

AFRICAN UNION

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*African Commission on Human  
& Peoples' Rights*

*Commission Africaine des Droits de l'Homme  
& des Peuples*

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

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## INTRODUCTION

1. This is the Twenty-Seventh (27<sup>th</sup>) Activity Report of the African Commission on Human and Peoples' Rights (the "ACHPR").
2. The Report describes the activities undertaken by the ACHPR from June to November 2009, and includes the 7<sup>th</sup> Extra-Ordinary Session of the ACHPR, held in Dakar, Senegal, from 5 to 12 October 2009 and the 46<sup>th</sup> Ordinary Session of the ACHPR held in Banjul, The Gambia, from 11 to 25 November 2009.
3. Following the election of Commissioner Sanji Mmasenono Monageng to the Bench of the International Criminal Court and her subsequent resignation as a Member of the ACHPR, and the absence of the Vice Chairperson, Commissioner Angela Melo, Commissioners Bahame Tom Mukirya Nyanduga and Reine Alapini Gansou were elected as Acting Chairperson and Acting Vice Chairperson respectively on 14 July 2009.

## EVENTS PRECEDING THE SESSION

4. Members and staff of the ACHPR participated in, and collaborated with other human rights organisations in a series of activities preceding, and on the margins of the Session, including the following:
  - i Meeting on the Research Findings of the ACHPR and the International Labour Organisation Joint Project on Constitutional and Legislative Measures on the Rights of Indigenous Populations/Communities held on 6 November 2009, in Banjul, The Gambia;
  - ii NGO Forum held from 7 to 9 November 2009, organised by the African Centre for Democracy and Human Rights Studies (ACDHRS);
  - iii Working Group on Indigenous Populations held from 7 to 9 November 2009, organized by the Working Group on Indigenous Populations/Communities in Africa; and
  - iv 3<sup>rd</sup> Conference of National Human Rights Institutions held from 8 to 10 November 2009, organised by the Directorate of the Political Affairs of the African Union Commission (AUC).

## ATTENDANCE AT THE SESSION

5. The following members of the ACHPR attended the 46<sup>th</sup> Ordinary Session (Session):
  - Commissioner **Reine Alapini-Gansou**, Acting Vice-Chairperson
  - Commissioner **Catherine Dupe Atoki**;

- Commissioner **Musa Ngary Bitaye**
- Commissioner **Mohamed Fayek;**
- Commissioner **Mohamed Bechir Khalfallah**
- Commissioner **Soyata Maiga**
- Commissioner **Mumba Malila;**
- Commissioner **Kayitesi Zainabo Sylvie;**
- Commissioner **Pansy Tlakula;** and
- Commissioner **Yeung Kam John Yeung Sik Yuen.**

6. Commissioner Angela Melo was absent.

7. Outgoing Chairperson, Commissioner Bahame Mukirya Tom Nyanduga, also attended part of the Session, and presided over the Opening Ceremony.

## THE OPENING CEREMONY

8. At the Opening Ceremony, speeches were delivered by the out-going Acting Chairperson of the ACHPR, Mr. Bahame Tom Mukirya Nyanduga; Ambassador Emile Ognimba, Director of the Political Affairs Directorate of the AUC, representing Her Excellency Mrs. Julia Dolly Joiner, Commissioner for Political Affairs, the representative of Non-Governmental Organisations (NGOs), Mrs. Hannah Forster, the representative of the AU Member States, Honourable Minister of Justice from the Republic of Mozambique, Honourable Maria Benvinda D. Levi, representative of National Human Rights Institutions (NHRI's), Mrs Winfred Lichuma.
9. Mrs. Therese Sarr Toupan, Acting Registrar of Companies, representing the Honourable Minister of Justice of the Republic of the Gambia, Mrs. Marie Saine Firdaus, delivered the welcome address and finally opened the 46<sup>th</sup> Ordinary Session of the ACHPR on Human and Peoples' Rights.
10. A total of two hundred and **eighty-eight (288)** participants attended the 46<sup>th</sup> Ordinary Session of the Commission, including: 10 representatives from 8 National Human Rights Institutions, 8 International and Inter-Governmental Organizations, 112 participants from 36 African and International NGOs and 67 State Delegates from 21 States Parties.
11. In his address, Commissioner Nyanduga thanked the Government and people of the Republic of the Gambia for their hospitality and for hosting the African Commission's Secretariat. He also thanked the participants for attending the Session. He stated that the objective of the 46<sup>th</sup> Ordinary Session was to, among other things,, review the human rights situation in African countries and the various measures taken by governments, and also to engage in dialogue with the various human rights actors on the continent. He noted that this dialogue was increasingly including non-state actors on the enjoyment of human and peoples' rights in Africa.

12. The outgoing Acting Chairperson highlighted that the ACHPR continues to receive numerous reports on human rights abuses perpetrated on the continent. He stated that there have been important developments in many parts of the world, including Africa, which have witnessed unparalleled growth in democracy and major social and economic changes that have transformed the political landscape. He said that Africans have continued to demand the right to determine how they are governed. He noted that though major strides have been made in this regard, there are some areas in which Africa must do better. He also expressed concern regarding the escalating human rights violations in countries like Democratic Republic of Congo, the Republics of The Gambia, Guinea, Sudan, Niger and Somalia.
13. He also highlighted climate change as another threat to the enjoyment of human rights on the continent. He stated that many African nations are realizing that the threats from climate change are serious and urgent, since no nation can escape the consequences thereof. He indicated that unless Africa and the international community adopt policies and programmes to combat the negative effects of climate change in Africa, there is a risk of massive violations of human rights in Africa, which continue to rely on rain fed agriculture. Inaction, he said, is not an option.
14. He urged Member States to the African Union to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ("African Court") and make the relevant declaration under Article 34 (6) of the Protocol, as a matter of priority, to ensure that the African Court fully discharges its mandate. He noted with appreciation that the work of the ACHPR continues to receive the attention of States Parties, including AU Policy Organs, the Executive Council and the Assembly.
15. Ambassador Emile Ognimba, Director of Political Affairs Directorate of the AUC, representing Her Excellency Mrs. Julia Dolly Joiner, the AUC Commissioner of Political Affairs Directorate also addressed the 46<sup>th</sup> Session. He said that despite some progress, the overall human rights record in Africa remains poor and noted with regret that many African countries continue to violate the human rights of their own people.
16. He said that the deteriorating human rights situation in many African countries has had an especially negative impact on the life of women and children. Stressing that human rights should be the collective responsibility of all, he expressed the hope that the 46<sup>th</sup> Ordinary Session will address these important issues. He stated that the AUC in partnership with different stakeholders including other competent AU organs and the United Nations is working on a strategic plan to improve the human rights situation in Africa.
17. In her opening speech, Mrs. Therese Sarr-Toupan, representing Honourable Attorney General and Minister of Justice of the Republic of The Gambia welcomed the participants to the 46<sup>th</sup> Ordinary Session and expressed the delight of the Government and people of The Gambia for the opportunity to host the Session of the ACHPR.

18. She indicated that the Gambian Government is committed to the protection and development of human and people's rights, nurture peace, political stability and good governance across the world. She stressed that the promotion and protection of human rights in Africa is the primary responsibility of States because it is only when human rights are guaranteed, promoted and protected, that human security can become a reality.
19. She lamented the fact that in 2009, Africa witnessed the resumption of coup d'états, social unrests, summary executions and sexual crimes, which have become the tools and weapons in the hands of junta regimes. In this regard, she urged the ACHPR to continue working with member states to implement its mandate to monitor, protect and promote human rights.
20. She called on the promoters and protectors of human to act responsibly in when they execute their mandates and functions and not to make misleading and unsubstantiated claims of alleged human rights violations or statements founded on others ulterior motives.
21. She concluded by wishing all participants successful deliberations and declaring the Session officially opened.

## **SWEARING IN OF NEW COMMISSIONERS**

22. During the 15<sup>th</sup> Ordinary Session of the Executive Council of the African Union held in Sirte, Libya, in June 2009, two new Commissioners were elected as members of the Commission, while one was re-elected. The Commissioners are:
  - Commissioner **Mohamed Fayek, elected;**
  - Commissioner **Mohamed Bechir Khalfallah, elected;**
  - Commissioner **Zainabo Sylvie Kayitesi, re-elected.**

23. In accordance with Rule 16 of the Rules of Procedure of the ACHPR, these Commissioners were sworn in after making a solemn declaration during the Public Session of the ACHPR.

## **ELECTION OF THE BUREAU**

24. In accordance with Article 42 of the African Charter and the relevant provisions of the Rules of Procedure of the ACHPR **Commissioner Reine Alapini Gansou** and **Commissioner Mumba Malila** were elected Chairperson and Vice- Chairperson, respectively, for a term of two years, effective from 11 November 2009.



## AGENDA OF THE SESSION

25. The Agenda of the Session was adopted on 11 November 2009 and is attached to this Report as **Annex I**

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

26. The ACHPR considered applications by four (4) NGOs seeking Observer Status, and granted Observer Status to three (3) NGOs in accordance with the 1999 Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights, ACHPR/Res.33 (XXV) 99. The NGOs so granted Observer Status are the following:
- i. Africa in Democracy and Good Governance (ADG), The Gambia;
  - ii. Female Lawyers Association-Gambia (FLAG), The Gambia
  - iii. Frontline, Ireland;
27. This brings the total number of NGOs with Observer Status before the ACHPR to **four hundred and five (405)**.
28. The ACHPR decided to defer the application for Observer Status by one NGO, namely, Coalition of African Lesbians (CAL), based in South Africa, to the next Ordinary Session, pending the finalization of the ACHPR 's consideration of the position paper on "Sexual Orientation" in Africa.
29. During the 46<sup>th</sup> Ordinary Session, the ACHPR did not receive any application for Affiliate Status from any NHRI. The number of NHRIs with Affiliate Status with the African Commission thus remains at **twenty - one (21)**

## HUMAN RIGHTS SITUATION IN AFRICA

30. Statements were made by State Delegates from Botswana, Burkina Faso, Congo, Cote d'Ivoire, Egypt, Ethiopia, Libya, Mauritania, Mozambique, Namibia, Nigeria, Sahrawi Arab Democratic Republic, South Africa, Tanzania, Tunisia, Uganda and Zimbabwe on the human rights situations in their respective countries. The summarised texts of these statements are in the Session Report of the 46<sup>th</sup> Ordinary Session of the ACHPR.
31. Representatives of International Organisations and NHRI's spoke about various human rights issues on the continent, and the need to continue cooperation with the ACHPR, to better promote and protect human rights. These organisations included the Office of the High Commissioner for Human Rights (OHCHR), South African Human Rights Commission (SAHRC), National Human Rights Commission of Rwanda (NHRCR),

Kenyan National Human Rights Commission (KHRC) and Ugandan National Human Rights Commission (UHRC).

32. A total of forty (40) Non-Governmental Organisations (NGOs), which have Observer Status with the ACHPR also made statements on the human rights situation in Africa.

## **ACTIVITIES OF MEMBERS OF THE AFRICAN COMMISSION DURING THE INTER-SESSION**

33. The Chairperson and Members of the ACHPR presented Reports on the activities that they undertook during the inter-session period between the 45<sup>th</sup> Ordinary Session in May 2009, and the 46<sup>th</sup> Session in November 2009. The reports covered activities undertaken in their capacities as Members of the ACHPR, as Special Rapporteurs, and/or as Members of Special Mechanisms. The activities are set out hereunder. Commissioner Malila presented the activity report of the former Acting Chairperson on his behalf.

### **Commissioner Bahame Tom Mukirya Nyanduga - Acting Chairperson**

#### *Report on activities as Commissioner*

34. In June 2009, the Acting Chairperson participated in a Conference convened by IRRI and other NGOs in Nairobi, Kenya. The Conference adopted recommendations, *inter alia*, calling upon the International Criminal Court Prosecutor and the international community to address the issue of selectivity of referrals, which is a matter of concern to African States.
35. Between 26 June and 4 July 2009, he participated at the meetings of the Permanent Representative Committee (PRC), the Executive Council and the Assembly of Heads of State and Government, which took place in Sirte, Libya, where he presented the 26<sup>th</sup> Activity Report of the ACHPR to the Executive Council.
36. Between 14 and 17 July 2009, he participated in the Joint Meeting of the African Court and the African Commission in Arusha, Tanzania. The aim of the Meeting was to deliberate the harmonisation of the Rules of Procedure of the two institutions, relation between the African Commission and the African Court.
37. Between 31 August and 3 September 2009, the Acting Chairperson presented lectures on "Comparative Analysis of the African Human Rights System, the Inter American, and European Human Rights Systems," to the Summer Human Rights School, organised by the Faculty of Law of the University of Lueven, Belgium.
38. On 9 September 2009, he sent an Urgent Appeal for the adoption of Provisional Measures to Brother Leader Muammar Al-Gaddafi, the Head of the Great Socialist Arab Libyan Jamahiriya, concerning allegations that a number of Nigerians held in various prisons were due to be executed, pending the consideration of a Communication forwarded to the African Commission by Socio-Economic Rights and Accountability Project, a Nigerian NGO.

39. Between 9 and 11 September 2009, he participated in an International Conference organised by the MacArthur Foundation, the Hauser Centre of Harvard University, the International Centre for Transitional Justice and the International Criminal Court on International Criminal Justice, in New York, USA.
40. As one of the panellists, he made a presentation, on the Role of International and Regional Judicial and Quasi-Judicial Institutions, Relative to the Accountability for International Crimes.
41. Between 5 and 11 October 2009, the Acting Chairperson participated in the 7<sup>th</sup> Extra Ordinary Session of the African Commission to finalise the Interim Rules of Procedure of the African Commission, and to prepare for the 2<sup>nd</sup> Joint Meeting between the African Commission and the African Court in Dakar, Senegal.
42. Between 12 and 16 October 2009, he participated in the 2<sup>nd</sup> Joint Meeting between the African Commission and the African Court, in Dakar, Senegal to harmonise both institutions Rules of Procedure.
43. On 20 October 2009, the Acting Chairperson sent an urgent appeal to H.E. President Jacob Zuma of the Republic of South Africa, concerning allegations that the Government of South Africa was reviewing police powers regarding the use of force when executing powers of arrest, to give them the right to shoot to kill.
44. Between 7 and 9 November 2009, he participated in the Forum of NGOs prior to the 46<sup>th</sup> Ordinary Session of the African Commission, and the 20<sup>th</sup> African Human Rights Book Fair, held in Banjul, The Gambia.
45. During the Forum, he made an opening statement, where he condemned the resurgence of coups on the continent, and the abuse of coalition arrangements adopted to diffuse critical violations of human and peoples' rights, by some parties to national unity governments.
46. Between 8 and 10 November 2009, he participated in the 3<sup>rd</sup> Conference of African Human Rights Institutions (NHRIs), organised by the Directorate for Political Affairs of the African Union, in Banjul, The Gambia.
47. During the Conference, the Acting Chairperson emphasised the need to strengthen coordination and collaboration between the African Union Commission, the African Commission, NHRIs and other organisations which have a human rights mandate on the continent. He also made a recommendation that the African Commission should review the Resolution for granting Affiliate Status to NHRI, which was adopted in 1998, in order to take into account developments and concerns expressed by NHRIs.
48. On 11 November 2009, the Acting Chairperson opened the 46<sup>th</sup> Ordinary session of the African Commission.

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

49. On 29 June 2009, the Acting Chairperson addressed an urgent appeal to H.E. President Joseph Kabila of the Democratic Republic of Congo, following allegations that the government had expelled thousands of Angolan immigrants. He urged the Government of the Democratic Republic of Congo and the Republic of Angola, to engage in mutual negotiations with a view of providing a mechanism to address the property rights of

migrants instead of engaging in mutual expulsion, which is prohibited under Article 12 of the African Charter

50. In his report, the Special Rapporteur noted that conflicts in Somalia, Sudan and Democratic Republic of Congo continue to create displacement and violations of the rights of Internally Displaced Persons. He mentioned the Displacement in Darfur where more than 2 million people have continued to live in camps for the last six years. In this regard, he underscored the importance of the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, (otherwise known as the Kampala Convention), adopted at a Special Summit of the African Union, held in Kampala, Uganda, between 22 and 23 October 2009.
51. From 19 to 23 October 2009, the Special Rapporteur participated in the meeting of the Executive Council of the African Union, and the Special Summit of the African Union in Kampala, Uganda. The highlight of the Special Summit was the adoption of the Kampala Convention.
52. The Special Rapporteur served as one the AU Legal Experts who drafted the Framework Paper, the initial zero draft, and also assisted in the negotiation process of the Kampala Convention.
53. During the Special Summit, he had the opportunity to address Ministers and Representatives attending the latter on the role of the Special Rapporteur and the African Commission envisaged in the Kampala Convention.
54. The Special Rapporteur urged all AU Member States to sign and ratify the Convention expeditiously. He also urges all the partners of the African Commission, namely the NHRIs, NGOs, the Media and all the friends of the Commission, to ensure that the Kampala Convention is given maximum publicity, as an advocacy tool for the rights of Internally Displaced Persons, wherever they are on the Continent.

### **Commissioner Catherine Dupe Atoki**

#### *Activities as a Commissioner*

55. From 14 to 17 July 2009, Commissioner Atoki participated in the Joint Meeting between the African Commission and the African Court in Arusha, Tanzania.
56. From 6 to 7 August 2009, Commissioner Atoki attended the Gender Expert Meeting on Guidelines for Reporting on the Protocol on the Rights of Women in Africa in Pretoria, South Africa, organized by the Centre for Human Rights, University of Pretoria, in collaboration with the African Commission.
57. The overall objective of the meeting was to strengthen the capacity of the African Commission to promote and protect women's rights through monitoring implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women. At the end of the deliberations a Guideline on the State Reporting were adopted to be presented to the African Commission for consideration.
58. From 10 to 15 August 2009, Commissioner Atoki participated as a Judge together with

seven other panelists in the 18<sup>th</sup> Annual Moot Court Competition organized in Lagos, Nigeria by the Centre for Human Rights, University of Pretoria, South Africa.

59. On 25 September 2009, Commissioner Atoki was invited by the Permanent Mission of Sweden to the United Nations, in collaboration with Amnesty International, New York,, to present a paper during a meeting at a side event during the 64<sup>th</sup> United Nations General Assembly Meeting. She presented a paper on "*Debating the death penalty- experiences from different regions.*"
60. From 5 to 11 October 2009, Commissioner Atoki attended the 7<sup>th</sup> Extra-Ordinary Session of the African Commission in Dakar, Senegal. This meeting was convened to conclude the position of the African Commission on the issues of complementarity in the revised Rules of Procedure, ahead of its meeting with the African Court.
61. From 12 to 16 October 2009, Commissioner Atoki attended a Joint Meeting between the African Commission and the African Court, in Dakar, Senegal. This Meeting finalized the issue of complementarity of the revised Rules of Procedure and harmonization of the Rules of Procedure of the both institutions.
62. On 21 October 2009, Commissioner Atoki delivered a Statement to commemorate Africa Human Rights Day in Cotonou, Benin, during her Promotional Mission in the country. The statement, which was broadcasted on the National Television, emphasized the need for States Parties to the African Charter, NGOs, international community and other stakeholders to continue to commit to the realization of the rights enshrined in the African Charter.
63. From 13 to 27 May 2009, Commissioner Atoki undertook a Promotion Mission to the Republic of Sudan, together with Commissioners Reine Alapini-Gansou, Pansy Tlakula, and Soyata Maiga.
64. The aim of the Promotion Mission was to *inter alia* promote the African Charter; exchange views and share experiences with the Government of the Republic of Sudan and major human rights stakeholders in the country on how to enhance the enjoyment of human rights in the country; discuss ways to promote human rights in the Sudan; to exchange views with relevant Sudanese authorities on Sudan's preparation for the country's general elections in 2010; and to exchange closer collaboration between the African Commission and the Republic of Sudan on one hand, and between the African Commission and civil society organization in the country.
65. The full Report of this mission will be presented to the African Commission during its 47<sup>th</sup> Ordinary Session.

*Activities as Chairperson of the Follow-up Committee of the Robben Island Guidelines on the Prevention of Torture (RIG)*

66. From 23 to 27 June 2009, the Chairperson of the Follow-up Committee of the Robben Island Guidelines on the Prevention of Torture (RIG) in Africa honoured an invitation by the Association for the Prevention of Torture (APT), to Geneva for a working visit.
67. The meeting afforded the Chairperson the opportunity to meet with several officials of the United Nations (UN) working in the field of torture prevention, including members of the Sub Committee on the Prevention of Torture (SPT), the body responsible for the implementation of the Optional Protocol on the Convention Against Torture (OPCAT).
68. During the working visit, the Chairperson also engaged members of the APT on further collaboration with the African Commission, particularly in respect of the provision of a Technical Assistant to the Committee.
69. From 25 to 27 October 2009, the Chairperson undertook a mission to the Republic of Uganda. During the mission, the Chairperson had discussions with high ranking Government officials, politicians and law enforcement officials to whom presentations were made on prevention and prohibition of torture, its effect on the victims and their rehabilitation.
70. During the mission, she raised the need to expedite the adoption of the Anti- Torture Bill which was before the National Assembly for consideration.
71. During the mission, a one-day Sensitization Workshop to promote the RIG was also held, and participants included: police, immigration, army, prison, special forces of Uganda, staff of the Ministry of Justice, the Uganda Human Rights Commission, the Uganda Amnesty Commission, the Law Reform Commission of Uganda and staff of the Ministry of Foreign Affairs. The Chairperson also visited the Central Prison in Kampala.
72. On 21-23 October 2009, the Chairperson conducted a Promotional Mission to the Republic of Benin. During the mission, she had a constructive dialogue with Benin authorities on Government policies and measures put in place for the prevention and protection of torture. The mission provided an opportunity to promote and sensitize relevant stakeholders on the RIG and the need to use the Guidelines in their torture prevention programmes.
73. In collaboration with the Ministry of Justice and Association of the Prevention of Torture, a one-day seminar on the RIG was also organized and resource persons at the seminar included Dr. Hans Draminsky Petersen, a Member of Sub-Committee of the Prevention of Torture.
74. In the report, the Chairperson highlighted the following positive developments in the area of prevention of torture in Africa:

- The ratification of OPCAT by the Federal Republic of Nigeria in August 2009, making it the 6<sup>th</sup> African Member State to do so. She called on the State to establish a National Prevention Mechanism (NPM).
  - The steps taken by the Republic of Sudan in prosecuting police officers in two cases involving custodial killings as a result of torture.
  - The steps taken by the Republic of Uganda in starting the process of criminalizing torture and urged the State to expedite the process, so that prosecution of the perpetrators of the torture can be well situated in law.
  - The initiative of Benin to criminalize torture in the Penal Code Bill taken before Parliament, and urged the State Party to speed up the process of adoption of the Bill as well as the Penal Procedure Code Bill.
  - Senegal's adoption of a law establishing an NPM pursuant to the ratification of OPCAT. However because the membership of the NPM has not been composed, she urged the State to expedite the composition of the members of the NPM.
75. She requested of the Republic of Togo, whose draft law on the ratification of OPCAT is currently before the parliament, to speed up its adoption.
76. The Chairperson further urged States Parties to the African Charter, which have not criminalized torture, or ratify OPCAT, and/or set up a National Preventive Measure and to do so urgently.

