principle states: 'Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.'

61. In the same vein, the Commission considers the arraignment, trial and conviction of Malaolu, a civilian, by a special military tribunal, presided over by serving military officers, who are still subject to military commands, without more, prejudicial to the basic principles of fair hearing guaranteed by article 7 of the Charter.

62. It is fitting in this regard to cite the Commission's general position on the issue of trials of civilians by military tribunals. In its Resolution on the Right to Fair Trial and Legal Assistance in Africa of 1999, the Commission had, while adopting the Dakar Declaration and Recommendations, noted thus:

In many African countries military courts and special tribunals exist alongside regular judicial institutions. The purpose of military courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.

They should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, special tribunals should not try offences that fall within the jurisdiction of regular courts.

63. The Commission considers the said trial, which has not been refuted by the respondent state, save to the extent that it was done under a law validly enacted by the competent authority at the time, in contravention of the right to fair trial guaranteed under article 7 of the Charter. The Commission also finds the setting up of the said tribunal for the trial of treason and other related offences as impinging on the independence of the judiciary, in as much as such offences are being recognised in Nigeria as falling within the jurisdiction of the regular courts.

64. The Commission also finds the trial in contravention of the basic principle of fair hearing contained in principle 5 of the United Nations Basic Principles on the Independence of the Judiciary (the UN Basic Prin-

ciples) and article 7(1)(d) of the African Charter. Principle 5 of the UN Basic Principles stipulates:

Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

65. Furthermore, in its General Comment on a similar provision of article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee observed:

The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned . . . While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.

(See also its comment on the report of Egypt, UN Doc CCPR/C/79/Add 23 of August 1993.)

66. It could not be said that the trial and conviction of Malaolu by a special military tribunal presided over by a serving military officer, who is also a member of the Provisional Ruling Council (PRC), a body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the Charter. This is also in contravention of article 26 of the Charter which states:

States parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

67. It is also contended by the complainant that Malaolu is being punished by Nigeria's military government over news stories published by his newspaper relating to an alleged *coup d'état* plot involving Nigeria's Chief of Staff and Second-in-Command, Lt General Oladipo Diya and other military officers and civilians. This is alleged to be in contravention of his right to freedom of expression enshrined in article 9 of the Charter.

68. The government argues that Malaolu was tried along with a number of people accused of involvement in the alleged plot to overthrow the late General Sani Abacha. It contends that the trial was not an ostensible case of victimisation against Malaolu or his profession, but rather that one or two other journalists were also sentenced to imprisonment at the same trial.

69. Considering the facts at the disposal of the Commission and the

response of the government, the Commission takes the view that it was only Mr Malaolu's publication which led to his arrest, trial and conviction and therefore finds that in violation of article 9 of the Charter as alleged.

70. The complainant avers that while Mr Malaolu was in detention, he was subjected to such cruel, inhuman or degrading treatment as having his legs and hands chained to the floor day and night. From the day he was arrested and detained, until the day he was sentenced by the tribunal, a total period of 147 days, he was not allowed to take a bath. He was given food twice a day, and while in detention, both in Lagos and Jos before he faced the special investigation panel that preceded the trial by the special military tribunal, he was kept in solitary confinement in a cell meant for criminals. The complainant submits further that the treatment meted out to Mr Malaolu contravened article 5 of the Charter. Article 5 provides:

Every 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.

Principle 1 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988 provides: 'All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.' Further, principle 6 states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

71. It is worth noting that the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental.

72. The government has not denied these allegations. Indeed, it has made it clear that it is not contesting the merits or demerits of the case. In the absence of any information to the contrary from the government, the Commission finds the various forms of treatments meted to Mr Malaolu while in detention, in violation of the victims right to respect and dignity and right to freedom from inhuman or degrading treatment guaranteed under article 5 of the Charter and reinforced by the above Basic Principles. (See communications 27/89, 46/91, 49/91 and 99/93 (*Organisation Mondiale Contre la Torture and Others v Rwanda*). [*The Commission also refers to an unofficial version of an earlier decision, which is omitted here — eds.*])

73. Although not an issue, the Commission notes that the alleged violations took place during a prolonged military rule and that such regimes, as rightly pointed out by the government are abnormal (see the Commission's Resolution on the Military of 1994). The Commission sympathises

with the government of Nigeria over this awkward situation but asserts that this does not in any way diminish its obligations under the Charter, nor the violations committed prior to its coming into office.

74. Finally, the Commission finds it necessary to clarify the position regarding the claim of the government of Nigeria to the effect that the trial was conducted under a law validly enacted by the competent authority at the time. Also that the victim was charged, tried, convicted and sentenced in accordance with the provisions of such a law.

75. In this regard, the Commission recalls its decision in communication 147/95 and 149/96, [*Jawara v The Gambia* paragraph 59], wherein it stated thus: 'For a state to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter.' It is therefore not enough for a state to plead the existence of a law, it has to go further to show that such a law falls within the permissible restrictions under the Charter and therefore in conformity with its Charter obligation. No such reasons have been adduced in the instant case. The Commission therefore rejects this argument.

For these reasons, the Commission:

[76.] Finds the Republic of Nigeria in violation of articles 3(2), 5, 6, 7 (1) (a), (b), (c), (d), 9 and 26 of the African Charter and principle 5 of the UN Basic Principles on the Independence of the Judiciary;

[77.] Urges the Republic of Nigeria to bring its laws into conformity with the provisions of the Charter.

* * *

Huri-Laws v Nigeria

(2000) AHRLR 273 (ACHPR 2000)

Communication 225/98, *Huri-Laws v Nigeria*
Decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual Activity Report
Rapporteur: Ben Salem

State responsibility (change of government/improved situation does not extinguish claim, 36-37)

Interpretation (international law, 36, 40)

Cruel, inhuman or degrading treatment (conditions of detention, 40-41)

Health (detainees denied medical care, 41)
Personal liberty (*incommunicado* detention, arbitrary arrest and detention, no reason given for arrest, no legal remedies to challenge detention, 40-46)
Fair trial (trial within reasonable time, 45-46)
Expression, association (persecution of employees and raids of offices of human rights NGOs, 47-49)
Movement (right to leave and return to home country — harassment, 50-51)
Property (search of premises without warrant — seizure of property, 52-53)

1. The communication is submitted by Huri-Laws, a non-governmental organisation (NGO) registered in Nigeria on behalf of the Civil Liberties Organisation (CLO), another Nigerian human rights NGO based in Lagos.
2. This communication was received at the Secretariat on 24 October 1998, during the 24th ordinary session.
3. It alleges that since the formation of the Civil Liberties Organisation on 15 October 1987, it has experienced all forms of harassment and persecutions from the Nigerian government.
4. These harassments and persecutions have always been carried out in the form of arrests and detention of key members and staff of the organisation and by way of raids and searches without warrants in the organisation's offices by its security agency, the State Security Services (SSS).
5. One of such acts occurred on 7 November 1997, when Mr Ogaga Ifowodo, a lawyer with the organisation, was arrested at the Nigeria-Benin border while returning from the Commonwealth Summit in Edinburgh, Scotland.
6. It is alleged that officers of the National Drug Law Enforcement Agency initially arrested Mr Ogaga.
7. He was first detained at 15 Awolowo Road, Ikoyi, headquarters of the SSS for a few weeks before being transferred to Ikoyi Prison, where he was held until April 1998.
8. The complainant alleges that the victim was detained in a sordid and dirty cell under inhuman and degrading conditions. He was denied medical attention and access to his family and lawyer. He was also denied access to journals, newspapers and books.
9. It is further alleged that he was tortured and rigorously interrogated, and that at no time during his detention was he informed of any charges against him, nor were any charges ever brought against him.
10. In another incident which the complainant contends adds up to the policy of persecutions on the part of the respondent state, it is alleged that

the federal military government of Nigeria and its agents, in exercise of the powers under the State Security (Detention of Persons) Decree no 2 of 1984 (as amended in 1990), arrested and detained Mr Olisa Agbakoba without charge or trial between 8 May and 26 June 1998.

11. It is alleged that Agbakoba, founder and board member of the Civil Liberties Organisation, was arrested at Lagos Airport on his return from Europe and detained at the SSS detention centre at Awolowo Road, Ikoyi, Lagos for five weeks.

12. On 10 May 1998, Mr Agbakoba accompanied by officers of the SSS was brought to the offices of the Civil Liberties Organisation for a search of the premises. Finding few employees present, because it was a non-working day, they departed.

13. On 11 May 1998, at about 10:30 Mr Agbakoba was again brought by about 30 agents of the SSS, who raided the Civil Liberties Organisation's headquarters in Lagos, apparently in search of incriminating materials on the activities of the United Action for Democracy (UAD) and CLO's involvement in its activities and rallies against the military dictatorship of the late General Sani Abacha and his self-succession bid.

14. It is further alleged that for about seven hours, the agents of SSS carried out a thorough search on the offices of CLO from room to room, breaking down doors and ripping open drawers and cabinets in search of documents. During this time, all the staff present were kept confined to the library, only one at a time being summoned to assist with the searching of their desks.

15. At the end of the search, 13 computers, official files and diskettes were carted away by the SSS operatives. Most of the files and documents were copied and photocopied.

16. Despite various protests by the staff, no warrant of arrest was presented to justify the search.

17. Furthermore, five staff of CLO were arrested and detained at the Awolowo Road office of the SSS. Three were released the same night, while Mr Okezie Ugochukwu and Ibrahim Ismail were detained for two days and nights and made to pass through very horrendous interrogation proceedings.

18. After their release, they were mandated to report on a daily basis to the SSS office, where they underwent continuing interrogations.

19. The complainant alleges further that all but one computer were released.

20. It is also alleged that Mr Agbakoba was later removed to Enugu Prison, 600 km east of Lagos.

21. The complainant alleges further that throughout his period of deten-

tion, Mr Agbakoba was neither charged with any crime, nor allowed access to his family, friends, doctors or lawyers. He was later released on 26 May 1998.

22. It is alleged that lawsuits were filed at the Federal High Court by Huri-Laws challenging the arrest and detention of Mr Agbakoba, and by CLO challenging the arrest and detention of Mr Ifowodo, but these suits were unsuccessful since the State Security (Detention of Persons) Decree no 2 of 1984 ousts the jurisdiction of the regular courts.

Complaint

23. The complainant alleges violations of articles 5, 6, 7, 9, 10, 14 and 26 of the Charter.

Procedure

24. At its 25th ordinary session held in Bujumbura, Burundi, the Commission decided to be seized of the communication, and requested the Secretariat to notify the Nigerian government. It also requested the Secretariat to submit an opinion on the admissibility of the communication, particularly in accordance with article 56(7) of the Charter, *vis-à-vis* Nigeria's current political situation.

25. On 19 August 1999, the Secretariat of the Commission notified the parties of this decision.

26. On 21 October 1999, the Secretariat received a letter from the complainant informing it that they would not attend the 26th ordinary session due to lack of funds, but authorised Ms Julia Harrington of the Institute for Human Rights and Development to represent them.

27. During the 26th ordinary session held in Kigali, Rwanda, the Secretariat received a submission from Ms Julia Harrington on additional information relating to the admissibility of the communication.

28. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit written arguments on the merits of the case.

29. On 17 January 2000, the Secretariat notified parties of the above decision.

30. On 17 February 2000, the Secretariat received a *note verbale* from the High Commission of the Federal Republic of Nigeria in Banjul, referring to the above *note verbale* and requesting the Commission to forward the following documents to the country's competent authorities to enable them to prepare for appropriate responses to the alleged violations: (a) The Draft Agenda for the 27th ordinary session and the letter of invitation to the session from the Secretariat; (b) A copy of the complaint that was

attached to the Secretariat's note; (c) A copy of the report of the 26th ordinary session.

31. Further to the above request, the Secretariat of the Commission on 8 March 2000 forwarded all the documents as requested, except the report of the 26th ordinary session, together with a copy of the summary and status of all pending communications against Nigeria, as well as a copy each of the three communications (nos 218/98, 224/98 and 225/98) as submitted by their authors.

32. On 21 March 2000, the legal representative of the complainant sent a letter to the Secretariat informing it that she would present oral arguments on the merits of the case and requested likely dates of such a presentation.

33. By letter of 22 March 2000, the Secretariat informed her of the possible date and drew her attention to the necessity of submitting a copy of the address to it before presentation.

34. At its 27th ordinary session held in Algeria, the Commission deferred taking a decision on the merits of the case to the 28th ordinary session scheduled for Republic of Benin.

35. The above decision was communicated to the parties on 6 July 2000.

Law

Admissibility

36. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of article 56(7) of the Charter in view of the prevailing political situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that, based on the well-established principle of international law, a new government inherits the previous government's international obligations, including responsibility for the previous government's misdeeds (see communications 64/92, 68/92 and 78/92 [*Achuthan and Another v Malawi*]).

37. The Commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (see communications 27/89, 46/90 and 99/93 [*Organisation Mondiale Contre la Torture and Others v Rwanda*]). Therefore, even if the situation has improved, so that it leads to the release of the detainees, the repeal of the offensive laws and tackles impunity, it is still the responsibility of the present government of Nigeria to be engaged for acts of human rights violations which were perpetrated by its predecessors.