### **Commissioner Musa Ngary Bitaye**

#### *Activities as a Commissioner*

77. From 14 to 17 July 2009, Commissioner Bitaye attended the Joint Meeting between the African Commission and the African Court in Arusha, Tanzania to harmonise their respective Rules of Procedure.
78. As the Acting Chairperson of the Commission's Advisory Committee on Budget and Staff Matters, he convened a meeting on the margins of the Joint Meeting of the African Commission and the African Court on 11 July 2009 in Arusha, Tanzania, to discuss activities for the 2010 budget of the African Commission.
79. From 5 to 11 October 2009, he participated in the meeting organised by the African Commission to prepare for the Joint Meeting with the African Court, in Dakar, Senegal.
80. From 14 to 19 October 2009, Commissioner Bitaye was delegated to attend the Mid - Term Review Meeting of the PRC in Addis Ababa. However, since the meeting was postponed, he used the opportunity to meet some Members of the PRC and AUC Officials to sensitize them on the challenges facing the African Commission.
81. On 25 of October, 2009 Commissioner Bitaye, together with the Secretary to the African Commission, and the Finance and Administration Officer were designated to attend the

reconvened Mid-Term Review meeting of the PRC in Addis Ababa. However, because it was again postponed to 2 November 2009, they used the opportunity to follow up on outstanding matters relating to the work of the African Commission, including meetings and courtesy calls to some members of the PRC, the Commissioner of the Department of Political Affairs and the Director of Administration and Human Resources Development of the AUC.

82. From 14 to 18 September 2009, Commissioner Bitaye undertook a Promotional Mission to the Federal Republic of Nigeria. He was accompanied by Dr. Feyi Ogunade, Senior Legal Officer at the Secretariat.
83. The above Mission was aimed at amongst others: promoting the African Charter; exchanging views with all human rights stakeholders, including the Government of the Federal Republic of Nigeria on the ways and means of enhancing the enjoyment of human rights in the country; and raising awareness and visibility of the African Commission and its functions, especially among the relevant government departments / institutions, and civil society organisations.

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

84. Commissioner Musa Ngary Bitaye in his capacity as Chairperson of this Working Group, indicated that the Group had undertaken the following activities, among others, during the intersession which include the publications of the following reports:
  - a) Reports of the Working Group's visit to Uganda and Central African Republic published in French and English;
  - b) Report from the Regional Sensitization Seminar of "The Rights of Indigenous Populations/Communities in Central Africa" organised by the Working Group in Yaoundé, Cameroon in September 2006;
  - c) Overview Report of the Research Project by the International Labour Organisation and the African Commission in collaboration with the Centre for Human Rights, University of Pretoria on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries published in English, French and Arabic.<sup>1</sup>
85. Plans are underway for a Consultant from the Working Group's Advisory Network of Experts to develop a manual for indigenous peoples' activists on how to effectively use the African Commission platform as well as other African mechanisms, such as the African Court.

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<sup>1</sup> The full electronic version of the overview report, and primary legal documents pertaining to indigenous peoples are contained in a database developed as part of the project accessible at ([www.chr.up.az.za/indigenous](http://www.chr.up.az.za/indigenous)), while hard copies of the Overview Report can be obtained from the University of Pretoria, South Africa through Prof. Frans Viljoen as well as from the Secretariat of the African Commission;



86. On 16 September 2009, the Chairperson of the Working Group sent an urgent appeal to the President of the United Republic of Tanzania following the evictions of the inhabitants of Liliondo village in Northern Tanzania. He urged the Government to take steps to ensure the protection of the rights of the indigenous populations in Liliondo.
87. From 10 - 14 August 2009, the Chairperson of the Working Group participated in the 2<sup>nd</sup> Ordinary Session of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) held in Geneva, Switzerland, with the support of Dr Albert Barume and Dr. Melakou Tegegn, expert members of the Working Group.
88. During the Session of the EMRIP, he made two presentations on, "The Study of lessons learned and challenges relating to the implementation of the right of indigenous peoples to education", and on "the United Nations Declaration on the Rights of Indigenous Peoples and its implementation in Africa".
89. In the margins of the Session of the EMRIP, he also held important meetings with other stakeholders, such as; Ambassadors of the African Permanent Missions in Geneva; the 5 Members of EMRIP; the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples; the African Caucus of Indigenous NGOs and Communities; the Indigenous Peoples and Minorities Unit of the UN Office of the High Commission on Human Rights; the International Labour Organisation (ILO); and the International Working Group on Indigenous Affairs (IWGIA).
90. On 6 November 2009, the Working Group organised a workshop in collaboration with the International Labour Organisation (ILO) to follow up on research findings of the Research Project on the Rights of Indigenous peoples in 24 African countries. It was also organised to explore the opportunities to disseminate and operationalize the research findings as well as to provide recommendations for future joint actions. The Working Group has developed Terms of Reference for the production of a film on the situation of indigenous peoples in Africa. The main target groups for the film are African governments, civil servants, key civil society actors and other relevant stakeholders. It will be used by the African Commission as a promotion tool for its work and by different indigenous organizations, human rights organizations, teaching institutions and other stakeholders in Africa to raise awareness about indigenous issues.
91. From 7 to 9 November 2009, the Working Group held a Meeting before the 46<sup>th</sup> Ordinary Session in Banjul, The Gambia to discuss activities undertaken during the past six months and plan for future activities.

## **Commissioner Reine Alapini-Gansou**

### *Activities as a Commissioner*

92. From 23 to 29 June 2009, Commissioner Gansou undertook a Promotional Mission to the Republic of Senegal. This Mission created a platform for the continuation of a dialogue on human rights issues with all stakeholders in the country, and also to publicize the mandate

of the African Commission.

93. From 11 to 16 July 2009, she participated in a Working Meeting between the African Commission and the African Court on Human Rights in Arusha, Tanzania.
94. From 6 to 8 August 2009, Commissioner Gansou was invited by the Centre for Human Rights, University of Pretoria, to sit as a Judge on a panel during the 18<sup>th</sup> African Human Rights Moot Court Competition, in Lagos, Nigeria. On the sidelines of this competition, Commissioner Gansou participated in a workshop on “Human Rights Disputes within National Jurisdictions.”
95. From 30 to 31 August 2009, in her capacity as the acting Vice-Chairperson, Commissioner Gansou participated in an Extraordinary Session of the Executive Council of the African Union in Tripoli, in the Great Popular and Socialist Libyan Arab Jamahiriya. She had the opportunity to express the availability of the ACHPR in contributing greatly to issues relating to the exploitation of natural resources.
96. From 16 to 20 September 2009, Commissioner Gansou represented the African Commission at the 12<sup>th</sup> Session of the United Nations Human Rights Council (UNHCR) in Geneva. During the Session, she discussed with various partners and institutions on the establishment or strengthening of cooperation between the African Commission and the UNHRC. She also propagated the objectives of the African Commission and participated in discussions on key thematic issues such as the state of children.
97. From 5 to 16 October 2009, she participated in two meetings organized by the African Commission in Dakar, Senegal: the 7<sup>th</sup> Extra Ordinary Session aimed at preparing for the Joint Meeting with the African Court, and the second was the Joint Meeting with the African Court which finalized the issue of complementarity in the revised Rules of Procedure of the African Commission.
98. From 7 to 10 November 2009, Commissioner Gansou took part in the 3<sup>rd</sup> Conference of National Human Rights Institutions (NHRIs) organized by the Directorate for Political Affairs of the African Union Commission (AUC). During this meeting, discussions were held on varied experiences of the NHRIs represented, their relations with the African Union, as well as difficulties faced, and possible solutions to ensure better relations. She also participated in the NGO Forum as a prelude to the 46<sup>th</sup> Ordinary Session of the ACHPR. In this regard, she took part in the various deliberations on the State of Human Rights Defenders and also on the Search for Strategies with the view to Protection Human Rights Defenders.

*Activities as a Member of the Working Group on Older Persons and People with Disabilities in Africa*

99. From 26 to 28 August 2009, Commissioner Gansou participated in the Expert Seminar on the Rights of Older Persons and People with Disabilities in Accra, Ghana. The main objective of the Seminar was to initiate the drafting of a Protocol on the Rights of Older Persons and People with Disabilities in Africa.

100. During the Seminar, Commissioner Gansou made a presentation on the Special Mechanisms of the African Commission, their legal bases and their mandates. She made particular reference to the Working Group on the Rights of Older Persons and People with Disabilities, established during the 45<sup>th</sup> Ordinary Session of the African Commission.
101. At the end of the Seminar, participants prepared two Draft Protocols, one on Older Persons and the other on People with Disabilities. These two documents will be finalized at later stage and submitted to the African Commission to ensure that appropriate procedures for their transmission to the African Union are followed.

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

102. From 2 to 5 June 2009, the Special Rapporteur participated in a Regional Workshop on “Capacity Building of National Human Rights Defenders’ Organizations in Francophone West Africa in preparation for a General Periodic Review” By the Human Rights Council.
103. The Workshop, organized by the West African Network of Human Rights Defenders (ROADDH) with the support of the International Organization of the Francophonie shed light on certain aspects of the African human rights protection system. During the Workshop, she underscored the importance of members of civil society in ensuring the effectiveness of human rights.
104. From 10 to 19 June 2009, at the invitation of the International Service for Human Rights, the Special Rapporteur participated in a series of activities on the sidelines of the 11<sup>th</sup> Session of the Human Rights Council in Geneva. These included the following:
  - b) On 12 June 2009, she participated in a roundtable on “*Human Rights, Sexual Orientation and Gender Identity*,” organized in Geneva. This roundtable sought to initiate an interregional dialogue on issues relating to sexual orientation and gender identity within the context of human rights. It was also intended to sensitize and reinforce the joint Declaration of the General Assembly on human rights, sexual orientation and gender identity.
  - c) On 18 June 2009, she also responded to the invitation of the International Coalition of Women Defenders of Human Rights and the United Nations Special Rapporteur on Human Rights Defenders who were organizing the first strategic meeting of women rights defenders. This meeting sought to brainstorm on specific concerns confronting women human rights defenders and to find appropriate strategies to include them in the agenda of the Special Rapporteurs on human rights defenders. Another objective of this meeting was also to find possibilities for collaboration between the Coalition of Women’s Defenders and the Special Rapporteurs on Human Rights Defenders.
  - d) On 19 June 2009, she further participated in the meeting which presented the Annual Report (2008) of the Observatory FIDH / OMCT on Human Rights Defenders in Geneva. This meeting dealt with the state of human rights defenders in the world.
105. On 27 July 2009, the Special Rapporteur took part in the presentation of the Report of the Observatory FIDH/OMCT on the state of human rights in Cairo, Egypt. At this meeting,

she had the opportunity to engage members of civil society to ensure better collaboration with the African Commission and to work with the Government towards the presentation of its Report in accordance with Article 62 of the African Charter.

106. From 30 August to 5 September 2009, the Special Rapporteur participated in a training workshop for human rights defenders in Kigali, Rwanda. The main objective of this workshop, organized by the International Service for Human Rights was to prepare civil society for the upcoming General Periodic Review of Rwanda in 2011 and for the use of human rights promotion and protection mechanisms. During the workshop, she made a presentation on the work of the African Commission and her mandate.
107. From 21 to 23 September 2009, she was invited by the Centre for Conflict Resolution in Cape Town, in the Republic of South Africa, to attend a training workshop for Human Rights Defenders and their Role in Conflict Management and Resolution. During the workshop, she made a presentation on the mandate of the Special Rapporteur on Human Rights Defenders and the various procedures used in the promotion and protection of Human Rights Defenders in Africa.
108. From 22 to 23 October 2009, the Special Rapporteur took part in the European Development Days organized in Stockholm, Sweden by the European Commission and the European Union Presidency. Experts from different backgrounds and nations shared thoughts on themes centered particularly on good governance, climate change, energy and the economic recession. The Special Rapporteur talked about the strategies of the African Commission in terms of the right to reproductive health during a panel discussion. She also had the opportunity to participate in a Conference on the instruments for the promotion and protection of the rights of Human Rights Defenders.
109. From 27 October to 2 November 2009, she was part of the joint promotion mission to the Federal Republic of Sudan.
110. From 8 to 10 November 2009, the Special Rapporteur attended the NGO Forum which preceded the 46<sup>th</sup> Ordinary Session of the African Commission. During the Forum, the situation of human rights defenders in the continent was discussed.
111. From 21 to 22 October 2009, the Special Rapporteur took part in an inter-mechanism meeting on the protection of human rights defenders in Washington, United States of America, organized by the World Organization against Torture (OMCT). During this meeting which brought together regional and world institutions responsible for the promotion and protection of the rights of human rights defenders, she demonstrated her collaborative efforts with other counterparts and also shared the challenges faced by her mandate in the area of follow-up of individual cases on violations of the rights of HRD.
112. During the intersession, the Special Rapporteur forwarded Notes Verbales to some States Parties of the African Charter, requesting for promotional visits in their countries. These include: The Democratic People's Republic of Algeria; The Republics of Côte d'Ivoire; Congo Brazzaville; Liberia; and Ethiopia. Among these countries, the Republics of Congo and Liberia have responded positively to the request of the Special Rapporteur.

113. Due to reports of alleged human rights violations in some countries in the continent, the Special Rapporteur forwarded Press Releases and letters of Appeal to the countries concerned addressing the issues. The Special Rapporteur sent letters of Appeal to the Republic of Kenya, Libya, and Democratic Republic of Congo. She also published a joint press release with the United Nations Special Rapporteur on Human Rights Defenders concerning the human rights situation in The Gambia and Guinea.
114. The Special Rapporteur also enumerated challenges she faced in executing her mandate during the intercession. Amongst others, she mentioned communication breakdown between her mandate and NGO networks which hampers its visibility and effectiveness. In this regard, a website, known as; [www.srhrafrica.org](http://www.srhrafrica.org) has been created alongside the site of the African Commission to facilitate communication flow.
115. The Special Rapporteur also made some recommendations, including the fact that State Parties should respond to the Notes Verbales and other communications of the African Commission. According to her, this is part of their responsibility to comply with the African Charter, and also portrays their desire to have a constructive dialogue with the African Commission.
116. The Special Rapporteur presented a general Report on the execution of her mandate for the 2007 to 2009 period.

## **Commissioner Soyata Maiga**

### *Activities as a Commissioner*

117. From 11 to 15 July 2009, Commissioner Maiga participated in a Joint Meeting of the African Commission and the African Court, held in Arusha, Tanzania.
118. From 28 June to 2 July 2009, Commissioner Maiga participated at the Ordinary Session of the Executive Council and the Summit of the Heads of State and Government of the African Union in Sirte, Libya.
119. From 6 to 7 August 2009, she took part in the “*Gender Expert Meeting on State Reporting on the Protocol on the Rights of Women in Africa,*” organized by the Centre for Human Rights of the University of Pretoria, South Africa. The objective of the meeting was to enrich the Draft Guidelines which had been prepared and presented by the Centre for Human Rights on the implementation of the Maputo Protocol.
120. From 5 to 11 October 2009, Commissioner Maiga participated in the 7<sup>th</sup> Extra-Ordinary Session, organized by the African Commission in Dakar, Senegal.
121. From 12 to 16 October 2009, she participated in the Second Joint Meeting of the African Commission and the African Court in Dakar, Senegal.

### *Activities as a Member of the Working Group on Indigenous Populations/African Commission*

122. From 20 to 24 July 2009, Commissioner Maiga participated in a workshop with the theme, *"To promote the United Nations Declaration on the Rights of Indigenous Populations for the Reinforcement of Human Rights and Peace,"* in Bamako, Mali. This Workshop was organized by the Coordinating Committee of Indigenous Populations in Africa (IPACC), in collaboration with the Human Rights Council of the United Nations and TIN HINAN, a local NGO active in the promotion and protection of the culture and identity of the Touareg populations.

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

123. On 4 June 2009, the Special Rapporteur participated in a Roundtable in Geneva organized on the sidelines of the deliberations of the 11<sup>th</sup> Session of the United Nations Human Rights Council, with the theme: *"Maternal mortality and Human Rights."* The Roundtable was organized as a result of the initiative of the New York Centre for Reproductive Rights, Human Rights Watch, Action Canada for Population and Development and the International Initiative on Maternal mortality and Human Rights. Its main objective was to engage all actors, States, NGOs and International Organizations in an exercise of advocacy for the adoption of a Resolution on Maternal Mortality and Morbidity as a human rights problem by the Human Rights Council.
124. The Roundtable culminated in the adoption of a Resolution on Preventable Maternal Mortality and Morbidity and Human Rights, by the Human Rights Council on 16 June 2009.
125. On 5 June 2009, the Special Rapporteur also participated in a Roundtable in Geneva, on *"The 15 years of the United Nations Special Rapporteur on Violence against Women: Successes, Challenges and Perspectives"*. The meeting, which was organized at the initiative of the World Organization Against Torture (OMCT), registered the participation of the Office of the High Commissioner for Human Rights, the Special Rapporteur on extra-judiciary killings, NGO representatives, and in particular, the Asia Pacific Forum on Women, Law and Development, the NGO Committee on the Status of Women and the Working Group on Abuse against Women and Girls.
126. From 22 to 23 June 2009, she participated as an Ex-Officio Member in the deliberations of the Governing Council of the International Centre for Individual Rights and Democratic Development, commonly called Rights and Democracy in Montreal, Canada.
127. From 27 to 28 June 2009, she participated in the deliberations of the 14<sup>th</sup> Civil Society Consultation on the integration of Gender in the African Union held in Tripoli, Libya. This Consultation was directed by Africa Women Solidarity (FAS) in collaboration with the Organization of Maghrebi Mothers (OMMA), and the Organization of Young Libyans with the support of the African Women's Development Fund (AWDF).
128. On 4 August 2009, the Special Rapporteur participated in a Seminar organized by the South African Electoral Commission on the theme *"Women and Elections,"* in Pretoria, South Africa. This Seminar was organized within the framework of the commemorative

activities of Women's Month in South Africa.

129. On 5 August 2009, she moderated a Conference in Pretoria co-organized by the Head of Gender in the Africa/Multilateral Cooperation Division of the South African Ministry of Foreign Affairs and the Ministry of Women's Affairs on the theme: "*Protocol on the Rights of Women in Africa: State of Implementation and Challenges*". The discussions focused on the manner in which socio-cultural barriers could be overcome as they constitute obstacles to the development of women in Africa.
130. From 13 and 14 August 2009, she participated in a Regional Consultation co-organized in Bujumbura, Burundi by the Ministries responsible for gender and women's affairs of Burundi, Democratic Republic of Congo and Rwanda, in partnership with various Women's Organizations and Networks of these three countries.
131. On 20 August 2009, the Special Rapporteur took part in the organization of a Day of Information and Discussions for the leaders of Malian Women Associations and NGOs, on the draft Family and Persons Code in Bamako, Mali. The objective was to enlighten Malian women on the content of draft Code.
132. On 28 August 2009 the Special Rapporteur finalized a Regional Study on the Sex-Specific Discriminatory provisions and gaps in terms of Gender Equality in the national legislations of ECOWAS member States. This analytic and comparative study was carried out on the basis of 13 country reports which identified the discriminatory provisions and laws that do not provide appropriate guarantees for the realization of gender equality in each Member State. The information put together was illustrated by statistical data as well as examples of cases of discrimination and abuse brought before the national courts.
133. On 2 September 2009, she was invited to make a presentation on the State of Implementation in Africa of Security Council Resolutions 1325 and 1820 on "*Women, Peace and Security*" at a roundtable meeting organized in Ottawa by the Canadian Network for the Consolidation of Peace and the Pearson Centre for the Maintenance of Peace.
134. On 3 September 2009, she moderated a roundtable meeting organized by the West Africa Division of the Canadian Ministry of Foreign Affairs and International Trade in Ottawa on "*The Rights of Women in Africa in the Face of Rising Fundamentalism*".
135. On 4 September 2009, the Special Rapporteur moderated two conferences in Montreal, Canada, organized by Rights and Democracy for its staff on "*The Progress and the Challenges in the Promotion of Women's Rights in Africa*" and by Amnesty International Canada on "*The Impact of the Economic Crisis on Women's Human Rights in Africa*", for the benefit of its Members, NGO representatives and African nationals resident in Canada.
136. On 30 September 2009, she participated in a Panel of technical and financial partners on the Draft Malian Persons and Family Code under the auspices of the Canadian Embassy in Bamako, Mali. The objective of the discussions was to enhance their understanding of the problems relating to the Draft Code and the evaluation of the perspectives relative to its imminent promulgation by the President of the Republic.

137. From 28 October to 2 November 2009, the Special Rapporteur undertook a joint Promotional Mission to The Republic of Sudan, together with Commissioners Catherine Atoki and Pansy Tlakula.
138. The Special Rapporteur also forwarded Notes Verbales, Press Releases, letters of appeal and reminders to States Parties during the intersession. She dispatched Notes Verbales to several States Parties to the African Charter in the context of planned Promotion Missions. These include: Note Verbales to the Republic of Niger, the Republic of Gabon, Central African Republic, and Republic of Guinea. Amongst these countries only the Republic of Niger agreed in principle for the Special Rapporteur to undertake a Promotional Mission in the country.
139. With regard to the Maputo Protocol, the Special Rapporteur sent letters reminding States Parties to the African Charter, urging them to ratify the latter. However, only 29 countries have ratified the Protocol.
140. The Special Rapporteur, together with the Special Rapporteur on the Freedom of Expression, forwarded a letter of Appeal to His Excellency Professor Sheikh Dr. Yahya A. J. J. Jammeh, President of the Republic of The Gambia on 20 August 2009. The letter was requesting him to use his discretionary powers to pardon and release Journalists who were imprisoned, including a woman with a 7 months old baby.
141. Following the release of the Journalists, the two mechanisms forwarded a joint letter of appreciation the President of The Gambia.
142. On 31 July 2009, on the occasion of the Women's Pan-African Day, Commissioner Maiga issued a Press Release on the protection of Women against sexual exploitation and all other forms of abuse against them.
143. The Special Rapporteur called on those States that have not yet ratified the Maputo Protocol, to do so as soon as possible. She further urged those that have ratified the Protocol to include in their Periodic Reports submitted to the African Commission, all the statistical data on the situation of women and girls, as well as the legislative and other measures that they have taken to give effect to the provisions of the Protocol.
144. She also urged States Parties to strengthen programmes of education, information and sensitization on women's rights for the benefit of religious leaders, and customary heads. She said this will help accelerate the change of cultural patterns and models as well as the broadening of the universal values of equality and non-discrimination.
145. The Special Rapporteur recommended that African Commission adopt new guidelines on the Periodic Reports of States Parties that will involve the integration by the Special Rapporteur of integrating therein the legislative and other measures taken by them under the terms of the implementation of the Maputo Protocol.



146. She also encouraged the African Commission to support the efforts of the mechanism in the popularization of the Maputo Protocol and the Solemn Declaration of the Heads of State on Gender Equality in Africa at the continental level and in particular in conflict zones, where the situation of the rights of women and girls remains a matter of concern.

### *Commissioner Mumba Malila*

#### *Activities as a Commissioner*

147. On 11 June 2009, Commissioner Malila participated in a one day Global Peace Festival held in Lusaka, Zambia organised by the Inter-religious and International Federation for World Peace. During the festival, he discussed the existence and programmes of the ACHPR with a number of the participants.

148. On 23 June 2009, Commissioner Malila officially launched the second Annual State of Human Rights Report of the Zambia Human Rights Commission under the theme 'Constitutionalism and Human Rights'. The Report reflected various human rights aspects in Zambia in the preceding twelve months and contained recommendations on how to remedy some identified human rights challenges.

149. On 29 July 2009, he participated in a one - day open forum on HIV/AIDS and human rights in Zambia. The Forum which was organised by the Human Rights Commission, examined various issues related to the human rights of persons living with HIV/AIDS such as discrimination, access to treatment and social services.

150. On 25 August 2009, Commissioner Malila met with Ms. Magdalene Sepulveda, the United Nations Independent Expert on Human Rights and Extreme Poverty during her mission to Zambia. They discussed various issues relating to the adequacy or otherwise of the measures that have been put in place to mitigate instances of extreme poverty in Zambia, in particular the need for greater regard and recognition of economic, social and cultural rights.

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

151. As Special Rapporteur, Commissioner Malila attended and participated in the following activities in the intersession period;

- a) From 20 to 21 July 2009, he participated in a roundtable meeting on Penal Reform in Africa, organised by Penal Reform International in Kampala, Uganda. This roundtable was intended to take stock of progress on implementing penal reform in Africa and in particular of local good practices that have developed in the treatment of prisoners.
- b) During the roundtable discussion, the Special Rapporteur made a presentation on the African Commission's past, current and future initiatives and strategies for research, analysis and action in the domain of penal reform.

- c) On 31 August 2009, he participated in a one day seminar under the theme “Negotiating transition; The Limitation of the South African Model for the Rest of Africa.” The seminar was organised by the Centre for the Study of Violence and Reconciliation, in Cape Town, South Africa. This Seminar was aimed at providing space to critically reflect on the impact of the South African experience in international developments in negotiating peace and justice. In particular, it explored the impact of two key elements of the South African transition – the Government of National Unity and the Truth and Reconciliation Commission, in negotiating transition elsewhere on the continent with a specific focus on Zimbabwe and Kenya. The seminar also discussed existing and potential roles of various actors- local, regional and international- in shaping these processes and made recommendations for the future.
- d) Commissioner Malila presented a paper on “The Role and Responsibility of African Regional Mechanisms and International Community in, Securing Justice and Peace during Political Transition.”

- 152. During the inter session, the Special Rapporteur continued to receive reports of poor prison administration in various prisons across the continent. In this regard, he continued to engage with various actors in the area of prisoners’ rights to attempt to find a workable formula to encourage African states to do more in reforming their prisons in order to provide more humane environment to persons in detention.
- 153. He maintained contacts with Ms Rachel Murray of Penal Reform International (PRI) United Kingdom. He also liaised with Professor Jeremy Sarkin, United Nations Special Rapporteur on Enforced Disappearances, with a view to synergize their efforts as far as issues affecting African prisons are concerned.
- 154. The Special Rapporteur also continued to dialogue with Prof Muntingh of the Community Law Centre of the University of Western Cape, South Africa, on how the Centre could assist the Commission with statistical data on various issues affecting African prisons with a view to helping the Commission make informed decisions. To this end, a proposed Memorandum of Understanding between the Centre and the Commission was proposed.
- 155. He also maintained contact with Dr Uju Agomo of Prison Rehabilitation and Welfare Action (PRAWA) with a view to possible collaboration on a Prison Reform Intervention in Africa Project which will include African Correctional Services Association.

### **Commissioner Zainabo Sylvie Kayitesi**

#### *Activities as a Commissioner*

- 156. The Commissioner attended a Workshop on Building the Capacities of Human Rights Defenders in Kigali, Rwanda, from 31 August to 4 September 2009, in which she made two presentations on “the African Commission as a Regional Human Rights Promotion and Protection Mechanism” and on “the National Human Rights Institutions, the Role, Opportunities and Collaboration with the Human Rights Defender Organizations.

157. From 17 to 19 September 2009, Commissioner Kayitesi attended a Human Rights Training Workshop for university students and members of Steering Committees and student' organisations held in the province of Southern Rwanda, where she made a presentation on "International and Regional Human Rights Instruments".
158. The Commissioner participated in the 7<sup>th</sup> Extra-Ordinary Session, organized by the African Commission from 5 to 11 October 2009, in Dakar, Senegal, which examined the Rules of Procedure, in particular provisions on complementarity.
159. From 12 to 16 October 2009, she participated in the Second Joint Meeting of the African Commission and the African Court in Dakar, Senegal, which finalized the issue of complementarity between the African Commission and the African Court.

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

160. The Chairperson of the Working Group on the Death Penalty chaired a Sub-regional Conference on the Death Penalty in Africa, which took place in Kigali, Rwanda, From 23 to 25 September 2009. The Conference brought together representatives from States Parties, National Human Rights Institutions, NGO's and other stakeholders from East, South and Central Africa. The Conference adopted a Document entitled: "Framework Document on the Abolition of the Death Penalty in Africa".
161. In the margin of this Conference, the Chairperson had a meeting with Members of the Working Group to discuss the way forward in the work of the Working Group after the said Conference.
162. In that inter-session, the Chairperson of the Working Group monitored the situation of the Abolition of the Death Penalty. The Republic of Burundi and the Republic of Togo adopted laws on the Abolition of the Death Penalty. Other countries took measures for the Abolition of the Death Penalty such as Burkina Faso who initiated the process of consultation for the abolition of the Death Penalty.

#### *Activities as a Member of the Working Group on Specific Issues*

163. The Commission's Working Group on Specific Issues focused essentially on the drafting of the Commission's Rules of Procedure. The two meetings held between the Commission and the African Court in July and October 2009 in which Members of the Commission participated, made it possible to establish a consensual Rules of Procedure specifically on the provisions relative to complementarity.
164. At the end of the 7<sup>th</sup> Extra-Ordinary Session, during which the Rules of Procedure of the African Commission were examined, the Commissioner reorganized provisions on the complementarity adopted in the Session and she made a presentation on this reorganization of provisions of the Rules of Procedure at the beginning of the Meeting of the African Commission and the African Court.

## Commissioner Pansy Tlakula

### *Activities as a Commissioner*

165. From 25 to 27 August 2009, Commissioner Tlakula undertook a Promotional Mission to the Republic of Namibia. The objective of the Mission was to engage with relevant stakeholders to among other things, exchange views on ways and means of enhancing the enjoyment of human rights in the country.
166. From 26 October to 1 November 2009, Commissioner Tlakula undertook a Joint Promotional Mission to the Republic of Sudan, together with Commissioners Reine Alapini-Gansou, Soyata Maiga, and Catherine Dupe Atoki.
167. From 6 to 7 August 2009, Commissioner Tlakula participated in the Gender Expert Meeting on State Reporting on the Protocols on the Rights of Women in Africa, co-organised by the Centre for Human Rights, University of Pretoria, and the Special Rapporteur on the Rights of Women in Africa, in Pretoria South Africa.
168. From 14 to 16 September 2009, Commissioner Tlakula attended a Conference on Parliamentary Democracy in Africa in Gaborone, Republic of Botswana, in commemoration of International Democracy Day. The Conference was organised by the Inter-Parliamentary Union and the Parliament of Botswana. She delivered a keynote address on: *“What does the African Charter on Democracy, Elections and Governance say? Its relationship with the African Charter on Human and People’s Rights.”*.
169. In her address, she expressed concern that since the adoption of the Charter on Democracy in 2007, only 28 Member States have signed the Charter, and out of these, only two have ratified it, namely; The Federal Democratic Republic of Ethiopia and the Republic of Mauritania.
170. She urged Member States of the African Union to sign and ratify the African Charter on Democracy, Elections and Governance, so as to ensure its coming into force without further delay.
171. On 28 September 2009, Commissioner Tlakula attended *“The Right to Know Day: The National Information Officers Forum and Golden Key Award Ceremony”* organized by the South African Human Rights Commission, in Gauteng, South Africa, for Information Officers in the public sector. She delivered a key note address on the importance of access to information.
172. From 12 to 16 October 2009, Commissioner Tlakula participated in the Joint Meeting between the African Commission and the African Court on Human and Peoples’ Rights in Dakar, Republic of Senegal on the harmonization of the rules of procedure of the two institutions.
173. On 21 October 2009, Commissioner Tlakula attended a seminar organised by the South African Department of International Relations and Cooperation, the South African Human

Rights Commission, the Commission for Cultural, Religious and Linguistic and the Electoral Commission, in commemoration of Africa Human Rights Day in Johannesburg, South Africa. She delivered a key note address on "*Minorities and Political Participation*," which was the theme of the seminar.

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

174. From 1 to 6 June 2009, the Special Rapporteur attended the Global Forum on Freedom of Expression (GFFE) in Oslo, Norway. During the Forum, she participated in a roundtable discussion of Special Rapporteurs for Freedom of Expression from the United Nations, the African Union, and the Organisation of American States. Discussions were held about the various mandates of the Special Rapporteurs, how they can collaborate, and how their work can be supported by stakeholders that participated at the GFFE.
175. At the same Forum, there was a Training Workshop on "*Regional Human Rights Mechanism for free expression advocacy: Africa*." During this Workshop, the Special Rapporteur delivered a paper on "*How to Access and Utilise the Special Rapporteur on Freedom of Expression in Africa*."
176. From 22 to 24 October 2009, Commissioner Tlakula participated in a panel discussion on "*New Media for a New World: Democracy and Development*," organised by the European Commission on the margins of the European Development Days which took place in Stockholm, Sweden.
177. The panelists included among others; the President of Liberia, Her Excellency Ms. Ellen Johnson-Sirleaf and the Prime Minister of Kenya, His Excellency Mr. Raila Odinga.
178. In line with her mandate to make public interventions where violations of the right to freedom of expression and access to information in Africa have been brought to her attention, the Special Rapporteur received numerous reports alleging violations of freedom of expression and access to information in various States Parties. These allegations related to the arrest, prosecution, imprisonment and unlawful detention of journalists and media practitioners.
179. In this regard, the Special Rapporteur sent letters of appeal to the following countries, Cameroon, Cote d' Ivoire, Eritrea, Gabon, Kenya, Namibia, Niger, Senegal, Sierra Leone, and The Gambia in which she requested these States Parties to respond to the allegations she had received .
180. In her report, the Special Rapporteur highlights in particular the deteriorating situation of freedom of expression in the Republic of The Gambia. In this regard the Special Rapporteur sent a number of letters of appeal regarding the prosecution and imprisonment of six journalists in June 2009 for conspiracy and publishing seditious publication " with intend to bring hatred or contempt or to excite dissatisfaction against the person of the President or the Government of the Republic of The Gambia" and conspiracy to commit criminal defamation "with intend to bring the President of the Republic of The Gambia and the Government of The Gambia into contempt and ridicule".

The journalists were subsequently released on Presidential pardon. A letter of appreciation for the release of these journalists was sent to the President of the Republic of The Gambia, Sheikh Professor Dr. Alhaji Yahya A.J.J.Jammeh.

181. The Special Rapporteur highlighted that there is a need for a constructive dialogue between the journalists and media practitioners and the Government of The Gambia on the improvement of the situation of freedom of expression in the country. To this end, the Special Rapporteur appreciates the fact that the Government of The Gambia has accepted her request to undertake a promotional mission.
182. In line with her mandate to analyse national media legislation and policies within Member States to monitor their compliance with the African Charter and Declaration of Principles of Freedom of Expression in Africa and advise Member States accordingly, the Special Rapporteur analysed the national media laws of Kenya, Swaziland and Zimbabwe and transmitted her comments to these Member States.
183. She called on States Parties to revoke or amend all criminal defamation law according to Principles XII and XIII of the *Declaration of Principles on Freedom of Expression in Africa (the Declaration)*, investigate and punish perpetrators of murder, kidnapping, torture, harassment and intimidation of journalists, and to protect journalists working in States where there are ongoing conflicts in accordance with the Declaration, which supplements the provisions of Article 9 of the Charter on Freedom of Expression.
184. With regard to upcoming elections, the Special Rapporteur urged all the countries that will hold elections in 2010, which include Sudan, Ethiopia, Burundi, Comoros, Mauritius, Rwanda, Madagascar, Tanzania, and Central African Republic to ensure that journalists and media practitioners are allowed to freely disseminate information on the elections without any form of harassment or intimidation.

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

#### *Activities as a Commissioner*

185. On 22 July 2009 Commissioner Y. K. J. Yeung Sik Yuen received a delegation of the African Peer Review Mechanism (APRM) composed of 17 Eminent African Personalities at the Supreme Court, Port Louis, Mauritius.
186. The team was led by Professor Mohammed Seghir Babès from Algeria, and comprised among others; Professor Ijuka Kabumba from Uganda, Madame Sylvie Kinigi, former Prime Minister of the Republic of Burundi and Dr. Moise Nembot, Coordinator.
187. Commissioner Y. K. J. Yeung Sik Yuen had a two hours exchange with the distinguished delegates on human rights, best practices to promote human rights, corporate governance and democracy, as well as on the necessity of having an independent judiciary.

### *Activities as Chairperson on the Rights of Older Persons*

188. From 26 to 28 August 2009, the Chairperson organised an Expert Seminar on the Rights of Older Persons and People with Disabilities in Accra, Ghana.
189. The overall objective of the Expert Seminar was to start the process of drafting a Protocol on the Rights of Older Persons and People with Disabilities in Africa. Thus, experts were brought together from all the regions in Africa, to develop a coordinated approach and strategic arrangement in the drafting of this Protocol.
190. The Seminar achieved its purpose of initiating a draft Protocol on Older Persons, and a draft Protocol on People with Disabilities in Africa. He said that the two sets of drafts which have been forwarded to the Secretariat of the African Commission will be tabled before the latter for consideration.
191. He called on States Parties to put in place programs that promote the rights of older persons and protect them from abuse, neglect, and exploitation. He also urged States Parties to amend existing legislations to ensure equal opportunities for older persons.
192. The Chairperson further note that, despite the impairments of people with disabilities, they have the same right as every one and should therefore fully participate in activities of the community and be recognized as equal participants.

### **SPECIAL MECHANISMS**

#### **Distribution of Special Mechanisms**

193. The African Commission appointed the following Commissioners and independent experts:
  - a. **The Committee for the Prevention of Torture in Africa**
    - i. Commissioner Catherine Dupe Atoki- Chairperson
    - ii. Mr Jean-Baptiste Niyizurugero - Vice Chairperson (Membership renewed)
    - iii. Commissioner Musa Ngary Bitaye - (Member)
    - iv. Mrs Hannah Forster – Member - (Membership renewed)
    - v. Mr Malick Sow – Member - (Membership renewed)
  - b. **Working Group on Economic, Social and Cultural Rights**
    - i. Commissioner Mohamed Bechir Khalfallah - Chairperson
    - ii. Commissioner Soyata Maiga – (Member);
    - iii. Mr Ibrahima Kane – (OSISA) - (Membership Renewed);

- iv. Representative of Interrights – (Membership Renewed);
- v. Representative of the Institute for Human Rights and Developments in Africa – (Membership Renewed);
- vi. Representative of The Centre for Human Rights, University of Pretoria – (Membership Renewed).

**c. Working Group on the Death Penalty**

- i. Commissioner Zainabo Sylvie Kayitesi- Chairperson
- ii. Commissioner Mumba Malila - (Member);
- iii. Ms Alice Mogwe - (Membership Renewed);
- iv. Ms Alya Cherif Chammari - (Membership Renewed);
- v. Prof. Phillips Francis Iya - (Membership Renewed);
- vi. Prof. Carlson E. Anyangwe - (Membership Renewed).

**d. Working Group on Specific Issues Relevant to the Work of the Commission**

- i. Commissioner Pansy Tlakula – Chairperson
- ii. Commissioner Zainabo Sylvie Kayitesi - (Member);
- iii. Representative of Open Society Justice Initiative - (Membership renewed);
- iv. Representative of the Institute for Human Rights and Development in Africa – (Membership Renewed).

**e. The Working Group on Extractive Industries and Human Rights Violations in Africa**

- i. Commissioner Mumba Malila - Chairperson
- ii. Commissioner Soyata Maiga - Member

**Special Rapporteurs**

194. The African Commission renewed the appointments of the following:

- i. Commissioner Catherine Dupe Atoki – Special Rapporteur, Prisons and Conditions of Detention in Africa (Appointment);
- ii. Commissioner Mohamed Fayek, Special Rapporteur, Refugees, Asylum Seekers and Internally Displaced Person’s in Africa (Appointment);
- iii. Commissioner Mohamed Bechir Khalfallah, Special Rapporteur, Human Rights Defenders in Africa (Appointment);
- iv. Commissioner Soyata Maiga - Special Rapporteur on the Rights of Women in Africa (Reappointment);
- v. Commissioner Pansy Tlakula - Special Rapporteur, Freedom Of Expression and Access to Information in Africa (Reappointment);

**RE-ALLOCATION OF COUNTRIES OF RESPONSIBILITY**

195. The Commission reviewed the countries for which individual Commissioners would be responsible as follows;



- vi. Commissioner Reine Alapini-Gansou: Cameroon, Democratic Republic of Congo, Mali, Togo and Tunisia;
- vii. Commissioner Mumba Malila: Kenya, Malawi, Mozambique, Tanzania and Uganda;
- viii. Commissioner Catherine Dupe Atoki: Egypt, Ethiopia, Guinea Equatorial, Liberia and Sudan ;
- ix. Commissioner Musa Ngary Bitaye: Ghana, Nigeria, Sierra Leone, Rwanda and Zimbabwe;
- x. Commissioner Mohamed Fayek: Botswana, Eritrea, Somalia and South Africa;
- xi. Commissioner Mohamed Bechir Khalfallah: Chad, Central African Republic, Guinea Conakry, Mauritania, Sahrawi Arab Democratic Republic and Senegal;
- xii. Commissioner Soyata Maiga:, Angola, Benin, Congo, Gabon, Niger and Libya;
- xiii. Commissioner Kayitesi Zainabo Sylvie: Algeria, Burkina Faso, Burundi , Cote d'Ivoire, ,Guinea Bissau and Lesotho;
- xiv. Commissioner Pansy Tlakula: Mauritius, Namibia, The Gambia, Swaziland, and Zambia;
- xv. Commissioner Yeung Kam John Yeung Sik Yuen: Comoros, Djibouti, Madagascar Sao Tome and Principe, and Seychelles.

## **PRIVATE SESSION**

### **REPORT OF THE SECRETARY, INCLUDING ADMINISTRATIVE AND FINANCIAL MATTERS**

- 196. The Secretary to the ACHPR, Dr. Mary Maboreke, presented her Report to African Commission. The Secretary's Report set out the activities undertaken with the Secretariat's assistance during the six-month inter-session period between the 45th Ordinary Session of the African Commission held in May 2009, in Banjul, The Gambia and the 46<sup>th</sup> Ordinary Session, in Banjul, The Gambia.
- 197. Among other things, she briefed the ACHPR on the preparations of the ACHPR budget/proposals for 2010; the human resource challenge that continue to constrain the work of the ACHPR; the challenges to the ACHPR meeting the deadline for submission of documents to Member States, on account of the current scheduling of the ACHPR's statutory meetings; construction of the ACHPR's headquarters; and on the implementation of AU Policy decisions.

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

198. The Republic of Botswana, the Republic of Congo and the Federal Democratic Republic of Ethiopia presented their respective Periodic Reports to the ACHPR in accordance with Article 62 of the African Charter. The ACHPR examined the Reports and engaged in constructive dialogue with the three States Parties. The ACHPR adopted Concluding Observations on the Periodic Reports of the Republic of Congo and deferred adopting the Concluding Observations on those of the Republic of Botswana and the Federal Democratic Republic of Ethiopia until after the receipt of more information, as undertaken, by those States.

## STATUS OF SUBMISSION OF STATE REPORTS

199. The status of submission and presentation of the Periodic Reports of States as at the 46<sup>th</sup> Ordinary Session of the Commission stood as follows:

No.	Category	Number of States
1.	States which have submitted and presented all Reports	12
2.	States which have submitted all their Reports and will present the next Report at the 47 <sup>th</sup> Ordinary Session of the African Commission	3
3.	States which have submitted one (1) or two (2) Reports but still owe more Reports	26
4.	States which have not submitted any Report	12

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

No.	State Party
1.	Algeria
2.	Benin
3.	Botswana
4.	Republic of Congo
5.	Ethiopia
6.	Mauritius
7.	Nigeria
8.	Rwanda
9.	Sudan
10.	Tanzania

11.	Tunisia
12.	Uganda

b) States which have **submitted all their Reports and will present the latest one at the 47<sup>th</sup> Ordinary Session of the ACHPR:**

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

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

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

25.	Zambia	1 overdue Report
26.	Zimbabwe	1 overdue Report

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

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

200. The African Commission continues to urge States Parties to the African Charter that have not yet done so, to submit their Initial and Periodic Reports. States Parties are also reminded that they can combine all the overdue Reports into a single Report, for submission to the African Commission.

## PROTECTION ACTIVITIES

201. During the inter-session period between the 45<sup>th</sup> and 46<sup>th</sup> Ordinary Sessions, the ACHPR undertook several measures pursuant to Articles 46 to 59 of the African Charter, to ensure the protection of human and peoples' rights on the continent. These included, among others, writing Urgent Appeals, in reaction to allegations of human rights violations received from stakeholders and Press Releases addressing human rights violations.

202. In addition, during the 46<sup>th</sup> Ordinary Session, a total of seventy-nine (79) Communications were tabled before the ACHPR: **eight (8)** on Seizure; **seven (7)** on Admissibility; **one (1)** on the Merits; and **one (1)** for review.

203. The following Communications were seized of by the Commission;

- i. **Communication 366/09-** Hammadi Kamoun v. Tunisia
- ii. **Communication 375/09-** Prisillia Njere Echaria v. Kenya
- iii. **Communication 377/09-** Mendozaki Patricia Monachali v. South Africa
- iv. **Communication 378/09-** Socio- Economic Rights and Accountability Project v. Libya
- v. **Communication 379/09-** Monim Elgak Osma Hummedia ans Amir Suliman v. Sudan

- vi. **Communication 380/09**- Global Conscience Initiative Cameroon V. Cameroon
- vii. **Communication 381/09**- CIMIRIDE v. Kenya

204. The ACHPR decided to defer one (1) Communication- **Communication 382/09 Alex Alie v. Senegal**, because the ACHPR requested the Complainant to submit more information.

205. The ACHPR considered and adopted decisions on Admissibility of six (6) Communications. These are:

- i. **Communication 317/06** - IHRDA v. Kenya
- ii. **Communication 320/06** - Pierre Mamboundou v. Gabon
- iii. **Communication 321/06** - LSZ et al v. Zimbabwe
- iv. **Communication 347/07** - Association Pro Derechos Humanos De Espana v. Equatorial Guinea
- v. **Communication 348/07** - Association of the Families of Missing Persons v. Algeria
- vi. **Communication 357/07** - Urban Mkandawire v. Malawi.

206. The ACHPR considered and declared inadmissible the following Communication, attached as **Annex 2: Communication 310/05 - Darfur Relief and Documentation Centre v. Republic of Sudan**

207. The ACHPR considered and adopted a decision on the merits of one (1) Communication attached as **Annex 3**:

- i. **Communication 272/03** - Association des Victimes des Violences Post-Electorales & INTERRIGHTS V. Cameroun.

208. The ACHPR considered and adopted a decision on one (1) Communication for review, namely:

- i. **Communication 373/06** - Interrights / IHRDA v. Mauritania.

209. Consideration of sixty-two (62) Communications was deferred to the 47th Ordinary Session, for various reasons, including time constraints and lack of response from one or both parties.