38. Furthermore, it submitted that the Commission should not be swayed by the political situation in the country as that is capable of foreclosing the complainants' right to fair hearing, especially where they may be desirous of remedying the alleged violations. In any case, it noted that although Nigeria is now under a democratically elected government, the new con-

stitution provides by its section 6(6)(d) that no legal action can be brought to challenge 'any existing law made on or after 15 January 1966 for determining any issue or question as to the competence of any authority or person to make any such law'.

39. For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

40. The complainant alleges a violation of article 5 of the Charter with respect to Mr Ogaga Ifowodo only. Article 5 states:

Every 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.

It is alleged that Mr Ogaga Ifowodo was detained in a sordid and dirty cell under inhuman and degrading conditions. Also that being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma. Moreover, this deprivation of contact with the outside world and the health-threatening conditions amount to cruel, inhuman and degrading treatment. Principle 1 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988 provides: 'All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.' Further, principle 6 states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

It is worth noting that the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental (see UN Body of Principles).

41. The prohibition of torture, cruel, inhuman or degrading treatment or punishment is absolute. However, as observed by the European Court of Human Rights in *Ireland v United Kingdom* when called upon to decide on a similar provision of the European Convention on Human Rights

... the treatment prohibited under article 3 of the Convention is that which attains a minimum level of severity and ... the assessment of this minimum is, in the nature of things, relative. ... It depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc.

(Judgment of 18 January 1987, series A no 25 paragraph 162; see also the European Commission on Human Rights decision in *Jose Antonio Urruti-*

koetxea v France, decision of 5 December 1996, p 157). The treatment meted out to the victim in this case constitutes a breach of the provision of article 5 of the Charter and the relevant international human rights instruments cited above. Also the denial of medical attention under health-threatening conditions and access to outside world do not fall into the province of 'the respect of the dignity inherent in a human being and to the recognition of his legal status', nor is it in line with the requirement of principles 1 and 6 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. This, therefore, is a breach of article 5 of the Charter.

42. The complainant alleges that the detention of Ogaga Ifowodo and Olisa Agbakoba under the State Security (Detention of Persons) Decree no 2 of 1984 (as amended in 1990) is a violation of their guaranteed right to freedom from arbitrary detention under article 6 of the Charter. This is a violation of article 6 of the Charter which provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained.

43. Closely related to the above violation of the article 6 provision is the violation of the victims' right to fair hearing. The complainant states that up to the date of filing this communication no reason has been given for the victims' arrest and detention, nor have any charges been pressed against them. In expounding on the guarantees of the right to fair trial under the Charter, the Commission observed in its Resolution on the Right to Recourse and Fair Trial of 1992 thus:

(2) the right to fair trial includes, among other things, the following: (b) Persons who are arrested shall be informed, at the time of arrest, in a language which they understand, of the reason for their arrest and shall be informed promptly of any charges against them.

44. The failure and/or negligence of the security agents of the respondent government to scrupulously comply with these requirements is therefore a violation of the right to fair trial as guaranteed under the African Charter.

45. The complainant alleges violation of article 7(1)(a) and (d) of the Charter in that Mr Ifowodo and Agbakoba had no legal remedies available with which they could challenge their detentions. Further, that the absolute ouster of the jurisdiction of the court to adjudicate on the legality or otherwise of acts done under the decree is a violation of the above provision, and also a contravention of article 26 of the Charter. Article 7(1) of the African Charter states:

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.

Article 7(1)(d) states: 'Every individual shall have . . . the right to be tried within reasonable time by an impartial court or tribunal.' This is reinforced by paragraph 2(c) of the Commission's Resolution on the Right to Recourse and Fair Trial of 1992, which provides:

Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released.

46. The refusal and/or negligence on the part of the respondent government to bring Messrs Ifowodo and Agbakoba promptly before a judge or other judicial officer for trial is therefore a violation of article 7(1)(d) of the Charter. This is also in violation of article 26 which stipulates:

State parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

47. The complainant contends that CLO is a human rights organisation, permitting its employees the opportunity to work together towards respect for human rights through organised programmes. Such programmes are aimed at enlightening the people as to their rights. The persecution of its employees and raids of its offices in an attempt to undermine its ability to function in this regard amount to an infringement of articles 9 and 10 of the Charter providing for the rights to freedom of expression and association respectively. Article 9 of the Charter provides: '(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.'

48. The complaint above is therefore a violation of this provision. On the other hand, article 10 states: '(1) Every individual shall have the right to free association provided that he abides by the law.' In its Resolution on the Right to Freedom of Association of 1992, the Commission observed thus:

(1) The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard. (2) In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. (3) The regulation of the exercise of the right to freedom of association should be consistent with state's obligations under the African Charter on Human and Peoples' Rights.

49. The above actions of the respondent state constitute a violation of article 10 of the Charter.

50. The complainant alleges that the arrest and detention of Messrs Ifowodo and Agbakoba while returning from trips abroad are a violation of article 12(2) of the Charter. In this regard, it is contended that when re-entry points become sites of frequent harassment and arrest, freedom of

movement is infringed. Further, the Charter provides for restrictions on the right to freedom of movement only by law for the protection of national security, law and order, public health or morality. The arrest and subsequent detentions of the two men are unjustified by any appeal to these restrictions. Articles 12(1) and (2) state:

(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.

51. The said encroachment, not being in consonance with the above restrictions, is therefore a violation of the victims' right to freedom of movement under article 12(1) and (2) of the African Charter.

52. The complainant alleges that the search without warrant of CLO's premises and the seizure of its property is a violation of article 14 of the Charter. It is contended that article 14 implies that owners have the right to undisturbed possession, use and control of their property however they deem fit. Article 14 of the African Charter provides:

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

53. The complainant further contends that no evidence was ever offered of public need or community interest to justify the search and seizure. The said encroachment therefore is a violation of article 14 of the Charter.

54. Unfortunately, to date, the government of the Federal Republic of Nigeria has neither responded to the Commission's request for additional information/observations nor for the arguments on the merits of the case. In these circumstances, the Commission is therefore compelled to accept the facts of the complainant as the facts of this case.

For the above reasons, the African Commission:

[55.] Finds the federal government of Nigeria in violation of articles 5, 6, 7(1)(a) and (d), 9, 10(1), 12(1) and (2), and 14 of the African Charter.

RWANDA

Organisation Mondiale Contre la Torture and Others v Rwanda

(2000) AHRLR 282 (ACHPR 1996)

Communications 27/89, 49/91 and 99/93, *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Démocrates, International Commission of Jurists, Union Inter africaine des Droits de l'Homme v Rwanda*

Decided at the 20th ordinary session, Oct 1996, 10th Annual Activity Report

Mission by Commission (unsuccessful attempts to send mission, 8)

Admissibility (exhaustion of local remedies — serious or massive violations, 16, 17)

Interpretation (international standards, 20)

Equality, non-discrimination (discrimination on the grounds of ethnicity or nationality, 21, 22, 28, 30)

Life (extrajudicial executions, 23, 24)

Cruel, inhuman or degrading treatment (conditions of detention, 25, 26)

Personal liberty and security (arbitrary arrest and detention, 27, 28)

Expulsion (asylum, 30; mass expulsion, 29-32)

Fair trial (right to be heard — no possibility to challenge expulsion in courts, 33, 34)

Serious or massive violations (36)

[1.] Communication 27/89 alleges the expulsion from Rwanda of Burundi nationals who had been refugees in Rwanda for many years (Bonaventure Mbonuabucya, Baudouin Ntatundi, Vincent Sinarairaye and Shadrack Nkunzwenimana). They were told on 2 June 1989 that they had a month to leave the country. The reason given for their expulsion was that they were a national security risk due to their 'subversive activities'. The refugees were not allowed to defend themselves before a competent court.

[2.] Communication 46/90 alleges that arbitrary arrests and summary executions have occurred in Rwanda.

[3.] Communication 49/91 alleges the detention of thousands of people in various parts of the country by the Rwandan security forces. These arrests have been made on the basis of ethnic origin and peaceful political activities. The communication states that over 1 000 people including women,

children and the aged are held in deplorable conditions. A large number of villages have been destroyed and villagers, mostly Tutsis, have been massacred.

[4.] Communication 99/93 alleges serious and massive violations between October 1990 and January 1992. A report was submitted at the same time detailing such violations as widespread massacres, extrajudicial executions and arbitrary arrests against the Tutsi ethnic group.

Procedure

[5.] Communication 27/89 was submitted on 22 June 1989 by *Organisation Mondiale contre la Torture* and *Association Internationale des Juristes Démocrates*. The letter of the Free Legal Assistance Group was dated 17 March 1989, that of the Austrian Committee against Torture was dated 29 March 1989 and that of the *Centre Haitien* 20 April 1989.

[6.] The Commission was seized of the communication at the 6th ordinary session in October 1989.

[7.] On 14 March 1990 the Secretariat of the Commission notified the Ministry of Foreign Affairs of Rwanda.

[8.] From 1990 to 1995 the Commission attempted unsuccessfully to send a mission to Rwanda in order to carry out investigations on these cases.

[9.] Communication 46/90 was submitted by the International Commission of Jurists on 16 October 1990.

[10.] On 6 November 1990 a notification was sent to the Ministry of Foreign Affairs by registered mail.

[11.] At the 10th ordinary session, in October 1991, the communication was declared admissible. The Ministry of Foreign Affairs was notified of this decision on 23 October 1991.

[12.] Communication 49/91 was submitted by the *Organisation Mondiale Contre la Torture* (OMCT) on 28 November 1990.

[13.] Communication 99/93 was submitted by *Union Inter africaine des Droits de l'Homme* on 20 March 1993.

[14.] From 1993 to 1995 various letters and notifications were sent to Rwanda, to which there was no response from the government.

Law

Admissibility

[15.] It appears, as stated under article 58 of the African Charter, the communications 27/89, 46/90, 49/91 and 99/93 against Rwanda reveal the existence of a series of serious or massive violations of the provisions of the African Charter.

[16.] Article 56 of the African Charter requires that complainants exhaust local remedies before the Commission can take up a case, unless these remedies are, as a practical matter, unavailable or unduly prolonged. The requirement of exhaustion of local remedies is founded on, amongst others, the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international tribunal.

[17.] In accordance with its earlier decisions on cases of serious and massive violations of human rights, and in view of the vast and varied scope of the violations alleged and the large number of individuals involved, the Commission holds that remedies need not be exhausted and, as such, declares the communications admissible.

[18.] For the above reasons, the Commission declared the communications admissible.

Merits

[19.] The main goal of the communications procedure before the Commission is to initiate a positive dialogue [between the complainants and the state in order to reach an amicable settlement]. A prerequisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.

[20.] In the present case, there has been no substantive response from the government of Rwanda, despite the numerous notifications of the communications sent by the African Commission. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*] This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights. The fact that the government of Rwanda does not wish to participate in a dialogue obliges the Commission to continue its consideration of the case regrettably on the basis of facts and opinions submitted by only one of the parties.

[21.] Article 2 of the Charter reads:

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, . . . national and social origin . . .

[22.] There is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates article 2.

[23.] Article 4 of the Charter reads:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

[24.] The massacre of a large number of Rwandan villagers by the Rwandan armed forces and the many reported extrajudicial executions for reasons of their membership of a particular ethnic group is a violation of article 4.

[25.] Article 5 of the Charter reads: 'Every individual shall have the right to the respect of dignity inherent in a human being . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

[26.] The conditions of detention in which children, women and the aged are held violates their physical and psychological integrity and therefore constitutes of violation of article 5.

[27.] Article 6 of the Charter reads:

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.

[28.] The arrests and detentions by the Rwandan government based on grounds of ethnic origin alone, in the light of article 2 in particular, constitute arbitrary deprivation of the liberty of an individual. These acts are clear evidence of a violation of article 6.

[29.] Article 12 of the African Charter reads:

(3) Every individual shall have the right, when persecuted to seek and obtain asylum in other countries in accordance with the laws 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.

[30.] This provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state. Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum. The Burundian refugees in this situation were expelled in violation of articles 2 and 12 of the African Charter.

[31.] Article 12(5) of the African Charter reads: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

[32.] There is ample evidence in this communication that groups of Burundian refugees have been expelled on the basis of their nationality. This constitutes a clear violation of article 12(5).

[33.] Article 7(1) of the Charter reads:

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights . . .

[34.] By expelling these refugees from Rwanda, without giving them the opportunity to be heard by the national judicial authorities, the government of Rwanda has violated article 7(1) of the Charter.

[35.] The African Commission is aware of the fact that the situation in Rwanda has undergone dramatic change in the years since the communications were introduced. Furthermore, the Commission has to rule on the facts which were submitted to it.

For the above reasons, the Commission:

[36.] Holds that the facts constitute serious or massive violations of the African Charter, namely of articles [2], 4, 5, 6, 7, 12(3) and 12(4) and 12(5) of the Charter;

[37.] Urges the government of Rwanda to adopt measures in conformity with this decision.