210. During the 45<sup>th</sup> Ordinary Session, the ACHPR considered and adopted decisions on the merits of the followings Communications, attached as **Annex 4 and 5** respectively:

- i. **Communication 235/00** - Curtis Doebbler v. Sudan
- ii. **Communication 276** - Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya

211. The parties concerned (State Parties and Complainants) have been duly informed of the decisions of the ACHPR.

## **ADOPTION OF MISSION REPORTS**

212. During the Session, the African Commission adopted the following Mission Reports:

- i. Promotional Mission to the Republic of **Burkina Faso**
- ii. Promotional Mission to the Republic of **Congo**
- iii. Promotional Mission to the Republic of **Senegal**

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

213. During the 6<sup>th</sup> Extraordinary Session, the ACHPR decided to set up an Advisory Committee on Budget and Staff Matters, consisting of four Commissioners and three staff of the Secretariat, to facilitate the preparation and implementation of the programmes budget of the ACHPR. The Advisory Committee presented the 2010 Programmes Budget of the ACHPR during the Private Session,

## **RULES OF PROCEDURE**

214. During the meeting of the ACHPR and the African Court on Human and Peoples' Rights held in Dakar, Senegal, the ACHPR and the African Court continued consideration of their Interim Rules of Procedure.

## **RESOLUTIONS**

215. During the 46<sup>th</sup> Ordinary Session, the ACHPR adopted the following Resolutions:

- i. Resolution on Appointment of the Special Rapporteur on Prison and Places of Detention in Africa;
- ii. Resolution on Appointment of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa;
- iii. Resolution on the Designation of a Special Rapporteur on Human Rights Defenders in Africa;
- iv. Resolution on the Renewal of the Special Rapporteur on the Rights of Women in Africa;
- v. Resolution on the Renewal of the Mandate and Re-appointment of the Special Rapporteur for Freedom of Expression and Access to Information in Africa;
- vi. Resolution on the Renewal of the Mandate of the Working Group on Indigenous Populations/Communities in Africa;
- vii. Resolution on the Renewal of the Mandate of the Chairperson of the

- Working Group on the Death Penalty;
- viii. Resolution on the Change of Name of the Robben Island Guidelines Follow-Up Committee to the Committee for the Prevention of Torture in Africa and the Renewal of the Mandate;
  - ix. Resolution on the Appointment of the Chairperson and Members of the Working Group on Economic, Social and Cultural Rights in Africa;
  - x. Resolution on the Renewal of the Mandate and Composition of the Working Group on Specific Issues Relevant to the Work of the Commission;
  - xi. Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa;
  - xii. Resolution on the need for the Conduct of a Study on the Freedom of Association in Africa;
  - xiii. Resolution on the Impact of the ongoing Global Financial Crisis on the Enjoyment of Social and Economic Rights in Africa;
  - xiv. Resolution on Climate Change and Human Rights and the Need to Study Its Impact in Africa
  - xv. Resolution on the General Human Rights Situation in Africa.

## SESSION REPORTS

216. The African Commission deferred the consideration and adoption of the 45<sup>th</sup> and 46<sup>th</sup> Ordinary Sessions reports of the African Commission, as well as the 6<sup>th</sup> and 7<sup>th</sup> Extra-Ordinary Session.

## 7<sup>th</sup> EXTRA-ORDINARY SESSION

217. The ACHPR held its 7<sup>th</sup> Extra- Ordinary Session from 5 to 11 October 2009 in Dakar, Senegal.

218. The following Members of the ACHPR attended the Session:

- Commissioner **Bahame Tom Mukirya Nyanduga** - Acting Chairperson;
- Commissioner **Reine Alapini-Gansou** - Acting Vice-Chairperson;
- Commissioner **Catherine Dupe Atoki**;
- Commissioner **Musa Ngary Bitaye**;
- Commissioner **Soyata Maiga**;
- Commissioner **Kayitesi Zainabo Sylvie**.

219. It was convened, amongst other reasons, to conclude the position of the ACHPR on the issues of complementarity in the revised Rules of Procedure, ahead of its meeting with the African Court.

## **DATES AND VENUE OF THE 47<sup>TH</sup> ORDINARY SESSION**

220. The ACHPR decided that the 47<sup>th</sup> Ordinary Session will be held from 12 to 26 May 2010, in Tunis, the Republic of Tunisia.

## **SUBMISSION OF THE TWENTY- SEVENTH ACTIVITY REPORT**

221. In accordance with Article 54 of the African Charter on Human and Peoples' Rights, the ACHPR submits the present 27<sup>th</sup> Activity Report to the 16<sup>th</sup> Ordinary Session of the Executive Council of the African Union, for consideration and onward transmission to the 15<sup>th</sup> Summit of the AU Heads of State and Government.



## **List of Attachments**

- 1. Agenda of the 46<sup>th</sup> Ordinary Session (Annex 1)**
- 2. Decisions on Communications finalized at the 45<sup>th</sup> and 46<sup>th</sup> Ordinary Sessions**
  - a. Communication 310/2005 - Darfur Relief and Documentation Centre v. Republic of Sudan (Annex 2)**
  - b. Communication 272/2003- Association of Victims of Post Electoral Violence & INTERIGHTS V. Cameroon (Annex 3)**
  - c. Communication 235/2000 - Curtis Doebbler v. Sudan (Annex 4)**
  - d. Communication 276/2003 - Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (Annex 5)**

# Annex 1

## AGENDA OF THE 46<sup>th</sup> ORDINARY SESSION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (11<sup>th</sup> – 25<sup>th</sup> November 2009, Banjul, The Gambia)

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

**Item 2: Swearing in of new Members of the African Commission** (Public Session)

**Item 3: Election of the Bureau**

**Item 4: Adoption of the Agenda** (Private Session)

**Item 5: Organization of Work** (Private Session)

**Item 6: Human Rights Situation in Africa** (Public Session)

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

**Item 7: Cooperation and Relationship with National Human Rights Institutions (NHRIs) and Non-Governmental Organizations (NGOs)** (Public Session)

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

**Item 8: Consideration of State Reports** (Public Session)

- a) Status of Submission of State Party Reports
- b) Consideration of the :
  - i. Periodic Report of the Democratic Republic of Congo;
  - ii. Periodic Report of the Republic of Congo (Brazzaville);
  - iii. Periodic Report of the Federal Democratic Republic of Ethiopia;
  - iv. Periodic Report of the Republic of Cameroon;
  - v. Periodic Report of the Republic of Botswana.

**Item 9: Activity Reports of Members of the Commission & Special Mechanisms** (Public Session)

- a) Presentation of the Activity Reports of the Chairperson, Vice-Chairperson and Members of the ACHPR;
- b) Presentation of the Activity Reports of Special Mechanisms of the ACHPR:

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

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

- a) The Report of the Advisory Committee on Budget and Staff Matters;
- b) The MOU between the ACHPR and the CCR;
- c) Draft Paper on extending the Jurisdiction of the African Court;
- d) Report on Prison Reform Intervention in Africa; and
- e) Draft Guidelines on the Protocol on the Rights of Women in Africa

**Item 11: Consideration and Adoption of Draft Reports of (Private Session)**

a) Promotion Missions to the:

- i. United Republic of Tanzania;
- ii. Republic of Burkina Faso
- iii. Republic of Congo
- iv. Republic of Namibia

b) Special Mechanisms

- i. Mission of Special Rapporteur on Human Rights Defenders to Republic of Senegal;

**Item 12: Consideration of Communications: (Private Session)**

**Item 13: Report of the Secretary: (Private Session)**

**Item 14: Consideration and Adoption of (Private Session)**

- a) Recommendations, Resolutions and Decisions;

- b) Concluding Observations on the Periodic Report of the:
- Democratic Republic of Congo;
  - Republic of Congo (Brazzaville);
  - Federal Democratic Republic of Ethiopia ;
  - Republic of Cameroon; and
  - Republic of Botswana

**Item 15: Dates and Venue of the 47<sup>th</sup> Ordinary Session of the ACHPR** (Private Session)

**Item 16: Any Other Business** (Private Session)

**Item 17: Adoption of:** (Private Session)

- a) 27<sup>th</sup> Activity Report;
- b) Final Communiqué of the 46<sup>th</sup> Ordinary Session;
- c) 6<sup>th</sup> Extraordinary session
- d) Report of the 45<sup>th</sup> Ordinary Session;
- e) Report of the 46<sup>th</sup> Ordinary Session; and
- f) Report of the 7<sup>th</sup> Extraordinary Session.

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

**Item 19: Press Conference** (Public Session)

## Annex 2

### Communication 310/2005 - Darfur Relief and Documentation Centre v. Republic of Sudan<sup>2</sup>

#### Summary of Facts

1. This Communication is submitted by the Darfur Relief and Documentation Centre (DRDC) (hereinafter called the Complainant), on behalf of 33 Sudanese citizens (hereinafter referred to as victims) against the Republic of Sudan (hereinafter called the Respondent State).
2. The Complainant states that the victims were hired by the Iraqi - owned Southern Oil Company in the early 1980s as drivers, mechanics, electricians, cooks, servants and manual workers in the oil fields of the said company in Basra City (Southern Iraq).
3. On 22 and 23 February 1983 the said victims were arrested during the first Gulf War between Iran and Iraq and taken to Iranian territory on 24 February 1983 as civilian war detainees where they were detained in special military prisons, until 5 October 1990 (seven years), when they were released and repatriated to Sudan.
4. The Complainant submits that while in detention, the victims lost their sources of income and were unable to communicate with their families and lawyers; they were psychologically and physically tortured, had no access to medical treatment and could not carry out their religious rituals.
5. Following the victims' release from prison, the Iraqi government agreed to meet part of the unpaid salaries for the years that they had spent in Iranian custody. No arrangements were made to pay compensation, damages or reparations for the suffering caused to the victims during their detention.
6. A total of US\$ 500,000, paid in Sudanese currency at the exchange rate of the day of payment, was to be given to the detainees and divided evenly among all of them. It was agreed by the governments of Sudan and Iraq that the said amounts would be paid to the victims through the Ministry of Finance and Economic Planning in Khartoum. (See supporting documents No. 1, 2, and 3).The two governments further agreed that the full amount would be deducted from the debt that Sudan owed Iraq.
7. The Complainant submits further that the Ministry of Finance and Economic Planning in Khartoum informed the victims about the payment arrangements reached between Sudan and Iraq (See supporting document No. 4). The victims accepted the payment terms despite the fact that they were not part of the

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<sup>2</sup> The Republic of Sudan ratified the African Charter on 18th February 1986 and is consequently a State party to the African Charter.

negotiations that led to the payment agreement reached between Sudan and Iraq. This included payment in Sudanese currency and yet their salaries had been earmarked in US dollars.

8. The Complainant alleges that on 20 March 1992, the Sudanese Ministry of Finance and Economic Planning approved the payments to the victims and instructed the bank of Sudan to effect the said payments. (See supporting document No. 5). Subsequently, on 15 April 1993 and 10 May 1993, a total of US\$ 167,367 (SP 22,700,000) was paid to the victims as the first instalment. (see supporting document No.6) Each victim received the equivalent of US\$ 5,230. The Ministry of Finance and Economic Planning promised to pay the remaining balance amounting to US\$ 332,633 at a later date.
9. Payment of the remaining balance due to the victim was delayed and the Complainant states that the Ministry of Finance and Economic Planning eventually refused to pay the said amount altogether. The Complainant alleges that the then First Under-Secretary at the Ministry of Finance and Economic Planning, Mr. Hassan Mohamed Taha was responsible for ensuring that the said amounts were not paid to the victims.
10. The Complainant submits that the victims have attempted to use all the legal and political avenues available in order to have their rights recognised and recover the monies owed them but to no avail.

#### *Articles alleged to have been violated*

11. The Complainant alleges that Articles 1, 2, 5, 7(1) (a), 14 and 16(1) of the African Charter on Human and Peoples' Rights have been violated.

#### **Prayers**

12. The Complainant requests the African Commission to urge the government of Sudan to -:
  - Pay the outstanding balance due to the victims which currently amounts to US\$ 2,965,789, taking into account the accumulated benefit over the years or *rebeeh*<sup>3</sup> specified under the Islamic Banking system applied in Sudan;
  - Pay an additional US\$3 million in compensation for the material, social and psychological damage and disruption of life that the victims have endured during the last 13 years. This brings the total amount being requested to US\$5,965,789.
13. The Complainant further requests that in case of delay in satisfactorily settling the communication and effecting payment, similar benefits should be paid during 2006 and the subsequent years, as well as, US\$ 1,000,000 compensation

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<sup>3</sup> According to the Islamic Banking System the "rebeeh" is an annual benefit on the principal fund. This amount is multiplied by 120%.

for each additional year from 1<sup>st</sup> January 2006. The complainant seeks payment of the above balance, benefits and compensation in US currency to be divided equally between the victims.

### **Procedure**

14. The Communication is dated 22 November 2005 and was received by the Secretariat of the African Commission on 24 November 2005.
15. At its 38<sup>th</sup> Ordinary Session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission considered the Communication and decided to be seized of it.
16. By Note Verbale dated 8 December 2005, the Secretariat transmitted a copy of the Communication to the Respondent State by DHL and requested it to forward its submissions on admissibility within 3 months. The Complainant was also requested to send its submissions on admissibility within 3 months.
17. On 13 February 2006, the Secretariat of the African Commission received the Complainants' submissions on admissibility and acknowledged receipt of the same in a letter dated 14 February 2006. A copy of the Complainants' submissions on admissibility was forwarded to the Respondent State by fax and email.
18. By Note Verbale dated 20 March 2006, the Respondent State was reminded to forward its written submission on admissibility of the Communication.
19. On 20 May 2006, the Secretariat of the African Commission received a Note Verbale dated 20 May 2006 and attached to it was the State's submission on admissibility.
20. During the 39 Ordinary Session of the African Commission, the Commission decided to defer its decision on admissibility of the Communication to its 40<sup>th</sup> Ordinary Session. By letter and Note Verbale dated 31 May 2006, the Secretariat informed the Complainant and the State respectively, of the Commission's decision to defer the communication to its 40<sup>th</sup> Session.
21. By email dated 16 April 2007, the Secretariat received a letter dated 10 April 2007, from the Complainant, which had attached to it, additional submissions and documents in reply to the submissions of the Respondent State.
22. At its 40<sup>th</sup> Ordinary Session, the African Commission decided to defer the communication for further consideration on admissibility, to its 41<sup>st</sup> Ordinary Session.
23. During its 41<sup>st</sup> Ordinary Session which was held in Accra, Ghana, the Secretariat of the African Commission received, on the 22 of May 2007, a letter to the African Commission to which was attached further submissions by the complainant in

reply to the Respondent State's submission on admissibility.

24. At the 41<sup>st</sup> Ordinary Session of the African Commission, the decision on admissibility of the communication was further deferred to the 42<sup>nd</sup> Ordinary Session.
25. At the 42<sup>nd</sup> Session of the African Commission the decision on admissibility of this Communication was deferred, to get clarification on some issues from the Complainants.
26. At the 43<sup>rd</sup> Session the Secretariat was yet to receive the Complainants response and as a result deferred the Communication to the 44<sup>th</sup> Ordinary Session.
27. The Communication was further deferred during the 44<sup>th</sup> Session to give time to the Secretariat to draft its decision on admissibility.

## **The Law**

### **Admissibility**

#### **Summary of the Complainant's arguments on admissibility of the communication**

28. The Complainant states that a letter was addressed to the President of Sudan HE Omar El Bashir requesting him to intervene in the matter and resolve the case. (Attachment No. 7).
29. After studying the relevant documents relating to this matter, the Solicitor General, on 5 September 2000 forwarded a legal opinion to the Ministry of Finance and Economic Planning confirming that the victims were entitled to the payment of the outstanding balance held by the said Ministry. (Attachment No.9).
30. On 28 August 2001, Dr. Maghzoub Al Khalifa, the then Chair of the Joint Iraqi-Sudanese Ministerial Committee and a former Minister of Agriculture and Forestry of Sudan, sent a letter to the Ministry of Finance and Economic Planning reminding them of the agreement between the Sudanese and Iraqi governments and requesting them to pay the victims the outstanding amounts without delay. (Attachment No. 8).
31. The Complainant states that since attempts at solving the matter amicably had failed, the victims decided to pursue the matter in the courts of law.
32. The Complainant states that on 18 June 2000, the victims in this matter filed a complaint against the Ministry of Finance and Economic Planning before the Court of First Instance in Khartoum. The case - No. AM/1724/2000 was dismissed by the Court on 21 March 2000 (Attachment No. 10). The victims appealed against the judgment of the Court of First Instance before the Court of



Appeal in case no. ASM/475/2001. On 7 July 2001, the Court of Appeal issued an order to the Court of First Instance to reconsider its judgement and on 19 February 2002 the Court of First Instance dismissed the case once again. (Attachment No. 10).

33. The victims appealed against the second judgment of the Court of First Instance to the Court of Appeal in Khartoum in Case No. ASM/250/2002) and on 26 December 2002, the Court of Appeal upheld the judgment of the Court of First Instance and dismissed the case. (Attachment No. 11).
34. The victims approached the High Court in Khartoum, Civil Circuit in case MA/TM/165/2003 for an injunction against the ruling of the Court of Appeal. However, on 18 June 2003, the High Court decided to uphold the ruling of the Court of Appeal and dismissed the matter. (Attachment No. 11). The Complainants allege that the decisions of the court of first instance, Court of Appeal and the High Court, to dismiss the case, were based on technicalities and not on the spirit of justice, law and good conscience.
35. Consequently, the Complainant submits that the victims have exhausted all domestic remedies by virtue of the ruling of the High Court on 18 June 2003, which dismissed the case.
36. The Complainant submits that when reaching their judgments, the courts neglected to take into account elementary facts that would have favoured the victims' case. For instance, the fact that the victims received a part payment in respect of the agreement reached between Sudan and Iraq and that the Ministry of Finance and Economic Planning made an undertaking to pay the victims the outstanding balance; failure to take into account the legal opinion of the Solicitor General stating that he was not a witness to specific incidents. They also claim that the decisions of these Courts to dismiss the matter were based on technicalities and not on the spirit of fairness, law and justice.
37. The Complainant submits further that the Sudanese domestic courts are not competent to deal with a case of such magnitude and notes that the High Court when delivering its judgement in respect of the application for an injunction stated that the amount of financial indemnification claimed in this case supersedes the amount fixed by the Judicial Circular No. 44/99 which is a necessary condition for acceptance of an injunction before the High Court.
38. Additionally, the Complainant avers that the courts in Sudan failed to take into consideration the fact that the then ruling regime in Iraq was totalitarian and that the one in Sudan is military and as such citizens are unable to interfere with government decisions or procure the necessary documents that could prove their cases in a court of law.
39. For these reasons, the Complainant submits that the domestic judicial process was flawed and could not render justice to the victims.

40. The Complainant states that Sudan has been under totalitarian military government headed by a President who is still an active army officer since 30 June 1989. Consequently, the regime pursues a systematic policy of control and domination at all levels of the State apparatus including the judiciary whose procedure and decisions are not respected. As a result, Sudanese citizens, groups and organisations are unable to submit cases relating to human rights before the courts of law for fear of harassment, threats and intimidation by the government security agents.
41. To illustrate that the judiciary is not independent, the Complainant refers the African Commission to the annual reports the then UN Special Rapporteur on the Situation of Human Rights in Sudan in the Fifty-eighth<sup>4</sup> and the Fifty-ninth<sup>5</sup> Sessions of the UN Commission on Human Rights which make reference to the lack of independence of the judiciary in Sudan. Furthermore, the Complainant states that the International Commission of Inquiry on Darfur (ICID), established by the UN Security Council in October 2004 to investigate crimes committed within the context of the armed conflict in Darfur also examined the judicial system in Sudan as part of its mandate. In its report of 25 January 2005, the ICID gives a comprehensive overview of the Sudanese judicial system<sup>6</sup>. The Complainant submits that the report acknowledges that during the last decade the judiciary appeared to have been manipulated and politicised and as such judges who disagreed with the government often suffered harassment, including dismissals.<sup>7</sup>
42. The Complainant notes that, the Commission of Inquiry stated that it “considers that in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility...”<sup>8</sup>
43. The Complainant also draws the attention of the African Commission to its decision in **Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan**<sup>9</sup> in which the Commission found that the judiciary in Sudan was not independent. The Complainant state that even after this pronouncement by the Commission, the situation in Sudan has not improved but has in fact deteriorated in manifolds, as more judges are purged from the judiciary and supporters of the government were appointed in their place.

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<sup>4</sup> E/CN.4/2002/46 dated 23<sup>rd</sup> January 2002, Para. 19, 20 and 21 pp. 6 and 7.

<sup>5</sup> E/CN.4/2003/42 dated 6<sup>th</sup> January 2003' Para. 28 p.8.

<sup>6</sup> See paragraphs 432-455, pp 111-115.

<sup>7</sup> See Report of the International Commission of Inquiry on Darfur, at p.111 at Para. 432.

<sup>8</sup> See Report of the International Commission of Inquiry on Darfur, at p115 at Para. 455.

<sup>9</sup> Communications No. 48/90, 50/91, 52/91 and 89/93.

## **Summary of the Respondent State's submission on Admissibility**

44. The Respondent State starts by stating that the judicial system of the Sudan is one of the most competent and efficient organs of the State based on the principle of its total independence and the principle of separation of powers. It goes further to state that the judicial system is efficient, honest and characterised with competence. The State submits that the Sudan is one of the few African States which has a Supreme Court in every Province and a judicial system which is available to all.
45. The State contends that the Complainants have not fulfilled the conditions stated in Article 56 of the African Charter. The Respondent State submits that the complaint has not complied with the condition in Article 56(5) of the African Charter which provides for the exhaustion of local remedies before a Communication is brought before the African Commission.
46. The State submits in this regard, that the Complainants are afforded the opportunity to have their cases heard by the Constitutional Court and Department of Grievances these are the two mechanisms put in place by the Constitution of Sudan, for the protection of human rights. The State substantiates this claim with documents on statistics illustrating the judicial performance in the Sudan and states that the Complainants are yet to exhaust all these avenues which are available to them.
47. The Respondent State claims that the provision of Article 56(1) was not fulfilled because the complaint "was submitted by a so-called Abdul-Baqui Jubril on behalf of Dafur Centre for Relief and Documentation Centre." The State further states that this person continues to lodge complaints which are not backed by any evidence or legal basis, sometimes to the Commission, presenting complaints under the umbrella of a number of civil society organisations.
48. The State further states that the Complainant has failed to comply with the provisions of Article 56(2) of the African Charter and that the Complainant's resort to Article 1 of the Charter is not applicable in the present case. The State submits that the ultimate nature of any case is that there is a winner and a loser and states further that the Charter requires that there is compliance with the law when rights of individuals and groups are discussed. It goes further to state that it is unacceptable to say that the judgments passed by the courts are in violation of human rights, that these judgments testify to the reality and are in keeping with the letter and spirit of the African Charter and the AU Charter and that any assumption contrary to that shall be tantamount to denying the courts of the member States of their functions.
49. The State goes further to state that the International Human Rights instruments recognise the sovereignty of States and the rule of the natural law existing in these States and that any assumption to the contrary is itself a blatant violation of the law.

50. The Respondent State further submits that the complaint is not in compliance with Article 56(3) of the African Charter, which provides that a Communication brought before the Commission should not be written in insulting or disparaging language. The State contends that the Complainants' submissions, especially in paragraph 40 of the Communication contained statements which had improper utterances against officials as well as the methods of the application of justice and the rule of law in the Sudan.
51. The Respondent State also submits that the complaint is not in conformity with Article 56(6) of the African Charter, which provides that a Communication should be brought within a reasonable time after the exhaustion of local remedies. The State contends that the present Communication was brought before the Commission after the expiration of 31 months of the court's judgement.
52. That for these reasons the Communication should be declared inadmissible by the African Commission.

**Summary of the Complainants' reply to the Respondent State's submission on admissibility**

53. The Complainant alleges that though the Supreme Court is the highest court in the Sudan, the Civil Procedures Act of Sudan provides that the "Supreme Court shall have jurisdiction to determine: Objection by way of cassation against the decisions and orders of the Courts of Appeal concerning objections against administrative decisions."
54. The Complainant also argues that the Communication does not have to do with, nor were it brought before the Shar'ia Courts; it is a civil suit which was properly brought before the civil law circuit.
55. Also the Complainant submits that the final decision of the High Court which dismissed their case was handed to them by the registrar, more than three months after its pronouncement by the court. This delay prevented the petitioners from bringing an application for review of the Supreme Court's judgment within the prescribed period of 15 (fifteen days).
56. On the contention of the Respondent State that they could bring their matter before the Constitutional Court, the complainants state that the Sudan's Constitutional Bill of 2005, outlines the jurisdiction, functions and powers of the Constitutional Court. This Bill provides that the Constitutional Court has no jurisdiction to review judgements, decisions, proceedings, and orders passed by the judiciary. This means that the Constitutional Court lacks the competence to entertain matters that were already dealt with by other Courts.
57. The Complainant also alleges that the victims' ordeal with the Sudanese authorities has been going on since 1993, when the Ministry of Finance and

Economic Planning failed to pay the remaining balance of the funds. The victims then started proceedings in the courts in 2000, which was finally dismissed by the High Court in June 2003, and according to the Complainants, the victims have exhausted all means possible at their disposal to recover their outstanding funds to no avail.

58. The Complainant also alleges that the judiciary of the Sudan is not independent of the government in the discharge of its duties. This it alleges is due to the fact that the country is ruled by a totalitarian military regime. That the government pursues a systematic policy of tight control and domination at all levels of the State apparatus including the judiciary.
59. The Complainant alleges that in view of the above facts, it has exhausted all possibilities for local remedy in the Sudanese courts and seek that the African Commission finds this Communication admissible.

### **Analysis on admissibility**

60. The admissibility of Communications within the African Commission is governed by the requirements of Article 56 of the African Charter. This Article provides seven requirements which must all be met before the Commission can declare a Communication admissible. If one of the conditions/requirements is not met, the Commission will declare the Communication inadmissible, unless the Complainant provides sufficient justifications why any of the requirements could not be met.
61. In the present Communication, the Complainant claims that it has fulfilled all the requirements of Article 56 of the African Charter. The Respondent State on the other hand submits that five requirements of admissibility, that is, Article 56 (1), (2), (3), (5) and (6), have not been met.
62. Article 56(1) of the African Charter states that *“Communication relating to Human and Peoples’ Rights... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity...”* According to the Respondent State, the Communication does not indicate the authors. The Communication received by the African Commission indicates that the author of the Communication is the Darfur Relief and Documentation Centre which brought the Communication on behalf of 33 Sudanese nationals whose names are stated in the Communication. This means that the author of the Communication and the victims are clearly identified. The Commission therefore holds that the requirement under Article 56(1) of the African Charter has been met.
63. The State also submits that the Communication is incompatible with the Charter of the Organisation for African Unity (OAU) and as such does not comply with Article 56 (2), of the African Charter. This sub-Article provides that *“Communications...received by the Commission shall be considered if they are compatible with the Charter of the Organisation of African Unity or with the*

*present Charter.*" In the present case, there is evidence of *prima facie* violation of the African Charter in the refusal of the Ministry of Finance and Economic Planning (an institution of the Sudanese government), to pay the outstanding balance of the money due to the 33 Sudanese nationals in breach of the agreement between the Sudanese and Iraqi governments to pay them this money as compensation for their time in Iranian prisons. Secondly in view of the compatibility requirements, Sudan is a State Party to the African Charter. Thirdly the Republic of Sudan became party to the Charter on 18 February, 1986, the alleged violations in this Communication falls within the period of the Charter's application to Sudan. Lastly, the alleged violation took place within the territorial sphere which the Charter applies. For these reasons, the Commission holds that the Communication has sufficiently fulfilled the requirement of Article 56(2) of the African Charter.

64. In its submission, the State calls on the African Commission to declare the Communication inadmissible on the ground that it does not comply with Article 56(3) of the African Charter which states that "*communications ... 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 Organisation of African Unity (AU)*".
65. The Respondent State objects to the statements made by the Complainant in paragraph 40 of the complaint arguing that it is improper to describe any sovereign State as such. Paragraph 40 of the complaint states that "*This Communication documents a situation of absolute misuse of government authority and executive powers to inflict gross injustice and suffering among a vulnerable segment of the Sudanese citizens. This situation is a classical example of the absence of accountability of public officials and for the lack of proper administration of justice and the rule of law in Sudan.*"
66. In its decision on admissibility in *Zimbabwe Lawyers for Human Rights/ Zimbabwe(ZLHR)*<sup>10</sup>, the African Commission stated *inter alia* that "*in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56 (3) must be interpreted bearing in mind Article 9 (2) of the African Charter which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.*"

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<sup>10</sup> Communication 284/2003

67. The decision taken in ZLHR should be distinguished from another decision of the African Commission in *Ligue Camerounaise des Droits de l'Homme/ Cameroon*<sup>11</sup>, where the African Commission held that the Communication was inadmissible because of the complainant's use of language like "[President] Paul Biya must respond to crimes against humanity", "30 years of the criminal neo-colonial/ regime", "regime of torturers", "government barbarisms" e.t.c., as this was considered as insulting language.
68. The Respondent State in this Communication does not expressly state that the Communication was insulting or disparaging but however noted that the language used is "improper". In the opinion of the African Commission, the language used in the Communication, and especially in Paragraph 40, is not insulting or disparaging to the Government of Sudan and as such, is not contrary to Article 56(3). For this reason, the Commission holds that the proviso under Article 56(3) has been complied with.
69. Article 56(4) of the Charter provides that a Communication would be admissible if it is "...not based exclusively on news disseminated by the mass media". There is nothing in this Communication which has shown that it was based on news by the mass media and none of the parties have contested that point. To this end the African commission holds that this proviso has been fulfilled.
70. The Respondent State further submits that the Communication does not comply with Article 56(5) of the African Charter which requires that "*communications...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*". The Commission has stated that the justification for this requirement is that a government should be aware of a human rights violation in order to have a chance to remedy such violation, thus protecting its reputation which may be tarnished by being called to plead its case before an international body. This requirement also precludes the African Commission from becoming a tribunal of first instance, a function which it cannot fulfil practically or legally.
71. In the present case, the Respondent State contends that the Complainant has not exhausted local remedies available to it in the Sudan. The State submits that the Complainant has not brought its case before the Supreme Court for review and have also not taken the matter to the Constitutional Courts on appeal. Article 15 (2) of the Constitutional Court Act of Sudan (as amended in 2005), stipulates that "...there shall not be subject, to review of the Constitutional Court, the business of the Judiciary, the judgements, decisions, proceedings and orders passed by the Courts thereof". This means that the Constitutional Court has no jurisdiction to entertain appeals arising from judgements, decisions, proceedings, and orders passed by the Judiciary.
72. The author alleges that the matter was first brought before the Court of first

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<sup>11</sup> Communication 65/92

instance, but the case was dismissed, an appeal of this ruling was made to the Court of Appeal which ordered reconsideration of the matter in the court of first instance. The case was dismissed a second time by the court of first instance and this time the judgement was upheld by the Court of Appeal. The victims then brought the case before the High Court which approved the judgement of the Court of First Instance and dismissed the case. The Complainant claims that there is no other Court where they could take the case.

73. The Respondent State has however pointed out that there is still an option of taking the case before the Constitutional Court of the Sudan, available to the Complainants. The Constitutional Court Act of Sudan provides that “...*The Court... shall assume protection of the rights of a human being and the fundamental freedoms thereof*”<sup>12</sup> This, according to the State, means that the Complainant can still take its case on the alleged violation of the rights of the 33 Sudanese, to the Constitutional Court of Sudan for a remedy of the complaint. The African Commission therefore holds that not all the local remedies which are available to the Complainants have been exhausted in accordance with Article 56(5) of the Charter, and as such the Communication has not fulfilled this proviso.
74. Regarding the requirement under Article 56(6) of the African Charter which provides that “*Communications...received by the Commission shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter,...*”. The African Commission notes that the Charter does not provide for what constitutes “a reasonable period of time,” and neither has it defined reasonable time. For this reason, the African Commission would therefore treat each case on its own merits<sup>13</sup>.
75. Article 60 and 61 of the African Charter provides that the African Commission, in deciding matters brought before it, should draw inspiration from international law on human and peoples’ rights. The African Commission in this Communication would look at the jurisprudence of the European Court on Human Rights and the Inter- American Commission on Human Rights. The European Convention on Human Rights and Fundamental Freedoms provides that the (European) “*Court on Human Rights ... may only deal with the matter... within a period of six months from the date on which the final decision was taken*”<sup>14</sup>, after this period has elapsed, the European Court on Human Rights will declare such Application inadmissible. The American Convention on Human Rights also provides that to be declared admissible, “*the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment*”<sup>15</sup>. The Convention went further to

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<sup>12</sup> Article 15(1) (d) of the Constitutional Court Act

<sup>13</sup> Communication 308/05- Michael Majuru/Zimbabwe and Communication 43/90 Union des Scolaires Nigeriens- Union Generale des Etudiants Nigeriens au Benin/ Niger, where the Communication was declared inadmissible on the ground that none of the conditions relating to form, time limit or procedure laid down under Article 56 and Rule 114 of the (Previous Version of the Rules of Procedure) were complied with.

<sup>14</sup> Article 26 The European Convention on Human rights.

<sup>15</sup> Article 46(1) (b) of the American Convention on Human Rights



provide circumstances where this provision will not be applicable to include when “...there has been unwarranted delay in rendering a final judgment under the aforementioned remedies”.

76. The Inter American Commission on Human Rights has indicated that the six month period provided for in Article 46(1)(b) of the American Convention “has a twofold purpose: to ensure legal certainty and to provide the person concerned with sufficient time to consider his position”<sup>16</sup>
77. In the present Communication, a period of twenty nine (29) months (2 years and 5 months) has elapsed between the time when the High Court dismissed the matter (18 June 2003), and when the Communication was submitted to the African Commission (24 November 2005). The Complainant submitted this Communication way beyond a time which could be considered reasonable, looking at the European Court and the Inter- American Court jurisprudence. The Complainants have also not given any compelling reason why there was such a long wait before bringing the matter before the African Commission.
78. The provision of the Charter regarding time limit in Article 56(6) is to make a party complaining of a wrong done by a State, to be vigilant and to discourage tardiness from prospective complainants. However, where there is a good and compelling reason why a complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a complainant an opportunity to be heard.
79. In the present case, there is no sufficient reason given as to why the Communication could not be submitted within a reasonable period. For this reason, the African Commission holds that the Communication does not fulfil the proviso of Article 56(6) of the African Charter.

### **Decision of the Commission**

80. It must be reiterated that the African Charter provides that all the requirements in Article 56 must be fulfilled before a Communication will be declared admissible by the African Commission. The Commission holds that the provisions of sub-Articles 5 and 6 of Article 56 have not been fulfilled by the Complainant.
81. In view of the above, the African Commission decides:
- 1) to declare the Communication inadmissible;
  - 2) to transmit its decision to the parties;
  - 3) to publish this decision in its 27<sup>th</sup> Activity Report.

**Done in Banjul, The Gambia during the 46<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights held from 11 - 25 November 2009.**

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<sup>16</sup> IACHR, Case 11.230 - Francisco Martorell, Chile, Annual Report 1996, Report N<sup>o</sup> 11/96, par. 33.  
27<sup>th</sup> Activity Report of the ACHPR

## Annex 3

### Communication 272/2003: Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon

#### Summary of the Facts:

1. The Communication had been initiated against the Republic of Cameroon, State Party <sup>17</sup> to the African Charter, by two Non Governmental Organisations (NGO); *The Association of the Victims of Post Electoral Violence of 1992 of the North West Region*, headquartered in Bamenda, Cameroon; and *The International Centre for the Legal Protection of Human Rights (INTERIGHTS<sup>18</sup>)*, headquartered in London, UK.
2. In the Communication, the Complainants contend that on the 23rd October 1992, in reaction to the confirmation by the Supreme Court of Cameroon of the victory of the candidate Paul Biya of the Cameroon Peoples' Democratic Party (RDPC) in the presidential elections of the 11th October 1992, the members of the Social Democratic Front (SDF), the Principal Opposition Party, attacked the symbols of the State and the militants of the Party which won the elections, in the city of Bamenda, their Party stronghold.
3. Property belonging to RDPC militants and to other citizens are said to have been destroyed. The damages caused to Messrs. Albert Cho Ngafor and Joseph Ncho Adu are estimated at one billion CFA francs for each of them. Damages to the tune of 800 million CFA francs are said to have been caused to about a hundred other individuals.
4. Certain victims such as Mr. Albert Cho Ngafor, who had been sprayed with petrol, were moreover subjected to serious physical attacks.
5. In consequence the Cameroonian Authorities arrested certain individuals presumed to be responsible for these events; the said Authorities also set up, in February 1993, a Committee responsible for the compensation of the victims.
6. However, having waited in vain for their compensation, the victims of the post electoral violence of Bamenda organised themselves into an Association and embarked on certain activities in order to have the matter settled amicably.

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<sup>17</sup> Cameroon ratified the Charter on 26<sup>th</sup> June 1989

<sup>18</sup>INTERIGHTS enjoys Observer Status with the African Commission.

7. This method however proved fruitless, as, in spite of firm promises made by the President of the Republic, who had been approached in the context of the measures taken towards an amicable settlement, no concrete result had been obtained by the victims of the violence.
8. On the 13th March 1998, the victims of the Bamenda events brought an appeal for responsibility against the Cameroonian State to the Administrative Chamber of the Supreme Court. The appeal in question had been recorded on the 22nd April 1998 by the Clerk of Courts, under the number 835/97-98.
9. On the 16th July 1998, the Government of Cameroon reacted, requesting the Supreme Court to declare the victims' submission inadmissible and since then, the proceedings have been blocked in spite of all the efforts made by the Counsels of the Complainants, with the support of certain administrative Authorities, like the Commissioner of the District of Mezam (home region of the victims).

### **The Complaint:**

10. The Complainants allege the violation of Articles 1, 2, 4, 7 and 14 of the African Charter by the Republic of Cameroon. In consequence, the Complainants are requesting the African Commission to:
  - Declare the refusal by the Administrative Chamber of the Supreme Court of Cameroon to consider their appeal against the Government of Cameroon as contrary to the principles of the right to a fair hearing, as stipulated by the African Charter in its Article 7 and by the relevant provisions of other international human rights instruments;
  - Note that the Government of Cameroon has not respected its obligation to protect the physical integrity (Article 4) and property (Article 14) of individuals living on its territory or under its jurisdiction;
  - Request the Government of Cameroon to pay full compensation for the damages suffered by the victims of the post electoral violence in Bamenda;
  - Request the Government of Cameroon to enact positive legislation to ensure the fair, equitable and rapid compensation for the victims of human rights violations and to ascertain that the human rights violations committed in Bamenda do not happen again in Cameroon.

### **The Procedure:**

11. The Communication which was received at the Secretariat of the African Commission on the 04/04/2003 had been registered under N° 272/2003, for consideration by the African Commission at its 33rd Ordinary Session (15-29 May, in Niamey, Niger).
12. By letter ACHPR/COMM/2 of the **15th April 2003**, the Secretariat of the African Commission acknowledged receipt of the Communication to the Complainants.

13. During its 33rd Ordinary Session, the African Commission examined the Complaint and decided to be seized of it. Consideration of its admissibility was deferred to its 34th Ordinary Session scheduled to be held from the 7th to 21st October 2003 in Banjul, The Gambia.
14. By letter and by Note Verbale of the **27th June 2003**, the Secretariat of the African Commission informed both the Complainants and the Respondent State of the decision of the African Commission.
15. On the **5th August 2003**, the Secretariat received a memorandum from the Complainants on the admissibility of the Complaint and conveyed it to the Respondent State by Note Verbale dated 6th August 2003, whilst reminding it to convey its own memorandum to the Secretariat as early as possible.
16. By Note Verbale of the **14th October 2003**, the Ministry of Foreign Affairs of the Republic of Cameroon requested additional information and more time for it to prepare its memorandum on the admissibility of the case.
17. By letter of the **17th October 2003**, the Secretariat contacted the Complainants requesting them to provide the supplementary information required by the Respondent State. The Complainants complied without delay and the request of the Respondent State was met on the 30<sup>th</sup> October 2003.
18. During its 34th Ordinary Session which was held from the **6th to 20th November 2003** in Banjul, The Gambia, the African Commission examined the Complaint and heard the Parties. Sequel to this, the African Commission deferred its decision on admissibility of the case to its 35th Ordinary Session.
19. By Note Verbale and by letter of the **16th and 17th December 2003** respectively, the Secretariat of the African Commission informed the Parties reminding the Respondent State that its memorandum on admissibility was still outstanding.
20. By letter dated **16 March 2004**, and received at the Secretariat of the Commission on the **18 March 2004**, the complainants conveyed a letter transmitting additional arguments in response to the oral arguments made by Respondent State at the 34<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 6<sup>th</sup> to 20<sup>th</sup> November 2003.
21. On the **19<sup>th</sup> March 2004**, the Secretariat of the African Commission sent a Note Verbale to the Respondent State reminding it to send its comments on the admissibility of the Complaint.
22. By Note Verbale dated **6<sup>th</sup> April 2004** and received at the Secretariat of the African Commission, the Respondent State, referring to the Note Verbale sent to it on the 16<sup>th</sup> December 2003, informed the Secretariat that the case of which the African Commission had been seized and which opposed it to the Complainants, was still pending before the Administrative Chamber of the Supreme Court of Cameroon which had deferred the said case to the 26<sup>th</sup> May 2004.

23. During its 35th Ordinary Session which was held in May/June 2004 in Banjul, The Gambia, the African Commission examined the Complaint and heard the Parties on the admissibility of the case. On this occasion, the Respondent State submitted in writing, its memorandum on the admissibility of the case to the Secretariat of the African Commission, which in turn had conveyed it to the Complainant Party by letter dated **17<sup>th</sup> November 2004**.
24. During its 36th Ordinary Session, which was held in November/December 2004 in Dakar, Senegal, the African Commission considered the Complaint and declared it **Admissible**.
25. By letters dated **20<sup>th</sup> December 2004**, the Secretariat of the African Commission notified this decision to the Parties and requested their arguments on the merits of the case as early as possible.
26. On **30<sup>th</sup> March 2005**, the arguments of the Respondent State on the merits of the Communication had been received at the Secretariat of the African Commission through a Note Verbale dated **16 March 2005**.
27. On **14<sup>th</sup> April 2005**, the Secretariat of the Commission acknowledged receipt of the memorandum from the Respondent State on the merits of the Communication and on that same date, conveyed it to the Complainant Party for reaction.
28. On **3<sup>rd</sup> October 2005**, the Complainant sent its rejoinder to the observations of the Respondent State on the merits of the Complaint by letter dated **26<sup>th</sup> September 2005**. On the **13<sup>th</sup> October 2005**, the Secretariat acknowledged receipt of the letter.
29. On **30<sup>th</sup> November 2005**, this document had been forwarded against a receipt of acknowledgement, to the delegation of the Respondent State attending the 38th Ordinary Session of the Commission.
30. During this same Session (21 November - 5 December 2005, Banjul, The Gambia), the African Commission examined the Complaint and in the absence of any reaction from the Respondent State to the arguments of the Complainant Party on the merits of the case, differed its decision at this point to its 39th Ordinary Session.
31. On **7<sup>th</sup> December 2005**, this decision was notified to the Parties and the Respondent State, in particular had been invited to send its reaction on the submissions of the Complainant within 3 months.
32. In the absence of any reaction from the Respondent State, a reminder had been sent to it on the **23<sup>rd</sup> March 2006**.
33. By Note Verbale dated **29<sup>th</sup> March 2006**, and received by the Secretariat of the African Commission on the **13<sup>th</sup> April 2006**, the Respondent State conveyed its reaction on the arguments submitted by the Complainant Party on the merits of the case.

34. The Secretariat transmitted these arguments to the Complainant Party on the **8<sup>th</sup> May 2006**.
35. In a Note Verbale dated **30<sup>th</sup> June 2006** and a letter also dated **30<sup>th</sup> June 2006**, the Parties had been respectively informed that during its 39<sup>th</sup> Ordinary Session, the African Commission had decided to defer the case to its 40<sup>th</sup> Ordinary Session scheduled for the 15<sup>th</sup> to 29<sup>th</sup> November 2006 in Banjul, The Gambia.
36. On the **4<sup>th</sup> October 2006**, the Secretariat of the Commission received a memorandum from the Complainant Party in rejoinder to the arguments on the merits formulated by the Respondent State to the Communication.
37. During its 40<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from the 15<sup>th</sup> to 29<sup>th</sup> November 2006, the African Commission decided to defer the case to its 41<sup>st</sup> Ordinary Session scheduled for the **16<sup>th</sup> to 30<sup>th</sup> May 2007** in Accra, Ghana for a ruling on the merits of the case.
38. In a Note Verbale dated **31<sup>st</sup> January 2007** and a letter also dated **31<sup>st</sup> January 2007**, the Parties were informed about the deferment of the case to the 41<sup>st</sup> Ordinary Session of the African Commission scheduled for the **16 to 30 May 2007** in Accra, Ghana.
39. During its 41<sup>st</sup> Ordinary Session held in Accra, Ghana, the African Commission had deferred the Communication to its 42<sup>nd</sup> Ordinary Session for a decision on the merits of the case.
40. By Note Verbale dated **15<sup>th</sup> June 2007** and a letter dated the same day, the Parties to the Communication had been informed of the deferment of the case to the 42<sup>nd</sup> Ordinary Session of the Commission scheduled for the **14<sup>th</sup> to 28<sup>th</sup> November 2007** in Brazzaville, Congo.
41. In a Note Verbale dated **11<sup>th</sup> September 2007** a letter had been sent to the Respondent State reminding it of the deferment of the Communication to the 42<sup>nd</sup> Ordinary Session.
42. By letter dated **13<sup>th</sup> September 2007**, the Complainant Party had been reminded about the deferment of the Communication to the 42<sup>nd</sup> Ordinary Session.
43. The Parties had been respectively informed in a Note Verbale and a letter dated **19<sup>th</sup> December 2007** about the deferment of the examination of the decision on the merits to the 43<sup>rd</sup> Ordinary Session of the Commission to be held from 15 to 29 May 2008 in Ezulwini, in the Kingdom of Swaziland.
44. In a Note Verbale dated **18<sup>th</sup> March 2008** and a letter dated **20<sup>th</sup> March 2008**, the Parties had been reminded of the deferment of the case to the 43<sup>rd</sup> Ordinary Session of the Commission. The Parties had however been informed of the change of dates of the said Session the holding of which had been brought forward to the 7<sup>th</sup> to 22<sup>nd</sup> May 2008 instead of from 15<sup>th</sup> to 29<sup>th</sup> May as had been initially announced.