SENEGAL

Mouvement des Réfugiés Mauritaniens au Sénégal v Senegal

(2000) AHRLR 287 (ACHPR 1997)

Communication 162/97, *Mouvement des Réfugiés Mauritaniens au Sénégal v Senegal*
Decided at the 22nd ordinary session, Nov 1997, 11th Annual Activity Report

Admissibility (compatibility with the Charter, 21-23)

1. The complainant alleges that during the operations carried out from 16–29 October 1996 in the region of Podor, Mauritanian refugees established there were the main targets of the Senegalese security forces. Refugees were reportedly arrested and subjected to all sorts of humiliating treatment during identity checks. The green cards the Senegalese state had issued to them were allegedly not regarded as valid by the security forces who considered them expired.
2. The complainant further alleges that a group of individuals described as Mauritanian refugees were arrested by the Senegalese gendarmerie in Mboumba and on the Island of Morphil in October 1996.
3. The communication finally alleges that these Mauritanian refugees are still being held at the Central Prison in Saint Louis, while Senegalese nationals arrested together with them have been set free.
4. In a *note verbale* dated 24 July 1997, addressed to the Secretariat of the Commission, the Senegalese Ministry of Foreign Affairs and Expatriate Senegalese maintains that since the month of December 1995, when the United Nations High Commission for Refugees stopped distributing food, the majority of Mauritanian refugees voluntarily returned to Mauritania and those who remained are moving about freely and that they are shuttling between Rosso/Senegal and Rosso/Mauritania trying to reach an agreement with the Waly of Trarza in order to arrange for their final repatriation. The Ministry of Foreign Affairs insists that, in spite of the fact the refugees do not carry green cards, they are nevertheless free to go about their business on both sides of the common border.
5. The Ministry of Foreign Affairs also claims that the following four Mauritanian refugees, Samba Mbare, Alassane Bodia, Oumar Bodia and Balla Samba, arrested by the Senegalese gendarmerie for allegedly taking part

in the murder of an officer of the Mauritanian gendarmerie, were set free for lack of evidence. The Ministry of Foreign Affairs therefore argues that the communication should be declared inadmissible on the grounds that the allegations it contains are unfounded.

6. In reaction to the arguments of the defendant state, the complainant reiterated the facts alleged and rejected the Senegalese government's claim that the refugees voluntarily returned to their home country. According to the complainant, the refugees decided to return not individually but as a group and only after obtaining assurances about their security and reintegration into Mauritanian society.

7. The complainant claims that those refugees who left for Mauritania returned to Senegal because of threats they faced from Mauritanian authorities, the lack of assistance and the undisguised indifference of Mauritians concerning their situation. The complainant reiterates that the refugees continue to be handicapped by the fact that they do not possess green cards. The lack of this document prevents them, for example, from applying for employment within the Senegalese civil service.

8. The communication, however, does not indicate the provisions of the African Charter on Human and Peoples' Rights the defendant state may have violated.

Procedure

9. The communication was received by the Secretariat on 9 January 1997.

10. On 16 January 1997, the Secretariat informed the defendant state by *note verbale* about the substance of the communication. On the same day, it wrote to the complainant requesting it to state whether the information contained in its letter of 4 November 1996 was to be considered as a communication under the terms of article 55 of the Charter.

11. On 21 January 1997, the complainant replied in the affirmative to the question asked by the Secretariat.

12. On 27 February 1997, the Secretariat informed the complainant that its complaint had been recorded under number 162/97 and that it would be submitted to the Commission for a decision on its admissibility at the 21st ordinary session scheduled for April 1997.

13. On the same day, a *note verbale* was addressed to the defendant, informing it that the communication had been recorded and requesting it to submit its views about its admissibility.

14. On 19 March 1997, the Secretariat received a *note verbale* emanating from the Senegalese High Commission in The Gambia, acknowledging receipt of its note of 16 January 1997 and informing it that the dossier had been referred to the competent Senegalese authorities.

15. At the 21st session, the Communication was submitted to the Com-

mission which decided to postpone consideration of its admissibility until the 22nd session to be held in November 1997.

16. On 13 June 1997, the Secretariat addressed a *note verbale* to the Ministry of Foreign Affairs of Senegal informing it of the Commission's decision and requesting it to send its government's observations and arguments concerning this matter.

17. On 24 July 1997, the Secretariat received a *note verbale* from the Ministry of Foreign Affairs of Senegal containing the observations and arguments of its government on this matter.

18. On 25 July 1997, the Secretariat wrote to the complainant sending it a copy of the defendant's reply and requesting its own response. This response was received by the Secretariat on 6 October 1997.

19. At the 22nd session held from 2-11 November 1997, the Commission reached a decision on the question of admissibility.

Law

Admissibility

20. The Commission recalls that under the terms of the provisions of article 56(5), communications shall be considered by the Commission if they: 'Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'

21. In this case, it should be noted that the complainant avoids saying that it has not used the remedies supposed to be available to it under the legal system of the defendant state. Further, it simply presents facts which, *prima facie*, do not show that the Senegalese state may be responsible.

22. Further, the complainant does not mention the provisions of the Charter which the Senegalese state may have violated.

[23.] On these grounds, the Commission declares the communication inadmissible.

* * *

Union Nationale des Syndicats Autonomes du Sénégal v Senegal

(2000) AHRLR 290 (ACHPR 2000)

Communication 226/99, *Union Nationale des Syndicats Autonomes du Sénégal v Senegal*

Decided at the 28th ordinary session, Oct/Nov 2000, not reported in the 14th Annual Activity Report, source: www1.umn.edu/humanrts/africa/

Admissibility (failure to exhaust local remedies, 13, 14)

1. The complainant is a trade union congress *Union Nationale des Syndicats Autonomes du Sénégal* (National Union of Autonomous Trade Unions of Senegal), known by its acronym UNSAS. It claims that on 20 July 1998, at 6.20 am, the Senegalese government caused the arrest of Mr Mademba Sock, Secretary General of UNSAS and of the *Syndicat Unique des Travailleurs de l'Electricité* (SUTELEC), as well as 25 delegates and members of SUTELEC's executive. According to the complainant, these arrests were effected in flagrant violation of labour freedoms. The detainees were kept for four days without the opportunity of communicating with their counsel or their relations. This, according to UNSAS, constitutes violation of the provisions of article 10 of the International Covenant on Civil and Political Rights, which is incorporated into Senegal's Constitution.

2. UNSAS and other unions, joined by broad sectors of the labour world, mobilised themselves to push for the release of the detainees and their return to their posts, as well as for the opening of negotiations with the government with a strong concern for preserving social peace. Since then, the peaceful demonstrations that have been regularly declared have been subjected to unwarranted prohibitions on the part of the public authorities and 'fierce' repression, which has spared neither the head office of the union (regardless of the principle of inviolability of trade union premises, as recognised in International Labour Organisation conventions), nor private residences.

3. The complainant also states that the legal action brought against the detainees has yet to show any sign of respect for the right of access to defence counsel. In support of this view, the complainant states that the court had upheld its demands when it ordered the results of the preliminary investigation to be set aside and for the case to be withdrawn. According to the complainant, the presentation of the case before the criminal court for a judgment expected to be handed down by 15 October 1998 did not permit the exhaustion of all local remedies.

4. Without citing any specific provision of the African Charter on Human and Peoples' Rights, the complainant expresses the view that, in this case, the Commission should see to it that the socio-economic rights of the detainees and their families are respected.

Procedure

5. The communication is dated 13 October 1998 and was received by the secretariat at the 24th ordinary session.

6. On 11 January 1999, the secretariat wrote to the complainant to request information regarding the progress of the internal procedure. As of the date of the 25th ordinary session of the Commission, no feedback had been received.

7. On 16 April 1999, the secretariat received registered mail from the complainant dated 14 March 1999, to which was attached a copy of the judgment of 8 December 1998 rendered by the Special Regional Court of Dakar acting as a Court of Summary Jurisdiction. This letter reported on the progress of local remedies. It was unfortunately only received by the secretariat after the filing of the relevant documents to be submitted to the 25th session and could not therefore be taken into account.

8. A reading of the judgment and correspondence mentioned above highlights the following:

(a) The Special Regional Court decided to discharge the accused with regard to the charges of damaging and conniving to damage public utility electrical installations belonging to the *Société Nationale d'Electricité* (SENELEC) as well as the charge of hindering the free exercise of industry or labour. (b) The same court convicted Mr Sock for 'acts or manoeuvres likely to compromise public security' and sentenced them to a prison term of six (6) months. (c) Mr Sock submitted his appeal against the judgment. (d) After having served his sentence including four and half months of pre-trial detention, Mr Sock was released on 23 January 1999.

9. The complainant asserts that the judgment of the Special Regional Court is founded on a description of the facts on the basis of the wide provision of section 80 of the old Senegalese Penal Code. According to the complainant, Mr Sock is a victim of a 'conspiracy' geared towards destabilising and weakening SUTELEC.

10. At its 26th ordinary session, the Commission deferred the communication to the 27th ordinary session.

11. At its 27th ordinary session held in Algeria, the Commission deferred consideration of the case to the 28th session.

12. On 20th July 2000, parties were informed of the Commission's decision accordingly.

Law**Admissibility**

13. Article 56(5) of the Charter provides: 'communications . . . shall be considered if they: . . . are sent after exhausting local remedies, if any, unless, it is obvious that this procedure is unduly prolonged.'

14. Although the communication presents a *prima facie* case of series of violations of the African Charter a close look at the file indicates that the complainant is yet to exhaust all domestic remedies.

For the above reasons, the Commission:

[15.] Declares the communication inadmissible.

SIERRA LEONE

Forum of Conscience v Sierra Leone

(2000) AHRLR 293 (ACHPR 2000)

Communication 223/98, *Forum of Conscience v Sierra Leone*
Decided at the 28th ordinary session, Oct/Nov 2000, 14th Annual
Activity Report
Rapporteur: Dankwa

Admissibility (effect of execution of death penalty, 14)

Fair trial (appeal, 15-17, 20)

Life (death penalty, 18-19)

Mission by Commission (mission to state party, 20)

1. The complaint was submitted by the Forum of Conscience, a Sierra Leonian Human Rights NGO, on behalf of 24 soldiers who were executed on 19 October 1998 in Freetown, Sierra Leone.
2. The complainant alleges that the 24 soldiers were tried and sentenced to death by a court martial for their alleged roles in the *coup d'état* that overthrew the elected government of President Tijan Kabah.
3. The communication alleges further that the trial of the soldiers by the court martial was flawed in law and in violation of Sierra Leone's obligation under the African Charter.
4. It is also alleged that the court martial, which tried and convicted the above victims, allowed no right of appeal against conviction or sentence to a higher tribunal and therefore in breach of article 7(1) of the African Charter on Human and Peoples' Rights.
5. The complainant contends that the public execution of the 24 soldiers on 19 October 1998 after they were denied the right of appeal to a higher tribunal also amounts to an arbitrary deprivation of the right to life contrary to article 4 of the African Charter.

Complaint

The complainant alleges violations of articles 1, 4 and 7(1)(a) and 7(1)(d) of the African Charter.

Procedure

6. The communication was received at the Secretariat on 24 October 1998.
7. At its 25th ordinary session held in Bujumbura, Burundi, the Commission postponed consideration of the communication to its 26th ordinary session.
8. On 11 May 1999, the Secretariat of the Commission notified the parties of this decision.
9. At its 26th ordinary session held in Kigali, Rwanda, the Commission decided to be seized of this communication.
10. Between 14 and 19 February 2000, when the Commission's delegation visited Sierra Leone on a promotional mission, the subject of the complaint was taken up with relevant government officials, including the Attorney-General of Sierra Leone.
11. On 2 March 2000, the Secretariat of the Commission informed the parties of the decision taken by the Commission at its 26th ordinary session.
12. At its 27th ordinary session held in Algeria, the Commission examined the case and declared it admissible. It requested the parties to furnish it with arguments on the merits of the case.
13. The above decision was communicated to the parties on 12 July 2000.

Law**Admissibility**

14. The Commission takes note of the fact that the complaint was filed on behalf of people who had already been executed. In this regard, the Commission held that there were no local remedies for the complainant to exhaust. Further that even if such a possibility had existed, the execution of the victims had completely foreclosed such a remedy.

Merits

15. The complainant alleges that the decision of the court martial is not subject to appeal and is therefore a violation of the victims' rights to fair trial.

16. The facts as submitted by the complainant disclose that the 24 soldiers were executed publicly after being deprived of the right of appeal to a higher tribunal. In its Resolution on the Right to a Fair Trial and Legal Assistance in Africa of 1999, the Commission had, in adopting the Dakar Declaration and Recommendations, noted thus:

In many African countries, military courts and special tribunals exist alongside regular judicial institutions. The purpose of military courts is to determine of-

fences of a purely military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.

17. The Commission notes that the trial in issue was of a purely military nature, ie for their alleged roles in the *coup d'état* which overthrew the elected government. The Commission is however constrained to hold that the denial of the victim's right of appeal to competent national organs in a serious offence as this falls short of the requirement of the respect for fair trial standards expected of such courts. The execution of the 24 soldiers without the right of appeal is therefore a violation of article 7(1)(a) of the Charter. This is more serious given the fact that the said violation is irreversible. Article 7(1)(a) of the Charter states: 'Every individual shall have a the right to an appeal to competent national organs against acts violating his fundamental rights . . .'

18. The complainant alleges a violation of article 4 of the African Charter on Human and Peoples' Rights which provides that: 'Human beings are inviolable. Every human being shall be entitled to respect for his life No one may be arbitrarily deprived of this right.'

19. The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life. Having found above that the trial of the 24 soldiers constituted a breach of due process of law as guaranteed under article 7(1)(a) of the Charter, the Commission consequently finds their execution an arbitrary deprivation of their rights to life provided for in article 4 of the Charter. Although this process cannot bring the victims back to life, it does not exonerate the government of Sierra Leone from its obligations under the Charter.

20. The Commission notes the failure of the competent authorities of the Republic of Sierra Leone to respond to its request for additional information and arguments on the admissibility and merits of the case. It is noted that the Minister of Justice and Attorney-General explained to the Commission's mission referred to above that the regulations of the military did not allow for the right of appeal. However, before the Commission, the African Charter is the yardstick for determining violations. The rules and regulations governing the court martial, to the extent that they do not allow the right of appeal, offend the Charter. But it is noted with satisfaction that the law has been amended, subsequent to the mission to Sierra Leone, to bring it into conformity with the Charter.

For the above reasons, the Commission:

[21.] Finds the government of Sierra Leone in violation of articles 4 and 7(1)(a) of the African Charter on Human and Peoples' Rights.

SUDAN

International Pen (in respect of al-Jazouli) v Sudan

(2000) AHRLR 296 (ACHPR 1995)

Communication 92/93, *International Pen (in respect of Kemal al-Jazouli) v Sudan*
8th Annual Activity Report

Admissibility (failure to exhaust local remedies, 3)

1. The communication concerns one Kemal al-Jazouli, who was held *incommunicado* without charge from March to June 1992. During this period he had no opportunity to challenge his detention in a court of law.

Complaint

2. The complaint alleges violations of articles 6 and 7 of the African Charter.

Decision

3. The Commission is of the opinion that none of the information given whether taken individually or together can constitute exhaustion of local remedies. The victim was tried in June 1992 and the complaint was lodged with the Commission in March 1993. He had ample freedom to exhaust local remedies before he approached the Commission. The fact that the government has in general terms denied the existence of *incommunicado* detentions in Sudan does not amount to saying that the case has been tried in Sudanese courts.

For these reasons, the Commission:

[4.] Declares the communication inadmissible for non-exhaustion of local remedies.

* * *

Amnesty International and Others v Sudan

(2000) AHRLR 297 (ACHPR 1999)

Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*
Decided at the 26th ordinary session, Nov 1999, 13th Annual Activity Report
Rapporteurs: 17th–20th sessions: Kisanga; 21st–26th sessions: Rezag-Bara

Evidence (corroboration by reference to report of UN Special Rapporteur, 8, 48)

Admissibility (exhaustion of local remedies — serious or massive violations, jurisdiction of courts ousted 31-39; continuing violation, 6, 40)

State responsibility (duty to give effect to rights in the Charter in national law, 40, 42; responsibility for actions of non-state actors, 50; insufficient investigation into alleged violations, 51, 56; improved situation no effect on past violations, 45, 83)

Derogation (not possible under the Charter, 42, 79)

Missions by Commission (mission to state party, 26, 46)

Life (death penalty, extrajudicial executions, 47-52)

Torture (53-57)

Personal liberty and security (arbitrary arrest and detention, *incommunicado* detention 57-60)

Limitations of rights (limitations should not undermine rights guaranteed by constitution and international standards must be acceptable in democratic society, 59, 80, proportionality, 82)

Fair trial (appeal, defence — access to legal counsel, 64; impartial court — military tribunal — dismissal of judges, 61-70; competent court, 62)

Conscience (application of Shari'a law to non-Muslims, 18-20, 71-76)

Equality, non-discrimination (discrimination on the grounds of religion, 72-76)

Expression (persecution because of opinions expressed, 77-80)

Assembly (permission required to assemble, 81-82)

All the communications pertain to the situation prevailing in Sudan between 1989 and 1993.

1. Communication 48/90, submitted by Amnesty International, and communication 50/91, submitted by *Comité Loosli Bachelard*, deal with the arbitrary arrests and detentions that took place following the *coup d'état*

of 30 July 1989 in Sudan. It is alleged therein that hundreds of prisoners were detained without trial or charge.

2. Communication 50/91 alleges that since June 1990 members of opposition groups, among them Abdal-Qadir, Mohammed Salman and Babiker Yahya, have been arrested, detained, and subjected to torture. Other detainees include lawyers, members of opposition groups and human rights activists. The allegations are based on information from a wide variety of sources including interviews with eyewitnesses.

3. According to the plaintiff, Decree no 2 of 1989 permits the detention of anyone 'suspected of being a threat to political or economic security' under a state of emergency; the right to personal liberty and security was protected under the 1985 Transitional Constitution, article 21, but the Constitution was suspended in 1989. The complainant further claims that the President can order the arrest of anyone without the need to give reasons for such detention. No judicial challenge of such decisions is permissible. Decree no 2 also provides for the creation of special courts to try those arrested under the state of emergency legislation. Section 9 of the decree ousts the jurisdiction of the ordinary courts in cases arising from its enforcement. It is further alleged that the 1990 National Security Act created a National Security Council and Bureau. Under this act, the security forces have powers of arrest, entry and search. Persons can be detained under this act, without access to family, or lawyers for up to 72 hours, renewable for up to one month. Detention can be for up to three months if for the 'maintenance of public security' and on approval of the Security Council and a magistrate. Appeal to a magistrate is permitted. In 1994 this act was amended, enabling the National Security Council to renew a three-month order without reference to any persons. Further renewals require approval by a judge. There is no right to challenge detention under this act and no reasons need be given for such detention.

4. The communications additionally allege that political prisoners are kept in secret detention centres known as 'ghost houses'. One of these was closed in 1995 and prisoners were transferred to the main civil prison in Khartoum.

5. The communications also allege widespread torture and ill-treatment in the prisons and 'ghost houses' in Sudan. These allegations are supported by doctor's testimonies, personal accounts of alleged victims and a report by the UN Special Rapporteur. A number of individual victims are named. Additionally, it is alleged that many individuals were tortured after being arrested at army checkpoints or in military or war zones. Acts of torture included forcing detainees to lie on the floor and being soaked with cold water; confining four groups of individuals in cells 1.8 metres wide and one metre deep, deliberately flooding cells to prevent detainees from lying down, forcing individuals to face mock executions, and prohibiting them from washing. Other accounts describe burning [prisoners] with cigarettes and the deliberate banging of doors at frequent intervals throughout the

night to prevent [prisoners from] sleeping. Individuals were bound with rope so that circulation to parts of their bodies was cut off, they were beaten severely with sticks, and had battery acid poured onto open wounds.

6. The communications allege extrajudicial executions. Thousands of civilians have been killed in southern Sudan in the course of the civil war, and the government is alleged to have executed suspected members of the SPLA without trial and there has been no investigation into or prosecution for such incidents. In the course of counter-insurgency attacks, civilians in the Nuba Mountains area and northern Bahr al-Ghazal were killed when their villages were destroyed. This occurred in 1987-1989 but continues to this day.

7. In addition, detainees suspected of being supporters of the SPLA are alleged to have been arrested and then immediately executed in areas in southern Sudan.

8. Executions are also alleged to have been carried out by militia groups which are believed to have close connections with and the support of the government. No independent inquiry has been conducted into their activities nor have any persons been prosecuted in connection with such killings. These allegations are supported by evidence collected by the UN Special Rapporteur.

9. According to the complainant, an investigation was conducted in December 1987 by Abdel Latif district magistrate, Osamn Suleiman, into executions. A provincial judge ordered the investigation and the resulting report was to have been sent to the High Court in December 1988. No conclusions were ever made public.

10. In 1987 Dr Abdel Nabi Ali Ahmed, the Governor of South Darfur, announced the creation of a Commission of Inquiry into the massacres that occurred in the region in 1987. It was to have been composed of the District Prosecutor and police and security officials. A second commission was also said to have been set up to look into the background of the disturbances. The Commission of Inquiry sent a report to the Prime Minister in September 1987, but this was never made public. A National Committee of Investigation was set up by the Prime Minister but it is unclear if this was ever convened.

11. The complainant also claims that the 1983 Penal Code permits the use of the death penalty for a number of offences: murder — where it is mandatory; mutiny by a member of the armed forces; political offences — such as subversion, war against the state, treason, espionage, upsetting the national economy. Death sentences for murder can be set aside if the victim's relatives agree and compensation is paid to them by the accused. Section 47 creates an offence of attempt, abatement, causing or conspiring with others to facilitate mutiny, with a maximum penalty of death. The penalty also applies to those present at a mutiny without doing their ut-

most to suppress it; having knowledge or information or intention to go on a mutiny and failure to report such a state of affairs.

12. Communication 48/90 describes how the calling and organisation of a strike, possession of undeclared foreign currency, illegal production of and trading in drugs can also result in the death sentence. Individuals sentenced to death were not allowed to appeal against their conviction to a high court, nor permitted to have legal representation at new trials.

13. Communication 48/90 alleges that the 28 army officers executed on 24 April 1990 were allowed no legal representation. It adds that in July 1989, the Constitution of Special Tribunals Act was passed, dealing exclusively with the establishment of such tribunals. Under section 3 of that act, the President, his deputies or senior army officers could appoint three military officers or 'any other competent persons' as judges. All sentences were to be confirmed by the Head of State and appeal was only allowed against the death penalty or imprisonment terms of more than one year.

14. In September 1989 these special tribunals were abolished and replaced by the so-called Revolutionary Security Courts. The presiding judge and two others were to be chosen by the [Revolutionary Command Council] for their competence and expertise. Appeal was to a Revolutionary Security High Court but only against sentences of death and for those of imprisonment for more than 30 years. The September laws were to be applied in these courts from December 1989.

15. In December 1989 the government created more special courts in which lawyers, while being permitted to consult the accused prior to trial, are not allowed to address the court. Appeal is to the Chief Justice alone, not to any higher court.

16. Communication 52/91 provides evidence that over 100 judges have been dismissed in order to systematically dismantle the judiciary, which was opposed to the formation of special courts and military tribunals.

17. Information contained in communications 48/90 and 52/91, presented by the Lawyers Committee for Human Rights, describes government efforts to undermine the independence of the judiciary and the rule of law. It is alleged, in particular, that the government established special tribunals, which are not independent. The ordinary courts are precluded from hearing cases that are of the exclusive competence of the special tribunals. It is further alleged that the right to defence before these special tribunals is restricted. The communications also indicate that people brought before these tribunals are denied the right to contest the grounds for their detention under emergency legislation.

18. Communication 89/93, submitted by the Association of Members of the Episcopal Conference of East Africa, alleges oppression of Sudanese Christians and religious leaders, expulsion of all missionaries from Juba, arbitrary arrests and detention of priests, the closure and destruction of

church buildings, the constant harassment of religious figures, and prevention of non-Muslims from receiving aid.

19. The people of the southern part of Sudan are predominantly Christian or of traditional beliefs, whereas the religion in the north of the country and the regime imposed by the government are Islamic. Shari'a is the national law.

20. The said communication alleges that non-Muslims are persecuted in order to ensure their conversion to Islam. Non-Muslims are prevented from preaching or building churches, and the freedom of expression of the national press is restricted. Members of the Christian clergy are harassed, and there are arbitrary arrests of Christians, expulsions and denial of access to work and food aid.

The government's contention

21. The government confirms the situation claimed by the complainants in respect of the composition of the special courts. National legislation indeed permits the President, his deputies and senior military officers to constitute these courts consisting of 'three military officers or any other persons of integrity and competence'.

22. The government states in its submission of 1 January 1991 that the military courts are not extraordinary because trial is preceded by inquiry; evidence is taken on oath; information obtained during inquiry is not considered as evidence; decisions are taken after listening to the prosecution and defence; and the right of appeal is ensured as provision is made for a Military Court of Appeal to be constituted by the assent of the Head of State. It consists of three army officers whose ranks are not less than that of colonel, and shall include an officer from the judicial branch of the military; the accused may be accompanied by an advocate or friend. The government further states that the law establishing these tribunals permits the accused to be assisted by an advocate or any other person of his choice, and that the accused has the right to be defended before the special tribunals by a friend agreed to by the court. As regards the military tribunals, the national legislation allows the accused to be accompanied by a friend or lawyer.

23. In the remarks on these communications submitted to the Commission by the Sudanese Ministry of External Relations, dated 25 April 1999, the Sudanese government attributes a number of the alleged facts to the existence of a rebellion in the southern part of the country and claims that over 90 per cent of the alleged violations took place in areas currently under the control of the Sudanese People's Liberation Army (SPLA), led by rebel John Garang. It also refers to significant progress achieved in the eradication of the harmful effects of the war since the signing on 10 April 1996 of the Peace Charter and of the Khartoum Peace Agreement of 21 April 1997. The Sudanese government indicates that all persons cited in

communication 50/91 have been released. As regards the allegations in communication 89/93, the government reiterates its adherence to article 24 of the Sudanese Constitution which guarantees freedom of faith and worship, and recalls Pope John Paul II's pastoral visit to Sudan on 10 February 1993, as well as the conduct in Khartoum of the International Conference on Religions in October 1994.