45. In a Note Verbale dated **24<sup>th</sup> October 2008**, the Secretariat informed the Respondent State about the deferment of consideration on the decision on the merits of the Communication to the 44<sup>th</sup> Ordinary Session scheduled for the 10<sup>th</sup> to 24<sup>th</sup> November 2008 in Abuja, Nigeria.
46. During the same period of the **24<sup>th</sup> October 2008**, the Complainants had been informed by letter of the deferment of the Communication for examination on the merits to the 44<sup>th</sup> Ordinary Session of the African Commission.
47. After the examination of the communication at the 44<sup>th</sup> Ordinary Session held in Abuja in the Federal Republic of Nigeria, the African Commission deferred the reexamination to the 45<sup>th</sup> Ordinary Session scheduled for the 13<sup>th</sup> to 27<sup>th</sup> May 2009 in Banjul, the Gambia for the consideration of the new developments in the area of international law.
48. In a Note Verbale dated 21<sup>st</sup> December 2008 and a letter dated the same day, the Secretariat informed the Parties to the communication about the deferment of the case to the 45<sup>th</sup> Ordinary Session scheduled for 13<sup>th</sup> to 27<sup>th</sup> May 2009. In addition by note verbale dated 23<sup>rd</sup> April 2009 and a letter dated the same day , a reminder was sent to the parties.
49. The parties to the Communication were informed that the matter was deferred to the 46<sup>th</sup> Ordinary Session of the Commission scheduled to be held in Banjul, The Gambia from 11-25 November 2009 in a Note Verbale and a letter both dated June 11, 2009.

**The Law:**

**Admissibility:**

50. The African Charter on Human and Peoples' Rights stipulates in its Article 56 that the Communications referred to in Article 55 should necessarily, in order to be considered, be sent after all local remedies have been exhausted, if they exist, unless the procedure of exhaustion of local remedies is unduly prolonged.
51. In this instance, the Complainant, while admitting that the case is still under consideration by the legal Authorities of the Respondent State who had been seized of it, contends that the procedures are unduly prolonged and that under these conditions the requirement that local remedies be exhausted as stipulated by Article 56 of the African Charter, cannot apply.

**Arguments of the Complainant Party on the admissibility of the case:**

52. In support of his argument, the Complainant contends, in his memorandum on admissibility dated 05<sup>th</sup> August 2003, that the Complaint had been deposited with the African Commission five years after the same Complaint against Cameroon had been brought before the Administrative Chamber of the Supreme Court of this State, and which has, to date, remained without any response.

53. In the memorandum cited earlier, the Complainant further contends that the alleged victims of the Complaint had made several fruitless submissions for an out-of-court settlement to the administrative and political Authorities of the Respondent State. The alleged victims had then brought an appeal for liability against the State of Cameroon before the Administrative Chamber of the Supreme Court on the 13<sup>th</sup> March 1998. The latter conveyed its statement on defence to the Complainants on the 12<sup>th</sup> August 1998. Since that date and in spite of the reaction of the Complainants (27<sup>th</sup> August 1998) and the numerous reminders, the Complainants did not receive any more information relating to the case from the Administrative Chamber of the Supreme Court, and this despite the national<sup>3</sup> procedural legislation which stipulates that once the exchange of arguments is completed, the case files should be closed in the 5 months that follow. 5 years have passed without any reaction from the Administrative Chamber of the Supreme Court.
54. It is for this reason, pleads the Complainant, that although local remedies are available, they do not « at all respond to the imperative of efficacy which is their raison d'être ». The Complainant adds that the Administrative Chamber of the Supreme Court is familiar with this type of practices, which is why Cameroon had been condemned by the African Commission<sup>4</sup> (for a case which had remained pending for 12 years before the Yaoundé Court of Appeal) as well as by the United Nations Human Rights Commission<sup>5</sup> (for a case which had remained pending before the Administrative Chamber of the Supreme Court for more than 4 years).
55. During a hearing at the 34<sup>th</sup> Ordinary Session of the African Commission, the Complainant Party had reiterated these arguments insisting on the fact that the bringing of this case before the African Commission had contributed a lot to the revival of the case by the Cameroon legal Authorities after all these years of inaction.
56. In its memorandum with supplementary information on admissibility, dated 18<sup>th</sup> March 2004, the Complainant recalled that the Respondent State had been condemned by the African Commission and by the United Nations Human Rights Commission for the slowness of its justice system. These delays, which cannot be attributed to Cameroon's underdevelopment, but rather, according to the Complainant, « to the inefficiency of the Cameroonian national Authorities, both legal and administrative » are not only contrary to the African Charter but also to the principles of the right to a fair hearing adopted by the African Commission.
57. The Complainant further reiterates that the violation, according to him, by the Administrative Chamber of the Supreme Court, of the regulations which stipulate that once the exchanges of memoranda are completed, the latter should close the case file within 5 months, as since August 1998, the Complainants had not received any news from the said Chamber in spite of several reminders and, according to the Complainants, despite the fact that the Judges of this Court were « perfectly aware of the implications of this procedure for the Complainants ».

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<sup>3</sup> Cf. Law No 75/17 of the 08/12/1975 relative to the procedure before the Supreme Court

<sup>4</sup> Communication 59/91 : Louis Emgba Mekongo/Cameroon

<sup>5</sup> Communication 630/1995 : Abdoulaye Mazou/Cameroon



58. The Complainant Party moreover denounces the attitude of the powers that be, who had made promises which never culminated in results, but above all the shortcomings of the Cameroonian Authorities exposed by the mal-functioning of the Commission responsible for compensating the victims of the violence (placed under the Prime Minister's Office), which had been created in the context of the effort to find an amicable solution to the problem. This Commission, declares the Complainant, had been one of the local remedies open to the victims. But 12 years after its creation and 11 years after having heard the victims, this Commission had still not submitted its report. There again, concludes the Complainant, the delay is unduly prolonged. The Complainant therefore implores the African Commission to declare the Complaint admissible.

#### **Arguments of the Respondent State on the admissibility of the case:**

59. The Respondent State had for its part pleaded, during the hearing before the African Commission at its 34th Ordinary Session, that the delays observed in the administration of justice in Cameroon are due to the under developed nature of the country, which does not have the means to provide all the facilities required for a diligent justice system, and not to a deliberate desire by the Government to hinder the administration of justice.

60. The Respondent State again reiterated this point during a hearing by the African Commission at its 35th Ordinary Session. In its memorandum on admissibility submitted on this occasion, the Respondent State pleads that the Complaint is still under consideration before one of the highest national Courts which, certainly has a lot of backlog in its work, but which is aware of the situation and that the Parties require that the case be concluded by the national legal Authorities. Thus, on the 25th February and the 31st March 2004, the Administrative Chamber of the Supreme Court held two ordinary sessions. The debate on the case in question, scheduled for the 31st March 2004 had been postponed to the 26th May 2004 on the request of the Counsel for the Complainants.

61. The Respondent State further pointed out that for these reasons, the Complainant should not speak of abnormally long delays in the Cameroonian justice system, particularly where the « current delay is not attributable to the Court in charge of the case but rather to the Complainant Party itself ».

62. In consequence, the Respondent State requests the African Commission to declare the Communication inadmissible.

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

63. The African Commission considers that the Complainant Party, before appearing before it had started to use the remedies available at the local level. The procedure before the Administrative Chamber of the Supreme Court had lasted 5 years without any feedback for the Complainants, contrary to the regulations in force and in spite of the numerous reminders which had been sent to the said Court. The

African Commission therefore considers that the delay on the part of the Court in the treatment of the case was unduly prolonged.

64. Pertaining to the Compensation Commission set up under the Prime Minister's Office, its operations were highly inefficient as 12 years after its creation and 11 years after hearing the victims, it had not published its report. There also, the African Commission considers that this *ad hoc* Commission, whose establishment was aimed at achieving an amicable settlement of the case, had registered excessive delays in its operations.
65. The Respondent State pleads that the legal Authorities remain aware of the case at the national level but the African Commission considers the delays by the Administrative Chamber of the Supreme Court of Cameroon excessive.
66. The African Commission further notes that re-introduction of the proceedings on the case before the Administrative Chamber of the Supreme Court in February 2004, namely after a gap of 5 years, only took place after the submission of a Complaint (to the African Commission), by the victims in April 2003 and after the decision on seizure taken by the Commission on the said Complaint in May 2003 (33rd Ordinary Session), as well as the hearing of the Parties to the case in November 2003 during its 34th Ordinary Session. This leads the African Commission to presume that the re-introduction of the proceedings was not accidental but rather it was due to the action brought by the victims before the African Commission.
67. The African Commission considers that State Parties have an obligation to administer, on their territory, clear and diligent justice in order to give satisfaction to the Complainants in the shortest possible time, in conformity with the relevant provisions of the African Charter and with the directives and principles of the right to a fair hearing in Africa.
68. In this particular case, the Commission notes that for 5 years, the Administrative Chamber of the Supreme Court of the Respondent State had not provided any reaction to the Complainants, in spite of several appeals by the latter. The Respondent State has admitted this fact but attributes it to lack of resources. Consideration of the case has indeed recommenced a short while ago, but one can reasonably conclude that this consideration was largely due to the seizure of the African Commission by the victims. Whereas this should not be the case, that is, justice to be administered by State Parties should not wait for the African Commission to be seized of a matter before it is rendered fully, clearly and diligently. This had not been the case with the Administrative Chamber of the Supreme Court of the Respondent State.
69. Concerning the Compensation Commission, an *ad hoc* institution meant to solve the problem amicably at the national level, has shown its limitations in failing to produce any Report after twelve years of existence. The Respondent State does not refute these allegations, which allows one to believe that they are true. The African Commission therefore considers that this remedy is neither effective nor satisfactory.

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

**The Merits:**

71. Pursuant to Rule 120 of the Rules of Procedure of the African Commission, once a Communication which is submitted under the terms of Article 55 of the Charter has been declared admissible, the Commission « examines it in the light of all the information which the Complainant and the Respondent State concerned have submitted in writing, and it renders its observations on the subject ».

72. It appears from the case file that parties have made their conclusions on the merits of the case since 30 March 2005, and that the information provided by the Parties to the Communication and added to the case file is sufficient to allow a ruling on the merits of the case.

**SUBMISSIONS OF THE COMPLAINANTS ON THE MERIT**

73. The Complainants are requesting the African Commission to declare the State of Cameroon in violation of the relevant provisions of the African Charter and in particular of Articles 1, 2, 4, 7 and 14 of the said Charter and, in consequence, to declare the State of Cameroon bound to pay compensation for the prejudices sustained by the victims of the post electoral events of 1992.

74. The Commission is consequently obliged to examine the alleged violations on the basis of the facts and the law.

**ON THE VIOLATION OF ARTICLE 1 OF THE AFRICAN CHARTER**

75. Under the terms of Article 1 of the African Charter, « *the OAU Member States, Parties to the present Charter, recognize the rights, responsibilities and freedoms enunciated in this Charter and undertake to adopt legislative and other measures for their application* ».

**THE ARGUMENTS OF THE COMPLAINANTS PERTAINING TO THE VIOLATION OF ARTICLE 1 OF THE AFRICAN CHARTER**

76. From the point of view of the violation of Article 1, the Complainants contend:
- i. That the African Charter sets out in its Article 1 a general obligation on the protection of rights. In this context, like « the majority of the human rights treaties, besides requiring the States Parties to abstain from all violation or unauthorized restriction of the rights it proclaims, compels them to take positive measures to guarantee the widest possible protection of the individuals under their jurisdiction ».

- ii. That if the recognition referred to by Article 1 of the Charter « bestows them universality<sup>6</sup>, to the guaranteed rights, the taking of appropriate measures allows them to assume real effectiveness ». That the Commission has had the opportunity to underscore this aspect during the examination of a case on the activities of a petroleum consortium in Southern Nigeria by re-affirming that the African Charter was creating a certain number of obligations for the States Parties which include, in particular, « the responsibility of respecting, protecting, promoting and implementing<sup>7</sup> » the rights which it sets out before specifying that « the Governments have a responsibility to protect their citizens, not only by adopting appropriate legislation and by applying them effectively, but also by protecting the said citizens from harmful activities which can be perpetrated by private parties. This responsibility requires positive action on their part ».
- iii. That the interpretation by the Commission of Article 1 of the African Charter can be compared with that of the United Nations Human Rights Commission on Article 2 of the International Convention on Civil and Political Rights (CDH)<sup>8</sup>, interpretation in which the CDH affirms that the provision contained in Article 2 embraced an obligation of « absolute character » with « effect immediate<sup>9</sup> » requiring the States Parties to « take legislative, judicial, administrative, educational and other appropriate measures to fulfill their obligations<sup>10</sup> ».
- iv. That the Commission had to judge that the refusal or the negligence of the
  - a. Authorities of a State Party to protect journalists and human rights activists against
  - b. repeated attacks (harassment, arbitrary arrests, assassination, torture) by the security forces and unidentified groups, constitutes (d) a violation of the said Charter even if this State or its officers are (were) not the direct perpetrators of this violation<sup>11</sup> ».
- v. That the present Communication provides the Commission with the opportunity to
  - a. clarify the meaning and scope of the « positive actions » that the States are required to carry out in order to conform with the conditions of the African Charter, and this, by responding to the affirmation made by the Cameroonian Authorities and according to which the implementation of

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<sup>6</sup> See Juan Antonio Carrillo Salcedo « Article 1 » In the European Human Rights Convention : Commentary Article by Article under the direction of Louis Edmond Pettiti, Emmanuel Decaux and Pierre-Henry Imbert, Edition Economica 1999 page 141 « the use of the word in Article 1 recognizes preferably terms such as protect or respect, suggests that the recognized rights have a value erga omnes »

<sup>7</sup> Communication 155/96 Action Centre for Economic and Social Rights vs. Nigeria paragraph 44.

<sup>8</sup> See Note No. 22

<sup>9</sup> General Observation No. 31 « « the nature of the legal obligation imposed on the States Parties to the Convention » of the United Nations Human Rights Commission, CCPR/C/21/Rev.1/Add.13. Op. Cit. Paragraph 14

<sup>10</sup> Cf. General Observation No. 31 « the nature of the legal obligation imposed on the States Parties to the Convention » of the United Nations Human Rights Commission, CCPR/C/21/Rev.1/Add.13. Op. Cit. Paragraph 7

<sup>11</sup> Cf. Communication 74/92 National Human Rights and Liberties Commission against Chad, paragraph 35.

*« all the legal, technical, human and material means at their disposal to control the post-electoral events of Bamenda in 1992 frees them from the obligation of means which is incumbent upon them ».*

- vi. That the African Charter really and truly imposes **an obligation of result and not one of diligence** on the States Parties, of guaranteeing to the victims of the October 1992 events the enjoyment and effective exercise of the rights which it proclaims and the lack of respect for which gives rise to a right to compensation for the victims or their dependents and implies, for the Cameroonian State, the responsibility to compensate and the freedom to act against the perpetrator or perpetrators of the violation.
- vii. That, in effect, where, the Commission has not had numerous opportunities to make a ruling on the exact content of Article 1 of the Charter<sup>12</sup>, it has nonetheless pointed out that this Article is the basis of the rights recognized by the African Charter in so far as it confers on it « the legally binding nature which is generally attributed to international Treaties of this nature and that any violation of one of its provisions would automatically represent a violation of Article 1<sup>13</sup> ».

#### **PERTAINING TO THE VIOLATION OF ARTICLES 2, 4, 7 & 14 OF THE AFRICAN CHARTER**

77. Concerning the violation of Articles 2, 4, 7 and 14 the Complainants appear to link it

to the importance that Article 1 represents in the present case, since according to the Complainants, Article 1 is « the only one which defines the scope of the legal obligations contracted by the States Parties to the Charter, thereby allowing correct interpretation of the obligations contained in the other provisions of the Continental Treaty ». Thus, the Complainants contend that if taken in isolation, Article 1 of the Charter commits the State Parties to taking all the necessary legislative measures allowing the effective protection of the rights and liberties contained in the Charter, that is to say, of averting or at least of minimizing all risks of violating the exercise or enjoyment of these rights, and in combination with the other relevant provisions of the Charter, the obligation of averting violations imposes on the States Parties the obligations of:

- Taking preventive measures;
- Taking measures so that the enjoyment and exercise of the rights are not hindered by measures of seizure<sup>14</sup> or of expropriation which are

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<sup>12</sup> See Communications: No. 74/92; No. 137/94; No. 48/90; No. 50/91; No. 52/91; No. 89/93; No. 139/94; No. 154/96; No. 161/97; No. 147/95; No. 149/96; No. 155/96; No. 211/98; No. b223/98.

<sup>13</sup> Cf. Communication No. 147/95 and 149/96 Sir Dawda K. Jawara against The Gambia paragraph 46.

<sup>14</sup> Cf. Communication No. 140/94, 141/94 et 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda vs. Nigeria paragraph 54

not dictated by the satisfaction of a general interest or a public necessity or even the looting or the destruction of the property of natural persons or legal entities;

- Putting in place legislation which makes it possible to avert, repress and punish violations to life, but also « to take preventive measures of a practical nature to protect the individual whose life is threatened by the actions of another<sup>15</sup> ».

78. Thus, the Complainants contend :

- i. That the above mentioned Articles had been violated by the State of Cameroon since the latter had failed in its obligation to take adequate preventive measures if not to avert or prevent the events in question, at least to reduce them to zero. To support this reasoning, the Complainants emphasize that the Cameroonian Authorities knew that the Bamenda events were going to take place and that several personalities had spoken of threats coming from the Social Democratic Front (SDF) against the security of people and property in the Province.
- ii. That the Prime Minister at the time, Mr. Achidi Achu had alluded to the said threats
  - a. in the campaign speech he made on the **6th October 1992**<sup>16</sup> in Kumbo in the North-West Province. The said threats had been later mentioned by the Minister of Communication and Government Spokes-person in a press briefing on the political situation of the country during which he had spoken of the existence of a provisional arsenal of the SDF estimated at **300** pistols and **60** combat<sup>17</sup> weapons. Furthermore, in the interview granted to the national Daily the Cameroon Tribune, the Secretary General of the ruling RDPC Party, had unveiled « the diabolical plan» concocted at the beginning of the month of October by the Opposition to take over power<sup>18</sup>. Moreover, direct threats having been made against all those who support the ruling party, several complaints received by the Governor of the North West province brought by citizens wishing to obtain Government protection testify to the fact that the territorial Administrative Authorities had been informed about the SDF's plans.
- iii. That despite these early warning signs, the Government of Cameroon, in neglecting to take adequate measures to prevent the events of October 1992 from taking place, thereby violated, even passively, the obligation of prevention contained in Article 1 of the African Charter. The State of Cameroon has neither brought the perpetrators of these atrocities to justice, nor paid compensation for the

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<sup>15</sup> Cf. CEDH, *Affaire Kilic vs. Turkey*, 28 March, 2000 paragraph 62

<sup>16</sup> Cf Cameroon Tribune No. 5231 dated 7 October 1992, page 16

<sup>17</sup> Cf. «The Minister Kontchou Kouamegni reacts to the SDF strategy of chaos » in Cameroun Tribune No. 5246 du 26 October 1992. Page 4

<sup>18</sup> Cf. Cameroun Tribune No. 5231 dated 7 October 1992 page 8.

damages suffered by the victims whose right to an effective remedy has been violated.

- iv. That in consequence, the Commission should request the Cameroonian Authorities, in conformity with its own jurisprudence<sup>19</sup>, to pay compensation in view of the long delay by the Justice Administration in examining the Complainants' case. In conclusion, the Commission is being requested to reject the arguments of the Cameroonian Government, to take note of the violation of Articles 1, 4, 7 and 14 of the African Charter; to request the Government of Cameroon to institute proceedings against the perpetrators of the atrocities committed between the 23rd and 27th October 1992; to determine, on the basis of the evidence presented, the amount of compensation to be paid to the victims based on all the damages suffered by the latter. The Complainants further request the Commission to ask the State of Cameroon to amend the laws which are incompatible with the provisions of the African Charter and to fix a deadline for the State of Cameroon relative to the application of any decision that the Commission may take on this matter.

**THE ESSENCE OF THE ARGUMENTS OF THE RESPONDENT STATE IN  
RELATION TO  
THE VIOLATION OF ARTICLES 1, 2, 4, 7 & 14 OF THE AFRICAN CHARTER**

79. The Respondent State for its part, argues that the violations being alluded to by the Complainants are completely groundless since the State of Cameroon has not, in this particular case, deprived any of the Complainants of the right to respect for his life and physical integrity nor his right to property. The State of Cameroon took measures to save the life and property of individuals during what can be called the Bamenda events.
80. Furthermore, the Respondent State intimates that this particular case happened in the context of the years called democratic agitation during which Cameroon had experienced a certain amount of agitation due to the return to a multiparty system and to individual liberties. That for this reason, from May 1990 to December 1992, and due to the organization of two major elections, the legislative then the presidential, public law and order had been disrupted throughout the country thereby giving rise to a large loss of life, and important material damage.
81. According to the Respondent State, the specific case of Bamenda, which was of major proportions took place between the 23<sup>rd</sup> and 30<sup>th</sup> October 1992, and was marked notably by the difficulty of the State to maintain law and order. The Respondent State further contends that in the case of Bamenda, the implementation of the mandate to protect people and property by using the forces of law and order had been reinforced after the 23<sup>rd</sup> October 1992, date on which the results of the presidential elections were proclaimed. Thus, about 548 men had been deployed in the region of Bamenda with motor vehicles and other

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<sup>19</sup> See Communication 211/98 Legal Resources Foundation vs. Zimbabwe.  
27<sup>th</sup> Activity Report of the ACHPR

vehicles for the maintenance of law and order and equipment adapted to deal with the situation on the ground. However, although the post electoral disturbances had taken place in other parts of the territory, these incidents had been extraordinarily violent in Bamenda where they took the form of a generalized insurrection and had been instigated by the militants of an Opposition Party, the Social Democratic Front (SDF).

82. Moreover, the Respondent State contends that::

- i. Following the destruction, a joint Gendarmerie-Police-Justice Commission had been set up and given the responsibility for carrying out investigations on all suspects who had been arrested. However, the individuals who were given heavy charges and had been brought before the State security Court had later been released on the persistent request of the human rights defender organizations.
- ii. That it happened that the State of Cameroon, having steadfastly implemented the legal, technical, human and material resources at its disposal to contain the post electoral events of Bamenda in 1992, it was thus freed from the **obligation of diligence which was its responsibility**. The extent of the events in question having the **character of force majeure** was such that they could not be attributed to the State of Cameroon.
- iii. That in view of the full compensation being demanded by the Complainants, it should be recalled that the responsibility of the State of Cameroon could not be established in either the unexpected happening of the Bamenda events, or in their management. Consequently, it would be extremely difficult to pay compensation since there is no law which authorizes this sort of payment particularly where the State is not the perpetrator in any way.
- iv. That in relation to the enactment of a law allowing the payment of fair and equitable compensation to the victims of the human rights violations in Cameroon, following the unexpected happening of the events in question, the following institutions had been successively put in place:
  - An organization for political dialogue at the national level called the Tripartite and comprising the State, Civil Society and the Political Parties. This Tripartite had made possible the realization of the constitutional amendments of 18th January 1996.
  - A Committee then a National Human Rights and Liberties Commission;
  - A National Elections Observatory and the strengthening of the National Communications Council.
- v. That taking all these matters into consideration and with all the proper reservations, the African Commission should declare the present Communication baseless.



**ANALYSIS OF THE COMMISSION WITH REGARD TO THE NATURE AND  
SCOPE  
OF THE OBLIGATION CONTAINED IN ARTICLE 1 OF THE AFRICAN  
CHARTER.**

83. It follows from the arguments of the facts and the law presented by the Complainant Party and responded to by the Respondent Party, that the nature and the scope of the obligation contained in Article 1 of the African Charter constitute a matter of special importance in the present Communication. Thus, according to the Complainant Party, Article 1 of the African Charter imposes an obligation on the States Parties to take measures which can produce concrete results. Whereas it can be inferred from the arguments submitted by the Respondent Party that the provisions of Article 1 of the African Charter impose an obligation of diligence on the States Parties.
84. It is therefore up to the African Commission to clarify the nature and scope of this Article. It is evident that the legal aspect raised by the argument of the two Parties present before the African Commission relates to the question whether Article 1 of the African Charter imposes an obligation of diligence or an obligation of result vis-à-vis the States Parties to the said Charter. In other words, did the States Parties to the African Charter make the commitment of taking measures which should give certain results by virtue of Article 1?
85. In view of the importance of this question of law, and the importance which the Complainant Party appears to give Article 1, the African Commission should, in the present Communication, determine the legal nature of the obligation which the afore-mentioned Article imposes on States Parties.

**THE EXTENT OR THE SCOPE OF THE OBLIGATION CONTAINED IN  
ARTICLE 1 OF THE CHARTER**

86. Concerning the scope or the extent of the obligation imposed by Article 1 of the African Charter, it is important to point out that it had been clarified *sui generis*<sup>20</sup>, (in a distinctive manner) and that the Commission's jurisprudence is abundant enough in this area.
87. Thus, according to the Commission's jurisprudence, Article 1 confers on the Charter the legally binding character generally attributed to international Treaties of this nature. The responsibility of the State Party is established by virtue of Article 1 of the Charter in case of the violation of any of the provisions of the Charter. Article 1 places the States Parties under the obligation of respecting, protecting, promoting and implementing the rights.
88. The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of

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<sup>20</sup> See Communications : No. 74/92 ; No. 137/94 ; No. 48/90 ; No. 50/91; No. 52/91; No. 89/93; No. 139/94; No. 154/96; No. 161/97; No. 147/95; No. 149/96; No. 155/96; No. 211/98; No. b223/98., in which the African Commission has had to clarify the scope of Article 1 of the Charter

the State to guarantee that private individuals do not violate these rights. In this context, the Commission ruled that the negligence of a State to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the Charter which would be attributable to this State, even where it is established that the State itself or its officials are not directly responsible for such violations but have been perpetrated by private<sup>21</sup> individuals.

89. According to the permanent jurisprudence of the Commission, Article 1 imposes restrictions on the authority of the State Institutions in relation to the recognized rights. This Article places on the State Parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the Charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributable to the State can constitute, as had been indicated earlier, a cause of international responsibility of the State, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims<sup>22</sup>.
90. In this context of prevention, the State should carry out investigations so as to detect the various risks of violence and take the necessary preventive measures. The problem here does not concern so much the acts violating the rights but rather of knowing whether the State took the tangible measures to prevent the imminent risks of perpetration of the said acts. It is not a question of inculping the State for its lack of conscientiousness regarding any act perpetrated in relation to the guaranteed rights but of knowing whether the State, considering the imminent risks of serious violations, used due diligence that was required. Under the terms of comparative law, it is the position that was taken by the InterAmerican Human Rights Court in the **Vélasquez Rodríguez case** in the following terms:
91. “an illegal act which violates human rights and which is initially not directly imputable to a state (for example because it is the act of a private person or because the person responsible has not been identified) can lead to the international responsibility of State, not because of the act itself, but because of the absence of due diligence to prevent the violation or to respond to it as required by the convention.”
92. In the case **Zimbabwe Human Rights Forum vs. Zimbabwe**, the Commission had indicated and ruled that the doctrine of *due diligence* should be applied on a case by case basis.

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<sup>21</sup> Communication 74/92, National Human Rights and Liberties Commission vs. Chad; Communication 155/96, Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria.

<sup>22</sup> Communication 245/2002, Zimbabwe Human Rights NGO Forum vs. Zimbabwe, parag. 143.

## ON THE NATURE OF THE OBLIGATION CONTAINED IN ARTICLE 1 OF THE CHARTER

93. The scope of the State's general obligation to protect, sanctioned by Article 1 of the Charter having been clarified, it is therefore necessary to determine the nature of this obligation. Is it an obligation of diligence or an obligation of result?
94. Though by their origin, the obligation of diligence and the obligation of result emanate from the domestic law systems, particularly from continental civil law, this term has also been frequently used in international law since the 20<sup>th</sup> century<sup>23</sup>.
95. The obligation of diligence consists, for a Party to a Contract, in placing at the disposal of the other Party all the available resources without however guaranteeing the result that the said resources would produce. Thus, in the context of this obligation, the debtor undertakes to deploy all efforts to provide the creditor with a given requirement, but without being able to guarantee it. It is the case of the Doctor who undertakes to provide all the necessary care to his patient without however being able to guarantee the recovery of the said patient.
96. The assertion of such a responsibility has the effect of compelling the Party on whom reposes the obligation of diligence to pay compensation for the damages it may have caused in the execution of this obligation. This compensation takes the form of a conviction for the payment of damages with interest, that is to say an obligation to pay a sum of money. It is in this context that the notion of obligations arises, to which the Respondent State alludes in talking about its resources on the one hand and its corollary, the obligations of result, on the other.
97. On the contrary, the obligation of result pre-supposes the commitment of the debtor to obtain a specific result. Thus, in the context of this obligation, the transporter of a traveller undertakes to carry the passenger from point A to point B safe and sound.
98. Pertaining to evidence, the evidence of a fault is only required from the Complainant in the case of obligations of diligence since the Complainant has to prove that the debtor has not deployed all the required efforts to obtain the success of the undertaking. On the other hand, the creditor of an obligation of result is exempted from providing such evidence. In effect, all he has to do is to establish that the promised result has not been obtained; the debtor can only obtain release from his responsibility by establishing that the non-execution is due to circumstances beyond his control which cannot be attributed to him but to

force majeure. The force majeure represents a foreign event which is both unforeseeable and uncontrollable which is at the root of an injury<sup>23</sup>.

99. Generally, in international law, the notion of obligation of diligence and that of result emanate from the interpretation of Articles 20 and 21 of the draft articles of the International Law Commission (ILC) pertaining to the responsibilities of States. It must be noted that the comments from these two articles were adopted by the ILC which caused the latter to make a distinction between the violation of international obligations referred to as "behaviour" or "diligence" and the violation of obligations otherwise called " result" <sup>25</sup>
100. Under Article 20 of the draft Articles of the ILC entitled "Violation of an international obligation requiring the adoption of a predetermined specific behaviour when the behaviour of the said State is at variance with the behaviour specified under that obligation".
101. In respect of Article 21 of the draft ILC Articles which is entitled "Violation of an international obligation requiring the attainment of a specific result, the provision stipulates that:

"1) A State is in violation of an obligation requiring it to choose a determined result

if by the behaviour exhibited, the State does not ensure the realisation of the expected result required from it under the terms of that obligation.

2) If the behaviour of the State has created a situation that does not conform to the result required from it by the international obligation, but that it emerges from the obligation that this result or an equivalent result can all the same be achieved by the subsequent behaviour of the State, then a violation of the obligation occurs only when the State also fails by its subsequent behaviour to achieve the result expected from her by that obligation".

102. Thus, if the obligation of diligence requires that the State adopts specific behaviours or actions to attain specific results, then under obligation of result, the State enjoys the freedom of choice and action to achieve the result required by that obligation"

103. Consequently, in the case *Coloza vs Italy* case, the European Court of Human Rights declared and rendered judgement that " the contracting States (parties) enjoy very wide discretion in terms of the calculation of the choices and means to ensure

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<sup>23</sup> The distinction between these two types of obligations in international law has for the first time been established in explicit terms by D. Donati who has made it a general principle( **D. Donati I Trattati internazionali nel diritto costituzionale, Turin, Unione tipografico-editrice torinese, 1906, vol. I . p. 343 et suivant**) . It had already implicitly been done by H. Triepel where he highlighted the difference between domestic law immediately applicable and domestic law that is internationally pertinent (H. Triepel, *Volkerrecht und Landesrecht*, Leipzig Hirschfeld, 1899, p. 299) [édition française : *Droit international et droit interne*, tr. Par R. Brunet, Paris, Pedone, 1920, p. 297]

<sup>24</sup>Aubert Jean-luc, *Introduction to the Law and Fundamental Themes of Civil Law*, Paris, Armand Colin, 1995 N°244 P.252

<sup>25</sup> Yearbook of the International Law Commission, 1977, Vol II, Part 2, page 12 onwards

<sup>26</sup> Request No. 9024/80, CEDH, (1985) Série A, vol. 89

that their legal systems are in keeping with the provisions of Article 6 paragraph 1 (Art 6-1) in this field. The task of the Court is not to indicate to the States these means, but to determine if the result required by the Convention had been achieved”

104. Similarly, in the *De Cubber vs Belgium*<sup>27</sup>, the European Court of Human Rights observed that its task was to determine if the contracting States achieved the result required by the European Convention and that its task was not to point out specifically the means used to arrive at that result.
105. Moreover, in the judgement pronounced on January 19, 2009 in the case relating to the request for interpretation of the judgement of March 31, 2004, in the *Avena* case and other Mexican citizens (*Mexico vs the United States of America*, the International Court of Justice which had been seized by Mexico for the interpretation of paragraph 153 of the aforementioned judgement as imposing on the United States of America an obligation of result, maintained that “ It is true that the obligation enunciated in this paragraph is an obligation of result which should manifestly be enforced unconditionally<sup>28</sup>...”
106. Thus, the question that arises generally is to appreciate, on the one hand, the ultimate purpose or objective of the rights prescribed by the African Charter on Human and People’s Rights and on the other hand, whether yes or no the obligation prescribed in Article 1 of the Charter seeks to attain a purpose, an objective or to achieve a result through the provisions contained therein.
107. In the view of the Commission, the distinction between the obligation of diligence and that of result should not make one lose sight of the fact that , all obligations contained in a Treaty, Convention or a Charter seek to attain an objective, a purpose or a result. The Governments of the States Parties are linked to the people living on their territory by a social contract consisting of ensuring the security and guaranteeing the fundamental rights, including the right to life and respect for the physical and material integrity of the citizens. Where the rights, responsibilities and freedoms recognized by the States Parties to the Charter can hardly pose major problems, since these regulations are outlined in the Articles 2 to 29 of the Charter and their recognition emanates from the will of the States themselves to ratify the Charter, nonetheless this recognition ensues from the commitment made by these States to take tangible measures capable of implementing the provisions prescribed by the Charter.
108. It is also important to clarify that the signature, acceptance and ratification by the States of the provisions contained in the Charter, the preparation or the adoption of legal human rights instruments only constitute, in themselves, the beginning of the indispensable exercise of promotion, protection and the reparation of human and peoples’ rights. The practical implementation of these legal instruments through the State Institutions endowed with creditor, material and human resources, is also of considerable importance. It is not enough to make do with taking measures, these measures should also be accompanied with institutions that produce tangible results. Furthermore, the Periodic Report

imposed on the States Parties in the context of Article 62 of the African Charter is part of the procedure placed at the disposal of the African Commission to verify the results obtained by the States regarding their commitment as outlined in Article 1 of the said Charter.

109. Where it is true that the laws guaranteeing the rights and freedoms, those criminalizing the given facts and providing for penalties against the perpetrators of the said facts, as well as the State institutions which implement these instruments use the resources at the disposal of the citizens, it is also true that the decisions of the Courts and Tribunals made in relation to the violations of these rights and the results of the execution of the said decisions, contribute to restoring the rights of the victims.
110. It follows from the above that Article 1 of the African Charter imposes on the States Parties the obligation of using the necessary diligence to implement the provisions prescribed by the Charter since the said diligence has to evolve in relation to the time, space and circumstances, and has to be followed by practical action on the ground in order to produce concrete results. Thus, in its decision on **Communication 74/92**, the Commission said that the Governments have the responsibility of protecting their citizens not only through appropriate legislation and its effective enforcement but also by protecting them against injurious acts which can be perpetrated by third parties.
111. In fact, in the Commission's view, it is an obligation of **RESULT** that Article 1 of the African Charter imposes on the States Parties. In effect, each State has the obligation of guaranteeing the protection of the human rights written in the Charter by adopting not only the means that the Charter itself prescribes, in particular "all the necessary legislative measures for this purpose but in addition measures of their choice that the Charter called for by Article 1 and it therefore defined as one of result.
112. In accordance with its traditional commitment to protect the rights guaranteed by the Charter, the State Party is obliged to ensure the effective protection of human rights through out its territory. If this obligation were that of an obligation of diligence the guaranteeing of human rights would be the object of legal insecurity liable to release the State Parties to the human rights protection instruments from any responsibility of effective protection. It is in taking into account the compelling nature of the protection of human rights that the human rights instruments set up control institutions to ensure that the obligations ensuing from these instruments are effectively implemented.

#### **ANALYSIS OF THE COMMISSION WITH REGARD TO THE APPLICATION OF THE CASE IN POINT**

113. The legal nature of the obligations outlined in the provisions of Article 1 of the Charter having been clarified, the specific question raised with regard to its application to the case in point is that of knowing whether the State of Cameroon was held by an obligation of diligence or an obligation of result and whether the

circumstance of force majeure cited by the Respondent State is fulfilled in order to release the said State from its obligation.

114. The Complainant contends that the State of Cameroon is bound by an obligation of result and consequently is compelled to pay compensation for the injuries suffered by the victims of the 1992 post-electoral events. The State of Cameroon on her part maintains that it was bound by an obligation of diligence as the 1992 events were of an insurrectional character. They are akin to a situation of force majeure which the means employed by the Government could not curtail. Consequently, the State of Cameroon avers that it is free from any liability.

115. Pertaining to the case in point, considering the definition of the legal nature indicated above, the Commission is of the view that the obligations which ensue from Article 1 impose on the State of Cameroon the need to implement all the measures required to produce the result of protecting the individuals living on its territory. The use of the legal, technical, human and material resources that the State of Cameroon claims to have did not produce the expected result, namely that of guaranteeing the protection of human rights. For the post electoral events which gave rise to serious violations against the lives and property of the citizens would not have taken place if the State which, through its investigations knew or should have known about the planning of the said events, had taken the necessary measures to prevent their happening.

116. The events in question having taken place the day after the announcement of the results of the presidential elections, the Authorities only acted four days after the exploding of the hostilities, which promoted the magnitude of the violence and the serious violations of human rights and destruction of property. It has been established that, under the circumstances, the Respondent State has failed in its obligation to protect, considering its lack of diligence and allowed the destruction of lives and property. Furthermore, by invoking the circumstances of force majeure to free itself from its responsibility, the State of Cameroon has implicitly shown that it had been held by an obligation of result in this particular case.

117. In principle, the circumstance of force majeure which assumes the characters of unpredictability, irresistibility and imputability can be invoked if the conditions had been fulfilled at the time of the events. In this case, the said characters of unpredictability, irresistibility and imputability required by a situation of force majeure and which the Respondent Party is invoking cannot be applicable for, according to the Respondent State itself, disturbances of public law and order existed in the country since May 1990 and specifically during the holding of the elections, and that moreover, the threats<sup>24</sup> of the 11, 18, 19 and 22<sup>nd</sup> October 1992 from the SDF, the Opposition Party and qualified by the Respondent State as « an atmosphere of political intimidation and counter intimidation... », sufficiently prove the existence of early warning signs of the events in question and consequently the predictability of the events.

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<sup>24</sup> Cf. Cameroun Tribune No. 5231 of 7 October 1992 p. 8 and 16, Cameroun Tribune No. 5246 of 26 October 1992 p.4

118. What is more, the Respondent State had manifested its control of the territory and therefore its ability to stand up to the perpetrators of the post electoral events, by instituting a state of siege a few days after the events in question; had this state of siege been instituted earlier, the events in question would have at least been reduced in scope if not entirely quelled.
119. The obligations prescribed by the African Charter in its Article 1 impose on the States Parties (the State of Cameroon included) the need to put in place all measures liable to produce the result of preventing all violations of the African Charter over their entire territory. These are not only violations which could emanate from the State machinery itself or those from non State actors. The implementation of the legal, technical, human and material means alluded to by the State of Cameroon should have, in principle, produced the result of preventing the events in question since the said events were foreseeable; the said means should at least, have served to bring the perpetrators to justice, have them judged and sentenced in accordance with the law and restore the rights of the victims or their dependents after the said events had taken place. This is an *à posteriori* result which should have produced results considering the means chosen by the State of Cameroon itself
120. Each State Party to the African Charter is responsible for the security of the people and property living everywhere on its territory. Having a character of *erga omnes*<sup>25</sup>, such an obligation constitutes part of those which cover a particular interest for all the States Parties to the African Charter and for the entire international Community since it is recognized in both domestic and international law. Therefore, as underscored by the Respondent State, if it cannot be directly responsible for the events, the State of Cameroon cannot also extricate itself from its responsibility for the actions of others which are a result of its failure to conform to the provisions prescribed by Article 1 of the African Charter and therefore of its obligation of **RESULT**.
121. Consequently, in having failed to prevent the 1992 post electoral violence even though there were early warning signs (evidently) of the events in question and not having obtained the intended results mentioned above, the State of Cameroon has failed in its obligation of **Result** imposed on it by Article 1 of the African Charter, and that in consequence the Respondent State is hardly in a position to invoke the circumstances of force majeure. It therefore follows that the victims and their dependents should have their rights restored in full.

#### ANALYSIS OF THE COMMISSION WITH REGARD TO THE VIOLATION OF ARTICLES 2, 4, 7 AND 14 OF THE AFRICAN CHARTER

122. By invoking the violation of Articles 2 and 7 of the Charter, the Complainants wish to contest the freezing of the petition by the victims pertaining to responsibility

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<sup>25</sup> Cf. Barcelona Traction Judgement, CIJ, 5 Feb. 1970  
27<sup>th</sup> Activity Report of the ACHPR



of the issue which has been pending before the Administrative Chamber of the Supreme Court since 1998, in order to obtain full compensation of the corporal and material damages suffered. For the Complainants this procedure constitutes a violation of the right to an effective remedy.

123. Article 2 stipulates that:

« Every individual has the right to enjoy the rights and freedoms recognized and guaranteed under the present Charter without distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status ».

124. It appears that complainants drew the infringement of the enjoyment of their rights and freedoms hence the violation of article 2 of the Charter, from the fact that the respondent State failed to take adequate measures to prevent the violence which led to the physical harm and material damage suffered by the victims.

125. The African Commission is of the view that there is no doubt in the present case that the victims of the post elections violence suffered from damage which infringed the enjoyment of their rights. Respondent State did not debate the fact of harm being caused to the victims, but rather argued that the post election events are act of God and therefore it is beyond the capability of the State of Cameroun which should not be held liable

126. The African Commission is therefore in the position to hold that the provisions of article 2 of the African Charter have been violated because the victims were enjoying their rights and freedoms when they were attacked. Such attacks which infringed their rights and freedoms were made possible because the State of Cameroun failed to fulfill its obligation to protect which incumbent upon the State.

127. Article 7 stipulates:

« Every individual shall have the right to have his cause heard. This right comprises:

[...] (d) the right to be tried within a reasonable time by an impartial Court or Tribunal »

128. The term « remedy » refers to « any procedure by means of which one submits a constitutive act of an alleged violation of the [Charter] to an institution qualified in this respect, for the purpose of obtaining, as the case may be, a cessation of the act, its annulment, its amendment or compensation »<sup>26</sup>. Is effective the remedy which not only exists de facto, but also is accessible to the party concerned and is appropriate. The petition should be appropriate so as to allow the denunciation of the alleged violations and the payment of appropriate compensation.

129. However, the effectiveness of the remedy is not linked to the expected outcomes. Nonetheless, the effects in question should be of a nature to remedy the

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<sup>26</sup> Pettiti Louis-Edmond, Decaux Emmanuel and Imbert Pierre-Henri, the European Human Rights Convention, commentary Article by Article, Paris,Economica,1999 P.467-468

alleged violation, otherwise the effective character of the remedy disappears. Finally, there is need to specify that the right to effective remedy sanctions an obligation of diligence, for what is guaranteed is the existence of an appropriate remedy and not its favourable result, but an unfavourable jurisprudence renders the remedy useless.

130. Considering all of the foregoing, the Commission is of the view that the Complainants did not benefit from the right to an effective remedy, for if it was established that the remedy was available and assessable, it should be noted that it had not been appropriate since the fact that it was frozen made it impossible for the Court to make a ruling. The petition remained pending for more than 5 years before the Complainants decided to seize the African Commission in 2003.

131. With regard to Articles 4 and 14, the Complainants highlight the violations to the physical integrity and to the material damages suffered by the victims.

132. Under the terms of 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 ».

133. Article 14 provides that “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

134. In the light of their arguments, it would appear that the Parties seem to agree on the effectiveness of the violations to the lives of the victims and the considerable material damages which resulted from the violence of the post-electoral events. The Government has shown this agreement by setting up a Rescue Committee for the Victims, in conformity with the Law of 26 June 1964 which authorizes the State to provide « *assistance within the limits of the amounts provided for this purpose or constant assistance in any other form* ». The said Committee had evaluated the amount of damages –interest at five billion, eight hundred and eight million, three hundred and ten thousand, and eight hundred and eighty francs CFA (5 808 310 880). From all appearances, the victims had not been entirely unprejudiced.

135. The Respondent State observed in its arguments that it was not at all a compensation on its part but a show of solidarity, because it is not directly responsible for the prejudices suffered by the victims, and that it was an act by private individuals that the victims could bring to justice so as to have satisfaction with respect to their grievances.

136. The Commission is of the view that the responsibility of the Government has been established. It therefore follows that the Government should pay compensation for the prejudices suffered. Despite the fact that the Government is denying it, it understood that it could not remain insensitive to its obligation to pay fair compensation to the victims, for this reason it set up a Committee to assess the damages suffered by the Complainants.

## DECISION OF THE COMMISSION

137. Based on the foregoing reasons, the African Commission Decides that:

- i. The provisions of Article 1 of the African Charter impose on States Parties an **obligation of Result**;
- ii. The State of Cameroon failed in its general obligation as set forth and sanctioned under Article 1 of the African Charter and consequently the State of Cameroon has an obligation of **RESULT**;
- iii. **Due to its obvious lack of diligence**, the State of Cameroon is held responsible for the violation of Articles **2, 4, and 14** of the African Charter; and therefore, the State of Cameroon is responsible for the acts of violence which took place on its territory which gave rise to human rights violations, whether these acts had been committed by the State of Cameroon itself or by people other<sup>20</sup>; than the State;
- iv. The State of Cameroon had moreover violated the provisions of Article 7 of the same Charter;

138. Recommends to the State of Cameroon to:

- i. Take all the necessary measures for guaranteeing the effective protection of human rights at all times, and everywhere both in times of peace and in times of war;
- ii. Pursue its commitment to give fair and equitable compensation to the victims and without delay, to pay fair and equitable compensation for the prejudices suffered by the victims or their beneficiaries;
- iii. That the amount of compensation for the damages and interest be fixed in accordance with applicable laws;

**Done in Banjul, The Gambia at the 46<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 11 – 25 November 2009.**

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<sup>20</sup> The jurisprudence of the Commission is constant regarding the responsibility of States towards others, see the National Commission on Human Rights and Freedoms vs. Chad ; Com. 155/96.