Procedure

24. The Commission undertook an antipodal examination of the four communications. Communication 48/90, filed by Amnesty International, was received by the Secretariat in October 1990. On 20 October 1990, at its 8th ordinary session, the Commission was seized of the communication, and the decision on admissibility was passed on 12 October 1991 at the 10th ordinary session. Communication 50/91 was received on 30 November 1991. The Commission was seized of it at its 12th session, held in October 1992. At the 13th session, held in March 1993, the Commission (after declaring it admissible) decided to combine its procedure with that of communication 48/90. As for communication 52/91, it was received on 19 March 1991. The Commission was seized of it on 22 October 1991, and at the 13th session held in March 1993, the communication was declared admissible and its procedure combined with that of communication 48/90. Communication 89/93 was received on 27 August 1992. The Commission was seized of it at the 13th ordinary session in March 1993, and its procedure was combined with that of the three preceding communications.

25. The parties were regularly notified of all the submissions and had the opportunity to present their conclusions and material evidence at all stages of the procedure.

26. The Commission deployed a mission, comprising three Commissioners (EVO Dankwa, Robert H Kisanga and Mohamed Kamel Rezag-Bara), to Sudan from 1-7 December 1996. The mission was able to verify on the ground elements of the four communications under consideration. The mission report was presented to the Commission, which adopted it and decided to publish it.

27. The Commission ruled on the merits of the four communications at its 26th ordinary session.

Law

Admissibility

28. Admissibility of communications under the African Charter is governed by article 56, which sets out conditions that all communications must meet before they can be decided upon. These criteria must be applied bearing in mind the character of each communication. The case at hand is a combination of four different communications, which the Commission

decided to consider together, in accordance with its jurisprudence. (Cf communications 16/88, 17/88, 18/88 [*Comité Culturel pour la Démocratie au Bénin and Others v Benin*], 25/89 [*Free Legal Assistance Group and Others v Zaire* and 27/89, 46/90, 49/91, 99/93 [*Organisation Mondiale Contre la Torture and Others v Rwanda*]). This decision was based on the similarity of the allegations presented, on the one hand, and the human rights situation prevailing in Sudan during the period covered by these allegations of violations, on the other. The Communications were submitted by NGOs and allege many overlapping and interrelated details.

29. Article 56(5) of the African Charter requires, as a condition for admissibility, that communications must be submitted ‘... after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged ...’

30. In applying this provision, the Commission has elaborated through its jurisprudence criteria on which to base its conviction as to the exhaustion of internal remedies, if any. The Commission has drawn a distinction between cases in which the complaint deals with violations against victims identified or named and those cases of serious and massive violations in which it may be impossible for the complainants to identify all the victims.

31. In a case of violations against identified victims, the Commission demands the exhaustion of all internal remedies, if any, if they are of a judicial nature, that they are effective and are not subordinated to the discretionary power of public authorities. The Commission is of the view that this provision must be applied concomitantly with article 7, which establishes and protects the right to fair trial.

32. The Commission has stated that one of the justifications for this requirement is that a government should be aware of a human rights violation in order to have the chance to remedy such violation, thus protecting its reputation, which would inevitably be tarnished by being called to plead its case before an international body. This condition also precludes the African Commission from becoming a tribunal of first instance, a function that it cannot, either as a legal or practical matter, fulfil (see communication 25/89 [*Free Legal Assistance Group and Others v Zaire*, paragraph 36]).

33. In the cases under consideration, the government of Sudan has not been unaware of the serious human rights situation existing in that country. For nearly a decade the domestic situation has focused national and international attention on Sudan. Many of the alleged violations are directly connected to the new national laws in force in the country in the period covered by these communications. Even where no domestic legal action has been brought by the alleged victims, the government has been sufficiently aware to the extent that it can be presumed to know the situation prevailing within its own territory as well as the content of its international obligations.

34. Furthermore, the Commission is of the view that the internal remedies

that could have been available to the complainants do not fulfil its conditions or are simply non-existent. In these communications, section 9 of Decree no 2, promulgated in 1989, suspends the jurisdiction of the regular courts in favour of the special tribunals as regards any action undertaken in the application of the said decree. In addition, it outlaws any legal action taken against any action undertaken in the application of the same decree. Further, the remedies provided for under the 1990 national security law do not conform to the demands of protection of the right to a good administration of justice, to the extent that the appeals provided for in this law cannot be brought before a judge. It is evident that this appeal procedure, as provided for in the 1990 national security law, cannot be considered as fulfilling the criteria of effectiveness.

35. The 1994 law, which repeals and replaces that of 1990, brings up the principle of the non-existence of remedies, as well as the retroactivity of its provisions. Indeed, under the 1990 law, accused persons could always file an appeal before a judge. This new law stipulates that 'no legal action, no appeal is provided for against any decision issued under this law'. This manifestly makes the procedure less protective of the accused and is tantamount to the non-existence of the appeal procedure.

36. The Commission also holds the view that the appeal before the High Court, as provided for, against verdicts passed by the Revolutionary Security Courts (which replaced the special tribunals) does not fulfil the demands of effectiveness and existence contained in the African Charter. Indeed, appeals to this court are only permissible in the event of a death penalty or prison terms over 30 years. This implies that no other sentence can be appealed before the High Court, which consequently renders the appeal procedure non-existent for the complainants.

37. In the Commission's view, the right to appeal, being a general and non-derogable principle of international law, must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice.

38. In cases of serious and massive [violations], the Commission reads article 56(5) in the light of its duty to protect human and peoples' rights as provided for by the Charter. Consequently, the Commission does not hold the requirement of exhaustion of local remedies to apply literally, especially in cases where it is 'impractical or undesirable' for the complainants or victims to seize the domestic courts.

39. The seriousness of the human rights situation in Sudan and the great numbers of people involved render such remedies unavailable in fact, or, in the words of the Charter, their procedure would probably be 'unduly prolonged'.

For these reasons, the Commission declared the communications admissible.

Merits

40. Sudan ratified the African Charter on Human and Peoples' Rights on 18 February 1986. Prior to that, though Sudan had other obligations under international law, it was not bound by the African Charter, to the extent that the Charter only came into force there on 21 October 1986. It follows that the Commission can only take up violations that occurred after 21 October 1986. Continuing violations, as in the case of a law adopted prior to 1986, but that remains in force, fall within the competence of the Commission. This is because the effect of such laws extends beyond that date. Furthermore, ratification obliges a state to diligently undertake the harmonisation of its legislation to the provisions of the ratified instrument.

41. This decision does not encompass all human rights violations that may have occurred in Sudan after the period covered by the communications. In general, the Commission takes up only violations that are brought before it by complainants. Other violations can be discussed in the Commission's report on its mission to Sudan, which is not confined to the subjects of the communications.

42. Article 1 of the Charter confirms that the government has bound itself legally to respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them. While the Commission is aware that states may face difficult situations, the Charter does not contain a general provision permitting states to derogate from their responsibilities in times of emergency, especially for what is generally referred to as non-derogable rights.

43. The Commission is faced with the difficulty of deciding upon multifaceted allegations, some involving legal provisions that have changed over time. Since the communications were submitted, the situation in Sudan has not been static. And, as the government states, it has evolved in a direction that is more protective of human rights.

44. Confirming its willingness to cooperate with the Commission, the government replied in writing to the communications on 1 January 1991, 10 July 1997, 14 September 1997 and 25 April 1999, and received a mission of the Commission from 1-7 December 1996.

45. The Commission would like to commend and encourage the Sudanese government for its efforts to improve the human rights situation, with the adoption of a new Constitution and the repeal of the emergency laws which seriously jeopardised the rights guaranteed in the Charter. It, however, maintains that these new changes have no effect on the past violations, which it is required by virtue of its mandate to protect and promote human rights to rule upon.

46. The Commission indeed undertook a mission to Sudan; but this mission must be considered as part of its human rights promotion activities and does not constitute a part of the procedure of the communications, even if it did enable it to obtain information on the human rights situation in that country. Consequently, this decision is essentially based on the allegations presented in the communications and analysed by the African Commission.

47. Article 4 of the Charter reads: '... Every human being shall be entitled to respect for his life ... No one may be arbitrarily deprived of this right.'

48. It is alleged that prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extrajudicial executions. These allegations are upheld by evidence taken from the report of the United Nations Special Rapporteur.

49. The government has provided copies of the laws governing the executions alleged in the communications, but provides no specific information on the said executions. Neither has the Commission's delegation been able to obtain this information.

50. In addition to the individuals named in the communications, there are thousands of other executions in Sudan. Even if these are not all the work of forces of the government, the government has a responsibility to protect all people residing under its jurisdiction (see communication 74/91, [*Commission, Nationale des Droits de l'Homme et des Libertés v Chad*, paragraph 21]). Even if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law.

51. The investigations undertaken by the government are a positive step, but their scope and depth fall short of what is required to prevent and punish extrajudicial executions. Investigations must be carried out by entirely independent individuals, provided with the necessary resources, and their findings should be made public and prosecutions initiated in accordance with the information uncovered. Constituting a commission of the district prosecutor and police and security officials, as was the case in the 1987 Commission of Inquiry set up by the Governor of South Darfur, overlooks the possibility that police and security forces may be implicated in the very massacres they are charged to investigate. This Commission of Inquiry, in the Commission's view, by its very composition, does not provide the required guarantees of impartiality and independence.

52. According to the Commission's long-standing practice in cases of human rights violations, the burden of proof rests on the government. [*The Commission then cites unofficial versions of earlier decisions, which are omitted here — eds.*] If the government provides no evidence [to] contradict an allegation of human rights [violations] made against it, the Commission will take it as proven, or at the least probable or plausible. On the informa-

tion available the Commission considers that there was a violation of article 4 of the African Charter on Human and Peoples' Rights.

53. Article 5 of the Charter reads:

Every individual shall have the right to the respect of the dignity inherent in a human being . . . All forms of . . . degradation of man particularly . . . torture, cruel, inhuman or degrading treatment and punishment, shall be prohibited.

54. There is substantial evidence produced by the complainants to the effect that torture is practised. All the alleged acts of physical abuses, if they occurred, constitute violations of article 5. Additionally, holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned.

55. Torture is prohibited by the Sudanese Penal Code and perpetrators punishable with up to three months imprisonment or a fine.

56. The government does not deal with these allegations in its report. The Commission appreciates the fact that the government has brought some officials to trial for torture, but the scale of the government's measures is not commensurate with the magnitude of the abuses. Punishment of torturers is important, but so also are preventive measures such as halting of *incommunicado* detention, effective remedies under a transparent, independent and efficient legal system, and ongoing investigations into allegations of torture.

57. Since the acts of torture alleged have not been refuted or explained by the government, the Commission finds that such acts illustrate, jointly and severally, government responsibility for violations of the provisions of article 5 of the African Charter.

58. Article 6 of the Charter reads:

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.

59. In its written submission to the Commission on 1 January 1991, in reply to the allegations of arbitrary arrests made by the complainants, the government described the powers given to the President of the Revolutionary Command Council to issue orders and take measures in a state of emergency. Simply because an arrest is carried out under a written provision in force does not amount to a violation of article 6. This article must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society. In these cases, the wording of this decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter.

60. Furthermore, appeal in the case of arrest is to the body whose president orders the arrests. Such a remedy provides no guarantee of good administration of justice and is more akin to an appeal for clemency than a judicial appeal. Additionally, numerous arrests have been effected in disregard of this decree. The Commission is constrained to find that in Sudan there have been serious and continuing violations of article 6 during the period under consideration.

61. Article 7(1) of the Charter reads:

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

62. All these provisions are mutually dependent, and where the right to be heard is infringed, other violations may occur, such as detentions being rendered arbitrary. Especially sensitive is the definition of 'competent,' which encompasses facets such as the expertise of the judges and the inherent justice of the laws under which they operate.

63. At the level of procedure, the complaints allege extensive interference with due process, including the institution of numerous special courts and trial of individuals who were denied the assistance of counsel. Some individuals were denied the right to challenge the legal grounds for their detention.

64. The government's submission is only in respect of Decree no 2, which establishes the right of individuals to appeal to the Revolutionary Command Council. However, the government does not present evidence that this right was afforded to the persons in these cases. It is also unclear if accused persons have in all cases been permitted to select their own advocates without interference, or if the tribunal reserves the right to bar certain advocates from court. The right to freely choose one's counsel is essential to the assurance of a fair trial. To give the tribunal the power to veto the choice of counsel of defendants is an unacceptable infringement of this right. There should be an objective system for licensing advocates, so that qualified advocates cannot be barred from appearing in particular cases. It is essential that the national bar be an independent body which regulates legal practitioners, and that the tribunals themselves not adopt this role, which will infringe the right to defence.

65. The communications allege that the 28 army officers executed on 24 April 1990 were allowed no legal representation. The government states that its national legislation permits the accused to be assisted in his defence during the trial by a legal advisor or any other of his choice. Before the special courts the accused have the right to be defended by a friend to

be approved by the court. The government argues that the court procedures were strictly followed in the case of these officers.

66. While there is a simple contradiction of testimony between the government and the complainant, the Commission must admit that in the case of the 28 executed army officers basic standards of fair trial have not been met. Indeed, the Sudanese government has not given the Commission any convincing reply as to the fair nature of the cases that resulted in the execution of 28 officers. It is not sufficient for the government to state that these executions were carried out in conformity with its legislation. The government should provide proof that its laws are in accordance with the provisions of the African Charter, and that in the conduct of the trials the accused's right to defence was scrupulously respected. In this case, the very fact that the accused's choice is subject to the assent of the court before which he is to appear constitutes a violation of the right to be represented by counsel of one's choice, as provided for in article 7 of the African Charter, cited above.

67. Article 7 is closely related to article 26 of the Charter, which provides that: 'States parties to the present Charter shall have the duty to guarantee the independence of the courts . . .'

68. The government confirms the situation alleged by the complainants in respect of the composition of the Special Courts. National legislation permits the President, his deputies and senior military officers to appoint these courts to consist of 'three military officers or any other persons of integrity and competence'. The composition alone creates the impression, if not the reality, of lack of impartiality and as a consequence, violates article 7(1)(d). The government has a duty to provide the structures necessary for the exercise of this right. By providing for courts whose impartiality is not guaranteed, it has violated article 26.

69. The dismissal of over 100 judges who were opposed to the formation of special courts and military tribunals is not contested by the government. To deprive courts of the personnel qualified to ensure that they operate impartially thus denies the right to individuals to have their case heard by such bodies. Such actions by the government against the judiciary constitute violations of articles 7(1)(d) and 26 of the Charter.

70. The government has provided no contrary element in refutation of the allegations made against it, and the laws that it cites are deficient. Accordingly the Commission holds a violation of article 7(1)(c).

71. Article 8 of the Charter reads:

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

72. These issues should be considered in relation to article 2 of the Charter, which provides for equal protection under the laws, and article 8, on

religious freedom, which will be treated below. While fully respecting the religious freedom of Muslims in Sudan, the Commission cannot countenance the application of law in such a way as to cause discrimination and distress to others.

73. Another matter is the application of Shari'a law. There is no controversy as to Shari'a being based upon the interpretation of the Muslim religion. When Sudanese tribunals apply Shari'a, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always accord with international fair trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish.

74. It is alleged that non-Muslims were persecuted in order to cause their conversion to Islam. They do not have the right to preach or build their churches; there are restrictions on freedom of expression in the national press. Members of the Christian clergy are harassed; Christians are subjected to arbitrary arrests, expulsions and denial of access to work and food aid.

75. In its various oral and written submissions to the African Commission, the government has not responded in any convincing manner to all the allegations of human [rights violations] made against it. The Commission reiterates the principle that in such cases where the government does not respect its obligation to provide the Commission with a response to the allegations of which it is notified, it shall consider the facts probable.

76. Other allegations refer to the oppression of Christian civilians and religious leaders and the expulsion of missionaries. It is alleged that non-Muslims suffer persecution in the form of denial of work, food aid and education. A serious allegation is that of unequal food distribution in prisons, subjecting Christian prisoners to blackmail in order [to] obtain food. These attacks on individuals on account of their religious persuasion considerably restrict their ability to practice freely the religion to which they subscribe. The government provides no evidence or justifications that would mitigate this conclusion. Accordingly, the Commission holds a violation of article 8.

77. Article 9(2) of the Charter reads: 'Every individual shall have the right to express and disseminate his opinions within the law.'

78. The communications under consideration allege that persons were detained for belonging to opposition parties or trade unions. The government confirmed that the 'Decree on Process and Transitional Powers Act 1989', promulgated on 30 June 1989, stipulates in section 7 that during a state of emergency any form of political opposition by any means to the regime of the Revolution for National Salvation is prohibited where there is

'imminent and grave threat to the security of the country, public safety, independence of the state or territorial integrity and economic stability'.

79. As stated above, the Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.

80. The Commission has established the principle that where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law (communication 101/93 [*Civil Liberties Organisation (in respect of Bar Association v Nigeria)*]). Any restrictions on rights should be the exception. The government here has imposed a blanket restriction on the freedom of expression. This constitutes a violation of the spirit of article 9(2).

81. Article 10 of the Charter reads: '(1) Every individual shall have the right to free association provided he abides by the law.'

82. The Process and Transitional Powers Act 1989 prohibits, in section 7, effecting, without special permission, any assembly for a political purpose in a public or private place. This general prohibition on the right to associate in all places is disproportionate to the measures required by the government to maintain public order, security and safety. In addition, there is evidence from the complainants, which is not contested by the government, that the powers were abused. In the absence of information from the government, the Commission must give weight to the facts submitted by the complainant. Accordingly, the Commission holds a violation of article 10(1).

83. The Commission is cognisant of the fact that it has found many violations of the Charter on the part of the government. In concrete terms, this shows that the citizens of Sudan have endured much suffering. To change so many laws, policies and practices will of course not be a simple matter. However, the Commission must emphasise that the people of Sudan deserve no less. The government is bound by its international obligations and the Commission's findings are specific enough to permit their implementation. This decision does not constitute the Commission's viewpoint on the overall human rights situation in Sudan. It is based on the allegations of violations committed by Sudan after its ratification of the African Charter on Human and Peoples' Rights and on verifications carried out in this regard, while not failing to note that the situation has improved significantly.

For the above reasons, the Commission:

[84.] Declares that there has been a violation of articles 2, 4, 5, 6, 7(1)(a), (c), (d), 8, 9, 10 and 26;

[85.] Recommends strongly to the government of Sudan to put an end to these violations in order to abide by its obligations under the African Charter on Human and Peoples' Rights.

TANZANIA

Capitao v Tanzania

(2000) AHRLR 313 (ACHPR 1994)

Communication 53/91, *Alberto Capitao v Tanzania*
7th Annual Activity Report
(See also *Capitao v Tanzania* (ACHPR 1995), below)

[1.] Communication on recovery of money dated 26 March 1991.

Final decision

[2.] The Commission decides that local remedies have not been exhausted as required by article 56 of the Charter and [rule] 114 of the Rules of Procedure and declares the communication inadmissible.

* * *

Lawyers Committee for Human Rights v Tanzania

(2000) AHRLR 313 (ACHPR 1994)

Communication 66/92, *Lawyers Committee for Human Rights v Tanzania*
7th Annual Activity Report

[1.] Communication on false imprisonment.

[2.] The complainant Mr Seif Hamad having been granted bail and subsequently the charges against him having been struck out by the court, there is nothing further to proceed with, and the matter is accordingly closed.

* * *

Capitao v Tanzania

(2000) AHRLR 314 (ACHPR 1995)

Communication 53/91, *Alberto Capitao v Tanzania*
8th Annual Activity Report
(See also *Capitao v Tanzania* (ACHPR 1994), above)

Admissibility (failure to exhaust local remedies, 3)

[1.] Alberto Capitao is a businessman and a former citizen of Zaire, presently resident in Angola. He sued the Tanzanian Film Company, a state-owned company, in a Zairian court, and won a judgment of \$500 000 on 4 July 1994. The Embassy of Tanzania in Kinshasa was sued simultaneously with the Tanzanian Film Company. As of January 1985, no appeal in the case had been filed. The Tanzanian Film Company failed to pay the judgment debt. The Tanzanian Film Company has no property in Zaire; the only property of the Tanzanian state is the Embassy of Tanzania in Kinshasa, which is exempt from seizure under the tradition of diplomatic immunity. The complainant sought the intervention of the Foreign Ministries of Zaire and Angola where he now resides, but to no avail.

[2.] The complainant argues that he has been deprived of justice and in essence of the right to have his cause heard, since as an individual holding a judgment against a foreign state which refuses to pay, he has no recourse.

Decision

[3.] The Commission decided that the case was inadmissible on account of lack of exhaustion of local remedies. The case can be resubmitted when the local remedies have been properly exhausted or if the complainant proves that local remedies are unavailable, ineffective or unreasonably prolonged.

TOGO

Ayele v Togo

(2000) AHRLR 315 (ACHPR 1994)

Communication 35/89, *Seyoum Ayele v Togo*
7th Annual Activity Report

Admissibility (compatibility with the Charter, 3)

[1.] Communication on alleged deprivation of nationality.

Decision

[2.] The author complains that an alleged victim was by implication denied his nationality by the action of his own state.

[3.] The Commission decided that the allegation was vague and inadmissible under article 56 of the Charter.

* * *

Degli (on behalf of Bikagni) v Togo

(2000) AHRLR 315 (ACHPR 1994)

Communication 83/92, *Degli (on behalf of Bikagni) v Togo*
7th Annual Activity Report
(See also *Degli and Others v Togo* (ACHPR 1995), below)

Interim measures (unlawful detention, 6)

[1.] Linkages with 88/93 and 91/93.

[2.] Communication on unlawful detention.

[3.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;

[4.] Recalling the provisions of article 57 of the Charter and those of rules

110 and 115 of the Rules of Procedure of 1988 which stipulate that prior to any substantive consideration, all communications must be brought to the knowledge of the state concerned;

[5.] Notes that the said communication was brought to the attention of the state of Togo on 11 November 1992;

[6.] Confirms the interim measures taken during the 14th session, geared towards ensuring the security of Corporal Nikabou Bikagni to avoid any irreparable prejudice inflicted on the victim of the alleged violations.

* * *

Union Interafricaine des Droits de l'Homme and Another v Togo

(2000) AHRLR 316 (ACHPR 1994)

Communications 88/93 and 91/93, *Union Interafricaine des Droits de l'Homme, Commission International de Juristes v Togo*
7th Annual Activity Report

[1.] Communications on the human rights situation in Togo (88/93, 91/93).

[2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;

[3.] Recalling the provisions of article 57 of the Charter and those of rules 110 and 115 of the Rules of Procedure of 1988 which stipulate that prior to any substantive consideration, all communications must be brought to the knowledge of the state concerned;

[4.] Decides to bring the communication to the knowledge of the government of Togo and to request it to submit a response within two months of the receipt of notification. A substantive consideration of the matter shall be undertaken at the 16th session.

* * *

Degli and Others v Togo

(2000) AHRLR 317 (ACHPR 1995)

Communications 83/92, 88/93 and 91/93, *Jean Yaovi Degli (au nom du Caporal N Bikagni), Union Interafricaine des Droits de l'Homme, Commission International de Juristes v Togo*

8th Annual Activity Report

(See also *Degli (on behalf of Bikagni) v Togo* (ACHPR 1994), above)

Mission by Commission (mission to state party, 5)

State responsibility (violations by previous regime satisfactorily resolved, 5)

[1.] The first communication, no 83/92, concerns Corporal Nikabou Bikagni, whom the communication alleges was arrested on 7 October 1992 in Lomé and who was subject to torture and maltreatment. Under this duress, he made a confession that he was planning a *coup d'état* against the government of Togo.

[2.] The second communication, no 88/93, consists of a report of a mission sent to Togo by the *Union Interafricaine des Droits de l'Homme* from 23 to 29 December 1992. This report includes information on the attempt on the life of opposition leader Jules Christ Olympio, the assassination of the driver of the Prime Minister in December 1992, extortion and killings in villages in the north of Togo, the shooting incident of 25 January 1993 which resulted in at least 14 deaths, and the shooting incident of 26 January which resulted in at least four deaths. The communication also mentions the discovery of more than 15 bodies which were found, mutilated and bound, in the waters around Lomé. The report also provides a general overview of the political and economic situation in Togo, including irregularities with respect to how elections are conducted.

[3.] The third communication, no 91/93, alleges that on 30 January 1993 the Togolese military shot and killed 20 peaceful demonstrators in Lomé. This was related to a general breakdown of law and order which resulted in numerous violations of human rights by the security forces. Abuses by the security forces caused 40 000 Togolese to flee the country.

Complaint

[4.] The complainants allege grave and massive violations of various rights protected by the African Charter.

Finding

[5.] The Commission sent a delegation to Togo and it [concluded] that

these acts were committed under a previous administration. The Commission is satisfied that the present administration has dealt with the issues satisfactorily.

TUNISIA

Amnesty International v Tunisia

(2000) AHRLR 319 (ACHPR 1994)

Communication 69/92, *Amnesty International v Tunisia*
7th Annual Activity Report

Admissibility (consideration by other international body, 5)

[1.] Communication on alleged wrongful detention and torture.

Final decision

[2.] The African Commission on Human and Peoples' Rights, established under article 30 of the African Charter on Human and Peoples' Rights;

[3.] Meeting at its 13th ordinary session, from 29 March to 7 April 1993 in Banjul, The Gambia;

[4.] Considering articles 55 and 56(7);

[5.] Decides to declare the communication of Amnesty International against the Republic of Tunisia inadmissible pursuant to the relevant provisions of article 56(7) which stipulate that the communications submitted within the framework of part II, chapter III of the African Charter on Human and Peoples' Rights should not deal with cases which have been settled in accordance with the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of the present Charter.

UGANDA

Buyingo v Uganda

(2000) AHRLR 320 (ACHPR 1995)

Communication 8/88, *Nziwa Buyingo v Uganda*
8th Annual Activity Report

Admissibility (failure to exhaust local remedies, loss of contact with complainant, 3)

[1.] The author of the communication, Mr Nziwa Buyingo, citizen of Zaire, alleges that on 28 December 1987 he was subjected to arrest, arbitrary detention, torture and extraction of money by Ugandan soldiers in Kisoro, Uganda.

[2.] He alleges that his rights under articles 5, 6, 12 and 14 under the African Charter on Human and Peoples' Rights have been violated.

Finding

[3.] The Commission has since 1988 failed to get any response from the complainant on whether or not he has had recourse to local remedies as required by article 56(5) of the Charter and rule 103(1)(f) of the Rules of Procedure of 1988. The Commission accordingly declares the communication inadmissible.

ZAMBIA

Kalenga v Zambia

(2000) AHRLR 321 (ACHPR 1994)

Communication 11/88, *Henry Kalenga v Zambia*
7th Annual Activity Report

Amicable settlement

[1.] A communication on false imprisonment.

[2.] The author was released after a member of the African Commission on Human and Peoples' Rights effected an amicable settlement.

[3.] The normal procedure for communications was discontinued and the file closed.

* * *

Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia

(2000) AHRLR 321 (ACHPR 1996)

Communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*
Decided at the 20th ordinary session, Oct 1996, 10th Annual Activity Report

Admissibility (exhaustion of local remedies — onus on state to prove that remedies are available, 10-16)

Expulsion (mass expulsion, 19-20, 27-31)

Equality, non-discrimination (discrimination on the grounds of nationality, 21-26)

Fair trial (right to be heard — no possibility to challenge expulsion in court, 29-31)

[1.] The complaint is presented by a Senegalese NGO, *Rencontre Africaine pour la Défense des Droits de l'Homme*, on behalf of 517 West Africans who were expelled from Zambia on 26 and 27 February 1992, on grounds of being in Zambia illegally. Prior to their expulsion, most of the individuals had been subject to administrative detention for more than two months. The deportees lost all the material possessions they had in Zambia, and many were also separated from their Zambian families.

Procedure

[2.] The communication was submitted on 28 February 1992. The Commission was seized of it at the 12th session.

[3.] On 13 November 1992, the text of the communication was sent to the Zambian Ministry of Justice and Ministry of External Affairs by registered post. No reply has been forthcoming.

[4.] At the 16th session, the communication was declared admissible and the parties were informed that the merits of the case would be considered at the 17th session.

[5.] At the 18th session in October 1995, a delegation of the Zambian government appeared and presented additional information dated 29 September 1995.

[6.] The complainant also appeared and presented a reply to the government's arguments.

[7.] The Commission decided to pursue an amicable resolution to the communication, which would involve further details being given to the Zambian government so that reparations might be effected.

[8.] On 2 August 1996 the Commission informed the government of Zambia of its intention to continue the efforts towards an amicable resolution of the case.

Law

Admissibility

[9.] The Zambian government argues that the communication must be declared inadmissible because domestic remedies have not been exhausted.

[10.] Article 56 of the African Charter provides as follows: 'Communications . . . shall be considered if they: . . . (5) Are sent after exhausting local remedies, if any, unless it is obvious that these procedures are unduly prolonged'

[11.] The rule requiring the exhaustion of local remedies as a condition of the presentation of an international claim is founded upon, among other principles, the contention that the respondent state must first have an opportunity to redress by its own means within the framework of its

own domestic legal system, the wrong alleged to have been done to the individual.

[12.] This does not mean, however, that complainants are required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective.

[13.] When the Zambian government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the burden of demonstrating the existence of such remedies. The government of Zambia attempts to do so by referring to the Immigration and Deportations Act which provides for appeal of expulsion orders. The government states that actions for loss of property likewise can be brought under Zambian law.

14. The question is therefore whether, in the circumstances alleged, the Immigration and Deportation Act constitutes an effective and adequate remedy in respect to the complaints.

15. The mass nature of the arrests, the fact that victims were kept in detention prior to their expulsions, and the speed with which the expulsions were carried out gave the complainants no opportunity to establish the illegality of these actions in the courts. For complainants to contact their families, much less attorneys, was not possible. Thus, the recourse referred to by the government under the Immigration and Deportation Act was as a practical matter not available to the complainants. This was confirmed by the complainants during their arguments before the Commission, as well as by expert testimony. (See *Réplique du RADDHO a la Réponse du Gouvernement Zambien*, p 3; also the letter of the Executive Director of Afronet, Zambia, 7 October 1995.)

16. The Zambian government argues that the victims were remiss in not taking advantage of the legal aid system in Zambia ('Additional Information', p 6). However, the complainants make clear, in their *Réplique* and through expert testimony contained in the file, that if the victims of deportation were in fact illegal as the government argues, they would be ineligible for legal aid (see *Réplique*, p 3; see also the letter of Chakota Beyani, Refugee Studies Program, Oxford University, p 1).

17. For the above reasons the Commission holds the communication admissible.

Merits

18. Given that the process of arriving at an amicable resolution can take a substantial period of time, the Commission believes it is important to make a statement on the question of law raised by this communication.

19. Article 12(5) of the Charter provides: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

20. Clearly, the drafters of the Charter believed that mass expulsion presented a special threat to human rights.

21. The Charter makes this point clearly in article 2, which states:

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 other status.

22. This imposes an obligation on the contracting state to secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals.

23. The government of Zambia argues that the expulsion of the West Africans was justified because they were in Zambia illegally, and that the African Charter does not abolish visa requirements and borders between African states. It is true that the African Charter does not bar deportations *per se*, but Zambia's right to expel individuals does not justify the manner in which it does so.

24. The victims on whose part RADDHO seized the Commission were all from West Africa, some from Senegal, some from Mali, Guinea Conakry, and other West African countries. The government of Zambia, in its 'Additional Information' presented to the Commission at the 18th session, argues that the expulsion was not discriminatory because nationals of several West African countries and other foreign countries were all subject to the same treatment. (See 'Additional Information', p 1; list of aliens repatriated between 25 November 1991 and 16 January 1992, attached.)

25. The complainants respond that they are concerned only with the expulsion of West Africans, because it is these persons who appealed to them for help, but that simultaneous expulsion of nationals of many countries does not negate the charge of discrimination. Rather, the argument that so many aliens received the same treatment is tantamount to an admission of a violation of article 12(5). (*Réplique*, p 1-2).

26. It is clear from the government's own list of repatriated aliens, however, that after excluding nationals of Zambia's immediate neighbours, Tanzania and Zaire, West Africans constitute the majority of those expelled.

27. The Zambian government disputes the characterisation of the expulsions as '*en masse*' by arguing that the deportees were arrested over a two-month period of time, at different places, and served with deportation orders on different dates. (Additional Information, p 4, pp iii.) Zambia, however, cannot prove that the deportees were given the opportunity to seek appeal against the decision on their deportation.

28. Zambia maintains that the two months during which some of the deportees were held were necessary to verify their nationality in some cases, and also that complainants might have used this time to contact

their lawyers. The facts of this communication show that West Africans were arrested and assembled over time, with a view to their eventual expulsion. The deportees were kept in a camp during this time, not even an ordinary prison, and it was impossible for them to contact their lawyers.

29. Article 7 of the Charter specifies:

(1) Every individual shall have the right to have his cause heard. This comprises:
a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force . . .

[30.] In holding this case admissible the Commission has already established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation. This constitutes a violation of their rights under article 7 of the Charter and under Zambian national law.

31. The African Commission will not dispute that the Zambian state has the right to bring legal action against all persons illegally residing in Zambia, and to deport them if the results of such legal action justify it. However, the mass deportation of the individuals in question here, including their arbitrary detention and deprivation of the right to have their cause heard, constitutes a flagrant violation of the Charter.

For the above reasons, the Commission:

[32.] Decides that the deportations constitute a violation of articles 2, 7(1)(a), and 12(5) of the African Charter;

[33.] Resolves to continue efforts to pursue an amicable resolution in this case.

* * *

Amnesty International v Zambia

(2000) AHRLR 325 (ACHPR 1999)

Communication 212/98, *Amnesty International v Zambia*
Decided at the 25th ordinary session, May 1999, 12th Annual Activity Report
Rapporteur: Pityana

Admissibility (exhaustion of local remedies — deportation, 25)
Evidence (Commission not to judge facts, 32)

Expulsion (deportation — no reasons given, 33)
Expression (right to receive information, 33; persecution because of opinions expressed, 45-46)
Fair trial (right to be heard — no possibility to challenge deportation in court, retroactive legislation, 35-38, 52-53)
Interim measures (request for return of body for burial, return to home country, 39-40)
Limitations (limitations should not undermine rights guaranteed by constitution and international standards, 42)
Interpretation (the rules of natural justice apply, 42)
Equality, non-discrimination (discrimination on the grounds of political or other opinion, 43-44)
State responsibility (duty to give effect to rights in the charter in national law, 44)
Conscience (deportation for political reasons, 46, 47)
Association (deportation aimed against political activities, 48-49)
Family (effect of deportation on family, 50-51)

1. The Communication is submitted by Amnesty International on behalf of William Steven Banda and John Lyson Chinula.

2. The complainant alleges that Zambia has violated the provisions of African Charter in that: (a) Mr William Steven Banda was served with a deportation order on 10 November 1991. The reason given was that 'in my opinion by his presence he (is) likely to be a danger to peace and good order in Zambia'. He contested the order through the courts of Zambia. (b) On 25 October 1994, William Steven Banda was deported to Malawi unlawfully, wrongfully and out of political malice. He alleges that he was blindfolded and drugged, driven by Zambian immigration service and paramilitary police officers. He entered Malawi through Mchinji border post and was later dumped at Lilongwe Police station. (c) John Luson Chinula was removed from his home in Ndola on 31 August 1994. He was driven to Lusaka International Airport to be deported. He was served with a deportation order signed by the Minister of Home Affairs alleging that he was a threat to Zambia's peace and security. He was forcibly sedated and later found himself at Lilongwe police station in Malawi. His Warrant of Deportation also alleged that he was 'by his presence, likely to be a danger to peace and good order in Zambia'. No reason in law or in fact was advanced for this finding. (d) Both complainants were prominent political figures in Zambia. They were leading members of UNIP, the party that had been in power since independence in 1964. UNIP was defeated by MMD in the first multiparty elections of November 1991.

3. William Steven Banda exhausted all domestic remedies in that his matter went to the Supreme Court of Zambia. John Lyson Chinula could not effect any remedies through the Zambian courts because he was deported and was given no opportunity to approach the Zambian courts.

4. It is alleged by the complainant that prior to his forcible expulsion from Zambia under order of deportation, William Banda exhausted local remedies through his appeal to the High Court of Zambia in 1992 and the Supreme Court of Zambia in 1994.

5. The complainant alleges that the Zambian government's deportation of the two men amounted to 'forcible exile'.

6. The complainant alleges that attempts to seek redress through existing national legal remedies both in Zambia and in Malawi have been futile.

7. The complainant also charges that John Chinula was not allowed recourse to the national courts of Zambia. He was prevented from returning to Zambia by threats of imprisonment by the Zambian authorities.

8. The complainant states that Banda and Chinula have obtained two judgments at the High Court of Malawi confirming that they were not citizens of Malawi. The government of Malawi has failed to comply with the judgment of the court which ordered that they be assured of return to Zambia. They have therefore exhausted all available local remedies at their disposal.

9. The complainant prays that the Commission adopts interim measures to allow the deportees to return to Zambia immediately.

Complaint

10. The complainant alleges that articles 2, 5, 7(1)(a), 8, 9(2), 10, 12(2), 13(1), 18(1), 18(2) of the African Charter have been violated.

Procedure

11. The communication is dated 6 March 1998 and was sent by mail.

12. On 18 March 1998 a letter was sent to the complainant acknowledging receipt.

13. At its 23rd ordinary session held in Banjul, The Gambia, the Commission decided to be seized of this matter and declared the Communication admissible. The Commission also requested that provisional measures be adopted by the government of Zambia, namely to allow the burial of Mr John L Chinula in Zambia and the return of Mr William S Banda to his family in Zambia pending the finalisation of the matter by the Commission.

14. On 10 July 1998, the Secretariat of the Commission wrote to the Ministry of Foreign Affairs, Zambia, informing it of the decision of the 23rd ordinary session, drawing attention to the request for provisional measures to be taken by the government of Zambia.

15. A copy of the note was also sent to the Embassy of Zambia in Addis Ababa. When there was no reply, the Secretariat sent a reminder on 17 September 1998. The embassy replied on 21 September that the *note*

verbale had been received but did not enclose the communication referred to.

16. The representative of the government of Zambia appeared before the Commission on 26 and 27 of October 1998 at the 24th ordinary session. He presented a statement in response to the communication.

17. At the 24th ordinary session, the Commission postponed consideration of this for a decision on the merits to the next session.

18. On 26 November 1998, the Secretariat conveyed the decision of the Commission to the parties concerned.

19. In preparation for a hearing on this matter, the Rapporteur for this communication requested the parties to address only some of the critical matters he had identified. Mr Ahmed Motala represented Amnesty International. Mr Clifford Msika of the Centre for Human Rights and Rehabilitation, Lilongwe, Malawi, assisted him. Mr William Steven Banda was also present. The Zambian government was represented by Mr Palan Mulonda, Senior State Advocate in the Ministry of Legal Affairs accompanied by Mr K K Nsemukila, Deputy Permanent Secretary, Home Affairs Department and Ms Lucy M Mungoma of Foreign Affairs Department with responsibility for Africa and OAU relations. The Commission also heard testimony from Mr William Steven Banda.

Argument

20. Mr Motala argued that Zambia was bound by the African Charter which it ratified in 1984. It, therefore, was obliged to extend the rights in the Charter to 'every individual' except where political rights are specifically indicated as in article 13 for example. He argued that Zambia was in violation of article 12 especially sub-article 2 which provides that 'every individual' has a right to leave his country and to return. It also says that a 'non-national legally admitted in a territory of a State party may only be expelled from it by virtue of a decision taken in accordance with the law' He alleged discrimination on the basis of ethnic group and social origin (article 2) and on the basis of political opinion. The treatment the complainants received violated the victims rights to human dignity and freedom of movement. In the case of Chinula, he was deprived of the right to have his cause heard (article 7). He insisted that the actions against complainants were politically motivated. They have been left destitute in a strange country.

21. Mr Mulonda, for the government, stated that the government did not act with political malice. It acted within the law. The investigations against Banda began in 1976 and against Chinula in 1974, long before the present regime came into power. He denied that the deportees were drugged and dumped across the border. He stated that the Malawi authorities received them. The government of Zambia was acting within its sovereign rights in ordering its internal affairs, regulating immigration and was

within the provision or limitation of the right stipulated in article 12: '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.'

Law

Admissibility

22. Admissibility of communications under the African Charter is governed by article 56, which sets out conditions that must be met before they are considered by the Commission.

23. Article 56 of the Charter reads: 'Communications shall be considered if they: . . . (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged' . . .

24. This provision of the Charter is necessarily first considered before any substantive consideration of a complaint.

25. In the present case all local remedies have been exhausted and there is documentary evidence made available to the Secretariat of the Commission in support of this claim. As already stated in the case of Chinula, the arbitrary deportation prevented him from exercising this right.

26. The complainant has attached to the communication copies of the following judgments/orders obtained by William Banda and John Chinula: Consent Order of 13 March 1995, High Court of Lilongwe, in Miscellaneous Cause no 2 of 1995; Judgment of 30 June 1997, High Court of Malawi in Lilongwe in Miscellaneous Cause no 2 of 1995; Judgment no 16 of 1994, Supreme Court of Zambia in Lusaka, in *Banda v Chief Immigration Officer and Attorney-General*; Judgment no JH/12 of 1991, High Court of Zambia in Chipata, in *Banda v Chief Immigration Officer and Attorney-General*. For these reasons the Commission declares the communication admissible.

Merits

27. Zambia ratified the African Charter on Human and Peoples' Rights in January 1984.

28. A number of supporting documents were submitted: On Banda, the transcript of the judgment by Kakusa J in the High Court of Zambia held at Chipata; the judgment on appeal by Bweupe DCJ in the Supreme Court in Lusaka. The various decisions of the Malawi Court and affidavits submitted in support. The government also submitted documents on Banda and Chinula.

29. Regarding William Steven Banda, the judgment of Justice Kakusa in the High Court is instructive. The judge found that there was no evidence, on a balance of probabilities, to prove that Banda was born in Zambia of Zambian parents. He found that Banda was an unreliable witness. He, however, refused to rule as to where Banda originated from. He dismissed

all evidence that suggested that Banda was from Malawi as inadmissible and hearsay. He also noted that the government had failed to produce the alleged Malawian father of Banda. The judge also made the following *obiter dictum* without justifying his opinion, that (at p J25):

Once it is shown on a balance of probabilities that a petitioner is not a citizen of this Republic he becomes a deportable person even if the country to which he must proceed is unknown . . . possession of a National Registration Card . . . does not confer citizenship . . .

It appears that the authorities relied on this statement in deporting William Steven Banda.

30. The judge also expressed himself in sympathy with Banda's predicament. He said (at J25):

The petitioner has been in Zambia for a long time and has, in his own way, contributed in the political arena . . . Zambia has become almost the petitioner's only home — a *de facto* situation — upon which the executive may exercise its discretion and, maybe, consider normalising the status of petitioner should he apply . . . If this court were empowered to declare persons like petitioner to be Zambians, the petitioner would have received a favourable declaration considering his long stay in Zambia and the role he played.

31. It is not denied that on the day of the judgment, William Steven Banda was taken into custody and deported to Malawi. In addition, Banda charges that his pleas that he be taken to South Africa were ignored including his request for a five-days stay of execution of the warrant.

32. It is evident that the Malawi courts are irrelevant for purposes of deciding this matter against Zambia. The fact that they declared complainants not to be Malawi citizens is neither here nor there. Secondly, the Commission is not competent to substitute the judgments of the Zambian courts, especially on matters of fact. It must be accepted that the legal processes were appropriate and conducted in a manner that showed respect for the rule of law. The legal processes in Zambia did not violate the principles of the Charter. The Commission must, therefore, accept that William Steven Banda was not a Zambian by birth or descent.

33. This does not mean, however, that the Commission should not raise questions of law especially as the Zambian courts did not consider the obligations of Zambia under the African Charter. The court also failed to rule on the alleged reason for the deportation, namely, that his presence was likely 'to endanger peace and good order in Zambia . . .' 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. The fact that Banda was not a Zambian by itself does not justify his deportation. It must be proved that his presence in Zambia was in violation of the laws. To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (article 9(1)).

34. The Rapporteur invited the parties to give guidance on the authority of the Charter where it was in contradiction to domestic law. That seems relevant because Zambia ratified the Charter by Executive Act. That means that there is a legislative process that domesticates international human rights treaties. Mr Mulonda affirmed Zambia's commitment to abide by the treaties it is party to. He also confirmed that Zambia operated a dual legal system and that the Charter is not considered to be a self-executing measure. Nonetheless, Zambia accepted the binding character of the Charter in Zambia.

35. By all accounts, though, Banda was in possession of Zambian national registration certificate and a passport. For many years he freely used these without challenge. Immediately following the verdict of the Supreme Court, he voluntarily presented himself to the police but he was forcibly deported. This meant that he was denied the opportunity to pursue the option of applying for citizenship by naturalisation in terms of the Citizenship Act. Granted, the government argues that Banda had obtained the documents of registration and passport by making false claims about his place of birth. He could not, therefore, be approaching the court with clean hands. The unstated implication was that the chances of his obtaining naturalisation were negligible. In truth, of course, the court did not say that Banda was an illegal immigrant. It simply disputed his claims to being Zambian by birth. It was not proved, therefore, that Banda was in Zambia illegally.

36. Zambia has contravened article 7 of the Charter in that Banda was not allowed to pursue the administrative measures which were open to him in terms of the Citizenship Act. More importantly, Zambia is in breach of article 7(2) which says that: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed . . .' By all accounts, Banda's residence and status in Zambia had been accepted. He had made a contribution to the politics of the country. The provisions of article 12(4) have been violated.

37. The allegations of violations of articles 2, 4, 5, 6, 9 and 10 may now be addressed. The evidence that William Steven Banda was a political opponent of the ruling MMD cannot be overlooked. The manner in which he was treated was demeaning of the dignity and status of somebody of his standing in society. It appears that he was singled out for action because of his ethnic origin, which incidentally, is also found in Zambia. The authorities insisted on deporting him to Malawi even though he told them that he knew nobody there. There was no compelling evidence that he had roots in Malawi having lived in Zambia, by their own admission, since about 1964. Counsel for Zambia argued that Banda was 'accepted' by the Malawi immigration authorities. Whatever may have been the 'legal' basis for such 'acceptance', Malawi courts have ruled that they were not citizens of Malawi. In addition, unlawful deportation could not be said to obliterate their rights in Zambia.

38. John Lyson Chinula was in an even worse predicament. He was not given any opportunity to contest the deportation order. Surely, government could not say that Chinula had gone underground in 1974 having overstayed his visiting permit. Chinula, by all accounts, was a prominent businessman and politician. If government wished to act against him they could have done so. That they did not, does not justify the arbitrary nature of the arrest and deportation on 31 August 1994. He was entitled to have his case heard in the courts of Zambia. Zambia has violated article 7 of the Charter. Having made that finding, the findings in paragraph 30 above also obtain in this circumstance.

39. The Commission had requested provisional measures in terms of rule 111 of the Rules of Procedure. Zambia must be required to allow the return of William Steven Banda with a view to his making application for citizenship by naturalisation. No evidence was led before the Commission for compensation. The evidence is that Banda had lost his job as Governor after the 1991 elections. No award for compensation is called for.

40. John Lyson Chinula died in Malawi. He was a prominent businessman. His deportation must have caused prejudice to his business interests. His family is requesting the return of his body for burial in Zambia. The government of Zambia should be required to grant that wish.

41. The government of Zambia has relied on the 'claw-back' clause of article 12(2): '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 ...'

42. The deportation order also stated that the deportees were considered 'a danger to peace and good order to Zambia'. The Commission is of the view that the 'claw-back' clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. Secondly, the rules of natural justice must apply. Among these are in the *audi alterm partem* rule, the right to be heard, the right of access to the court. The court in Zambia, in Banda's case failed to examine the basis of administrative action, and as such it has not been proved that the deportees were indeed a danger to law and order. In any event the suggestion that they were 'likely' to be a danger was vague and not proved. It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause. The Commission should act bearing in mind the provisions of articles 61 and 62 of the Charter.

43. Article 2 of the Charter reads:

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 other status.

44. By forcibly expelling the two victims from Zambia, the state has violated their right to enjoyment of all the rights enshrined in the African Charter. This article imposes an obligation on the Zambian government to secure the rights protected in the African Charter to all persons within their jurisdiction irrespective of political or any other opinion. This obligation was reaffirmed by the Commission in communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*. The arbitrary removal of one's citizenship in the case of Chinula cannot be justified.

45. Article 9(2) states: 'Every individual shall have the right to express and disseminate his opinions within the law.'

46. Both Banda and Chinula were leading politicians and businessmen. Both had lived in Zambia for decades. Even if deportation action had been initiated against them in 1974 and 1976, it can be safely assumed that the action had been advanced unless it is proved that that was due to unlawfulness, fraud or obstruction of the course of justice. None of this was alleged. Action was accelerated upon the assumption of office of the MMD government in 1991. We are therefore persuaded that the deportations were politically motivated. This provision of the Charter reflects the fact that freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness and participation in the public affairs of his country. The Commission has to determine whether the 'deportations', being politically motivated, violate the provisions of article 9(2) of the African Charter as the two victims were denied the right to freedom of conscience as stipulated in article 8 of the Charter.

47. Article 8 of the African Charter states:

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

48. Article 10(1) of the Charter states: 'Every individual shall have the right to free association provided that he abides by the law.'

49. In deporting the two men, the government of Zambia has denied them the exercise of their right to freedom of association. This is so since they have been prevented from associating with their colleagues in the United National Independence Party and participating in their activities.

50. As the African Commission ruled in the case of communication 97/93 *Modise v Botswana*, by forcing Banda and Chinula to live as stateless persons under degrading conditions, the government of Zambia has deprived them of their family and is depriving their families of the men's support, and this constitutes a violation of the dignity of a human being, thereby violating article 5 of the Charter, which guarantees the right to 'respect of

the dignity inherent in a human being and to the recognition of his legal status'.

51. The forcible expulsion of Banda and Chinula by the Zambian government has forcibly broken up the family unit which is the core of society, thereby failing in its duties to protect and assist the family as stipulated in article 18 of the Charter:

(1) The family shall be the natural unit and basis of society. It shall be protected by the state (2) The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

52. Article 7(1) states that:

Every individual shall have the right to have his cause heard . . . (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed . . .

53. The Zambia government, by denying Mr Chinula the opportunity to appeal his deportation order, has deprived him of a right to fair hearing which contravenes all Zambian domestic laws and international human rights laws.

For these reasons, the Commission:

[54.] Holds a violation of articles 2, [5], 7(1)(a), [7(2)], 8, [9(1)], 9(2), 10, [12(4)], 18(1) and (2).

ZIMBABWE

Courson v Zimbabwe

(2000) AHRLR 335 (ACHPR 1995)

Communication 136/94, *William Courson v Zimbabwe*
8th Annual Activity Report

Equality, non-discrimination (discrimination on the grounds of sexual orientation, 2)

1. The communication concerns the legal status of homosexuals in Zimbabwe. The domestic law of Zimbabwe criminalises sexual contacts between consenting adult homosexual men in private. According to the complainant, this prohibition is currently being enforced in Zimbabwe, encouraged by statements against homosexuals by the President and by the Minister of Home Affairs.

2. The communication complains of violations of the African Charter on Human and Peoples' Rights, namely articles 1-6, 8-11, 16, 20, 22 and 24. The complainant points to article 60 of the Charter which states that the Commission shall draw inspiration from international law on human and peoples' rights and, as Annex B to the communication, the complainant has attached the views adopted by the Human Rights Committee in the case of *Toonen v Australia*. In this case the Committee was of the view that the criminalisation of homosexuality in Tasmania was unreasonable and interfered arbitrarily with Mr Toonens's right to privacy under article 17(1) of the International Covenant on Civil and Political Rights (CCPR).

Finding

[3.] The communication was withdrawn by the author. The Commission saw no need to continue with it.