## Annex 4

### Communication 235/2000 - Dr. Curtis Francis Doebbler v Sudan

#### Summary of Alleged Facts:

1. The Complainant represents 14,000 Ethiopian refugees who fled Ethiopia prior to 1991 during the Mengistu regime and lived in Sudan and were a subject of forced repatriation pursuant to a decision adopted by the Respondent State and the United Nations High Commission for Refugees (UNHCR) in September 1999. The Complainant states that during the 1980s and early 1990s an estimated 80,000 Ethiopians entered Sudan fleeing from persecution and from events disturbing public order in Ethiopia.
2. The Complainant alleges that the current Government in Ethiopia was formed by officials of the Tigrayan People's Liberation Front (TPLF) party, who were allies with the the Ethiopian People's Revolutionary Party (EPRP) during the struggle against the Mengistu regime. The supporters of the EPRP are allegedly the main target of repression by the Ethiopian government throughout the country.
3. The Complainant alleges that all Ethiopian refugees in Sudan were previously granted asylum by the Government of Sudan in accordance with its international obligations. The United Nations High Commission for Refugees, the agency responsible for the protection of refugees worldwide, also honoured this recognition until September 1999.
4. The Complainant alleges that in September 1999, the Government of Sudan signed an agreement with the UNHCR to invoke the Cessation Clauses (Article 1(C) (5)) of the 1951 UN Convention Relating to the Status of Refugees) with effect from 1 March 2000.
5. The Complainant alleges that by this agreement, Ethiopian refugees in Sudan would lose their right to work or receive any social assistance as a way of coercing them into forced repatriation back to Ethiopia.
6. The Complainant states that in February 2000, a notice was posted on the door of the UNHCR compound in Khartoum, Sudan, entitled "Information Announcement to the Ethiopian Refugees in Sudan" and stated in part:

*The Government of Sudan represented by the Commission for Refugees (COR) and the United Nations High Commissioner for Refugees (UNHCR) would like to inform all Ethiopian Refugees in Sudan of the following:*

*All Ethiopian Refugees outside Ethiopia after 1 March 2000 will lose their legal refugee status. This means all the legal rights granted by international, regional and local regulations which guarantee refugees status or condition as stipulated in the 1951 Geneva convention generally governing that status and treatment of refugees etc..., the*

*legal status in respect of resolving individual cases and the right to appear before the courts etc..., the right to acquire employment and the guarantees, the issue of comprehensive guidance and supply of shelter, health and treatment, education, food, social security, etc ...and in conclusion, the various administrative assistance, and permits like travel permits, employment permits, driving licences, identity cards, residence and travel documents for travelling abroad and commercial licences etc...; all will cease to exist forthwith. ...*

*In light of this new situation, any Ethiopian refugee who decides to remain in the Sudan after 1 March 2000 will bear full responsibility of the consequences which may follow as the result of the forfeiture of his entitlements which he used to enjoy as a refugee before 1 March 2000. ...*

*To avoid unnecessary problems, which will occur as a result of your illegal stay in the Sudan after 1 March 2000, we request you to seriously consider the circumstances which will assist you in taking a reasonable decision to guarantee your safety and that of the future of your family.*

7. The Complainant states that although the Government had only agreed to withdraw refugee status, dozens of refugees reported that the UNHCR informed them that they would be deported after 1 March 2000 and that any benefits that they were receiving would cease. Furthermore, some of the refugees were arrested, beaten, and further mistreated as a consequence of their protests against their involuntary repatriation.
8. The Complainant states that the Respondent State, the UNHCR and the Government of Ethiopia entered into an agreement to forcibly repatriate them. This action consisted of several steps, including all of the following: the withholding of social welfare benefits such a medical attention, food, clothing, and housing entitlements; and the implementation of an unfair screening procedure.
9. The Complainant states that some of the refugees who protested the removal of their refugee status were sometimes arrested and deported or threatened with arrest and deportation, forcing many of them to flee to neighbouring countries.
10. The Complainant further alleges that at the time, Ethiopia was involved in a full-scale international armed conflict with its neighbour Eritrea.
11. The Complainant states that the UNHCR and the Respondent State agreed bilaterally to establish a screening procedure. The Complainant alleges that this procedure did not provide the basic minimum standards of due process. For example, the refugees were not allowed to be legally represented; the Government of Sudan and/or the UNHCR recruited unqualified persons to do the screening. The screening did not take into account the 1969 African Refugee Convention or the African Charter in their evaluation of individual cases; the screenings did not start until months after the threat of forcible *refoulement* had been made, and implemented in large parts. Interpreters were recruited from the Ethiopian Embassy in Khartoum—the embassy of the State from which they harboured or had a recognized, well-founded fear of persecution.

12. The Complainant states that some of the refugees had lived and settled in Sudan for up to thirty years; that many of them are opponents of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and the Tigrayan People's Liberation Front (TPLF), ruling the country since 1991. The Complainant states that many refugees feared that they would be sent to the Ethiopia/Eritrea warfront, due to the war which was ongoing during the whole of 2000 or that they would be mistreated or even killed by the Ethiopian Government.
13. The Complainant states that some of the refugees, such as Mr. Luel Kassa, who was forced to return in early 2001, were arrested upon return; and others fled Ethiopia again to Sudan or a third country as soon as they were able to.
14. The Complainant states further that many of the estimated 14,000 Ethiopian refugees who are still living in Sudan do not wish to return to Ethiopia because they have a well-founded fear of persecution or because they are fleeing the war and famine in Ethiopia.
15. The Complainant states that in March 2001, more than 1,700 Ethiopian refugees in Port Sudan and Khartoum staged a hunger strike to protest their return. Their main complaint: the unfair process for determining their status.
16. Since March 2001, the Complainant has contacted the Government of Sudan and the UNHCR in an effort to resolve this matter, but without success.
17. The Complainant states that although some refugees were allowed to stay in Sudan, others remained without the consent of the Government of Sudan and feared the prospect of immediate deportation without due process of law. The Complainant further alleges that many of these refugees live in inhuman conditions after being denied the basic necessities of life.

### **Complaint**

18. The Complainant alleges violations of Articles 4, 5, 6, 12(3), (4) and (5) of the African Charter on Human and Peoples' Rights (African Charter).

### **Procedure**

19. The Complaint was received at the Secretariat of the African Commission on 22 February 2000.
20. At the 27th Ordinary Session held from 27th April to 11th May 2000 in Algiers, Algeria, the African Commission decided to be seized of the Communication and requested the parties to address it on the exhaustion of domestic remedies.
21. The above decision was communicated to the parties on 30 June 2000.
22. At its 28th Ordinary Session held from 23 October to 6 November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this Communication to the 29th Ordinary Session.

23. On 13 March 2001, the Secretariat received the Complainant's submissions on Admissibility.
24. At the 29th Ordinary Session held from 23 April to 7 May 2001 in Tripoli, Libya, the Respondent State informed the African Commission that they were not aware of Communications 235/00 and 236/00 - submitted by Dr. Curtis Doebbler against Sudan. During the Session, the Secretariat provided the Respondent State with copies of the said communications. The African Commission decided to defer consideration of these Communications to the next session.
25. On 19 June 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the Respondent State to forward its written submissions within two (2) months from the date of notification of this decision.
26. On 14 August 2001, a reminder was sent to the Respondent State to forward its submissions within the prescribed time to enable the Secretariat to process the Communication.
27. During the 30th Ordinary Session held from 13 to 27 October 2001 in Banjul, The Gambia, the Secretariat of the African Commission received the Respondent State's written submissions in Arabic on all pending communications against it on Admissibility.
28. During the same Session, the African Commission heard the oral submissions of the parties with respect to the Communication. The African Commission noted that the Respondent State had not responded to the issues raised by the Complainant. The African Commission therefore decided to defer the Communication to the 31st Session, pending receipt of detailed written submissions from the Respondent State.
29. On 15 November 2001, the Secretariat informed the parties of the decision and requested the Respondent State to forward its written submissions on the issues raised by the Complainant within two (2) months from the date of notification of this decision.
30. On 7 March 2002, a reminder was sent to the Respondent State to forward its submissions within the prescribed time.
31. At its 31st Ordinary Session held from 2 to 16 May 2002, in Pretoria, South Africa, upon the request of the Complainant, the African Commission decided to suspend consideration of this Communication in order to allow the parties to pursue an amicable settlement.
32. On 29 May 2002, the parties were informed of the decision of the African Commission.

33. On 17 August 2002, the Complainant informed the Secretariat that he had written to the Respondent State with a view to negotiating an amicable settlement. However, he had not received any response from the Government of Sudan.
34. On 16 January 2003, the Secretariat received a request from the Complainant for a hearing on Admissibility. The Secretariat acknowledged receipt of this correspondence on 27 January 2003.
35. The Secretariat informed both parties that the Admissibility of the Communication would be considered at the 33rd Ordinary Session.
36. At its 33rd Ordinary Session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission deferred its decision on Admissibility to allow the parties more time to send their written submissions on Admissibility.
37. On 18 June 2003, the Secretariat of the African Commission informed both parties of the above-mentioned decision and requested them to forward their written submissions on Admissibility within three (3) months from the date of notification of this decision.
38. On 18 September 2003, the Secretariat reminded the parties to provide the African Commission with their submissions on Admissibility.
39. By letter dated 19 September 2003, the Complainant forwarded a brief on Admissibility concerning the exhaustion of domestic remedies.
40. By a Note Verbale dated 30 September 2003, the Respondent State was informed that the Communication would be considered at the 34<sup>th</sup> Ordinary Session. The arguments of the Complainant were attached to the Note Verbale.
41. During its 34<sup>th</sup> Ordinary Session held in Banjul from 6 to 20 November 2003, the African Commission considered the Respondent State's arguments on Admissibility and declared the Communication inadmissible for non-exhaustion of domestic remedies.
42. On 4 December 2003, the Secretariat of the African Commission transmitted the decision to the parties.
43. On 10 February 2004, the Complainant requested the African Commission to reconsider its decision on Admissibility and requested an oral hearing at the next Ordinary Session.
44. During the 35<sup>th</sup> Ordinary Session, the Commission considered the request to reconsider its decision on Admissibility, and deferred it to the 36<sup>th</sup> Ordinary Session. The Commission requested the Secretariat to inform both parties of the decision and deferred consideration of the matter to the 37<sup>th</sup> Ordinary Session.



The same decision was communicated to the parties. The Secretariat requested them to submit additional arguments on Admissibility. A copy of the Complainant's brief was forwarded to the Respondent state, which was duly requested to forward its response.

45. On 25 October 2005, the African Commission informed the Complainant of its decision to grant him an opportunity to argue for the re-opening of the Communication at its 36th Session.
46. At the 36<sup>th</sup> Ordinary Session, the African Commission, upon consideration of the arguments put forward by the Complainant in his "Brief on the Issue of Exhaustion of Domestic Remedies", decided to reconsider its decision adopted during the 34<sup>th</sup> Ordinary session, at its 37<sup>th</sup> session.
47. On 14 March 2005 the parties were informed about the decision of the African Commission and a copy of the Complainant's brief was forwarded to the Respondent State, which was duly requested to forward its response.
48. During the 37<sup>th</sup> Ordinary Session held from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission decided to defer reconsideration of the Admissibility to the next Session.
49. On 28 June 2005, both the Complainant and the Respondent State were informed of the decision. The Respondent State was also reminded to forward its written submissions on admissibility within two (2) months from the date of notification of this decision.
50. At the 38<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 21<sup>st</sup> November to 5 December 2005, the Respondent State submitted written arguments on Admissibility. The African Commission deferred reconsideration of the Admissibility of the Communication to its 39<sup>th</sup> Ordinary Session.
51. On 16 December 2005, the Secretariat informed the parties of the decision. A copy of the Respondent State's arguments was sent to the Complainant.
52. On 8 March 2006, the Secretariat received from the Respondent State a copy of the minutes of an August 2000 meeting between the Government of Sudan, the Government of Ethiopia and the UNHCR. A copy of the latter documents was transmitted to the Complainant.
53. On 23 March 2006, the Secretariat received a response to the Respondent State's submissions of 3 December 2005. The document was duly transmitted to the Respondent State.
54. At the 39 Ordinary Session held in Banjul, the Gambia from 9 to 23 May 2006, the African Commission reconsidered its decision on Admissibility and declared that the Communication was Admissible.

55. By a Note Verbale of 14 July 2006, to the Secretariat informed both parties of the aforementioned decision and requested them to submit their arguments on the Merits within two (2) months.
56. On 18 September 2006, the Secretariat received a letter from the Complainant, requesting that the deadline for submission of arguments on the Merits be extended by 6 (6) months, as the Complainant had been unable to contact the Secretariat.
57. On 16 October 2006, the Secretariat acknowledged receipt of the letter from the Complainant, and reminded both parties to submit their arguments on the Merits by the end of October 2006.
58. On 11 April 2007, the Secretariat received the arguments on Merits from the Complainant.
59. On 25 April 2007, the African Commission acknowledged receipt of the Complainant's submissions and reminded the Respondent State to submit its arguments on the Merits by 10 May 2007.
60. On 20 June 2007, the Secretariat sent a Note Verbale to the Respondent State reminding the Respondent State that the African Commission intended to consider the Communication on the Merits during the 42<sup>nd</sup> Ordinary Session and requested it to forward its arguments on the Merits by the end of July 2007.
61. On 6 June 2007, the Secretariat informed the Complainant that the Respondent State had yet to submit its arguments on the Merits.
62. By a Note Verbale of 30 October 2007, the Respondent State was reminded to submit its arguments on the Merits before the commencement of the 42<sup>nd</sup> Ordinary Session in Congo, Brazzaville.
63. On 3 November 2007, the Secretariat of the African Commission informed the Respondent State that it had not yet received its submission on the Merits.
64. On 23 November 2007, during the 42<sup>nd</sup> Ordinary Session, the Respondent State submitted its arguments on the Merits. The arguments were in Arabic. During the 42<sup>nd</sup> session the African Commission deferred consideration of the Communication on the Merits in order to allow for translation of the Respondent State's submissions.
65. On 27 December 2007, the Secretariat informed the parties of its decision to defer the Communication. It acknowledged receipt of the State Party's brief on the Merits, and also forwarded it to the Complainant.
66. At the 43<sup>rd</sup> Ordinary Session, which took place from 7 to 22 May 2008 in Ezulwini, Swaziland, the African Commission deferred the Communication to

the 44<sup>th</sup> Ordinary Session, to give the Secretariat enough time to prepare the draft decision on the Merits.

67. On 2 June 2008, the parties were informed of the decision of the African Commission.
68. During the 44<sup>th</sup> session held in Abuja, Federal Republic of Nigeria, the African Commission considered the Communication and decided to defer it to the 45<sup>th</sup> session in order to finalise its decision on the Merits.
69. By letter and Note Verbale of 23 January 2009, both the Respondent State and the Complainant were informed of the decision of the Commission.

### **Law: Admissibility**

70. The African Commission recalls that it declared the Communication inadmissible during the 34<sup>th</sup> Ordinary Session of the Commission. The Complainant filed a request for the reopening of the case during the 35<sup>th</sup> Ordinary Session. This request was considered during the 36<sup>th</sup> Ordinary Session.
71. When declaring the Communication inadmissible, the African Commission stated the following:

*Although the parties have not provided the African Commission in writing with further written submissions on the issue of local remedies, the African Commission is in a position to rule on the Admissibility of this Communication by making reference to the written submissions of the Complainant (received on 13 March 2001) and those of the Respondent State (received during the 30<sup>th</sup> Ordinary session) as well as the oral submissions submitted by both parties during the 33<sup>rd</sup> Ordinary Session.*
72. The Complainant alleges that there were no effective local remedies against the Government's threat to forcibly repatriate the Ethiopian refugees. The refugees had been denied the right to legal representation during the hearings that were aimed at determining whether there was any risk if they returned to Ethiopia to be tortured or be subjected to inhuman, degrading and cruel treatment.
73. The Complainant submits that the procedure for repatriation agreed to by the UNHCR and Sudan was unacceptable for the following reasons: firstly, the Ethiopian refugees were given no opportunity to make representations during the decision-making process, despite public announcements to this effect. Secondly, most of the interpreters /translators were taken from the Ethiopian Embassy, the country from which the refugees were fleeing and they could therefore have been biased or prejudiced.
74. The Complainant adds that the Respondent State denied visas to the legal representatives of the refugees. By failing to ensure that the refugees were given a fair hearing in matters concerning their human rights under the African Charter, the Respondent State had by doing so denied them the right to access local effective remedies.

75. The Respondent State argued that there had been no complaint against illegal or forced repatriation of Ethiopians, and that this Communication does not contain any concrete indication in this regard. The Respondent State acknowledges that it understood the situation in Ethiopia was not favourable to those who feared persecution in their country of origin, but reassured the African Commission that every repatriation procedure in this case followed the principle of the Convention signed between Sudan, Ethiopia, and the UNHCR.
76. Furthermore, the Respondent State submitted that the Complainant neither approached the UNHCR nor any Court or administrative body to rule on any allegations of violation committed during the process of repatriation. The Complainant could have submitted an administrative application or referred the matter to the competent courts available in Sudan.
77. The Respondent State informed the African Commission that Article 20 of the 1996 Code of Administrative Courts gives the Complainant the right to lodge an appeal against any administrative decision. An appeal could have been lodged in the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the Government of any region or Federal or Regional Minister. The African Commission notes that the Complainant in this Communication makes no mention of any attempt on his part to access the available local remedies in the Respondent State.
78. For the above reasons, the African Commission declares that Communication inadmissible for non-exhaustion of local remedies.

### **Commission's Decision on Review**

79. The Commission accepted the Complainant's request to reconsider its decision on the basis of the submission by the Complainant that the Commission had not addressed itself to its jurisprudence, regarding the exceptions to the exhaustion of local remedies rule, in particular the non-applicability of domestic remedies to situations of massive violation of human rights, as is alleged in this instance.
80. The Commission reconsidered its decision under Rule 118(2) of the African Commission's Rules of Procedure. Rule 118(2) reads as follows:  
*If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.*
81. Rule 118(2) does not stipulate the conditions under which the Commission may reconsider its previous decision. The Commission may exercise its discretionary powers to reconsider its decision upon a party moving it, and adducing compelling reasons. The Commission is called upon at all times to protect human and peoples' rights. A decision to reconsider its decision must be aimed at protecting human and peoples' rights.

82. Further to that general principle, a party seeking the reconsideration or review of a decision must show that the Commission failed to take into account the criteria set out in Article 56 of the Charter, or it erred in reaching the decision it did. The review must be based on the same facts as was initially before the Commission. A party cannot introduce new facts or information at the review stage.
83. The Commission has in the past, based on its jurisprudence, held that the requirement of exhaustion of local remedies does not hold "... where it is impractical or undesirable for the complainants or victim to seize the domestic courts."<sup>21</sup>
84. Based on the above reasons the Commission reconsidered and departed from its previous decision and considered the parties' submissions on Admissibility.

### **Decision on Admissibility**

85. The Admissibility of the Communications submitted under the African Charter is governed by Article 56 of the African Charter. Of the seven conditions stipulated by this article, six have been met. The seventh which is Article 56(5), stipulates that:

*[C]ommunications shall be considered if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged..."*

86. The Respondent State claims that the Complainant did not exhaust local remedies. It stressed that the Complainant had the right to lodge an appeal against any administrative decision in accordance with Article 20 of the 1996 Code of Administrative Courts, and they could lodge an appeal to the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the Government of any region or to the Federal or Regional Minister.
87. The Complainant submits that the African Commission has held that "the rule of exhausting domestic remedies is the most important condition for Admissibility of Communications. There is no doubt therefore, in all Communications seized by the African Commission, the first requirement considered concerns the exhausting of local remedies..."<sup>22</sup> The Complainant argues that the reason for this rule has been defined by the Commission as a two-fold test. First, it is to give domestic courts an opportunity to decide upon cases before they are brought

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<sup>21</sup> See Amnesty International, et al. vs Sudan, Consolidated Comm. 48/90, 52/91 and 89/93 27<sup>th</sup> Ordinary Session, 10<sup>th</sup> Activity Report (2000).

<sup>22</sup> Communication 228/99-The Law Office of Ghazi Suleiman/ Sudan, 33<sup>rd</sup> Ordinary Session, Sixteenth Annual Activity Report (2003) at para. 29.

to an international forum. If a right is not well provided for at the domestic level, there cannot be effective remedies at all.<sup>23</sup>

88. Second, the Complainant states that the Respondent State should have notice of a human rights violation in order to have the opportunity to remedy such violation before submitting them to an International Tribunal.<sup>24</sup> The Complainant submits that the Respondent State was aware of the refugees' situation for years and did not act to protect them. The Complainant alleges that there can be no doubt that the Respondent State Government had been put on notice of the situation giving rise to this Communication. Such notice was given by the refugees themselves communicating with the Government; the communications of the refugees' legal representatives with the Government and coverage of the plight of the refugees by the news media.
89. The Complainant submits that the Respondent State responded to these communications by denying any responsibility for the plight of the refugees. The Complainant states that, because of the serious violations of human rights that have occurred, the requirement that the refugees resort to domestic remedies should be deemed waived and the Commission should consider the Merits of this Communication.
90. The Complainant claims that when interpreting Article 56 (5) of the Charter, the African Commission should take into consideration generally recognized principles of international law in the interest of ensuring the protection of human rights.<sup>25</sup>
91. The Complainant submits that the Commission has unequivocally held that when a Respondent State raises the defence of non exhaustion of local remedies, it must discharge the burden by demonstrating the existence of such remedies."<sup>26</sup>
92. The Complainant urges the African Commission to draw inspiration from regional and international human rights mechanisms on this issue. The Inter-American Court of Human Rights has repeatedly affirmed that a state has duties "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights."<sup>27</sup> The Court held that "the

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<sup>23</sup> Communication 155/96- The Social and Economic Rights Action Group and the Centre for Economic and Social Rights/ Nigeria, Fifteenth Annual Activity Report (2003) para 37.

<sup>24</sup> *Ibid.* at para 38.

<sup>25</sup> See Art. 60 of the African Charter.

<sup>26</sup> *Recontre Africaine Pour la Defense des Droits de l'Homme v. Zambia*, Comm.71/92, 21<sup>st</sup> Ordinary Session, Tenth Annual Activity Report (1997) at para. 12.

<sup>27</sup> *Exceptions and Exhaustions of Domestic Remedies* ( Art. 46(1)), 46(2)(A) and 46(2)(B) American Convention on Human Rights, Ser. A, No.11, Advisory Opinion OC-11/90 of (10 August 1990) at para.23; *Velasquez Rodriguez Case*, Ser. C, No.4 (29 July 1988) at para. 166; and *Godinez Cruz Case*, Ser. C, No.5 (20 January 1999) at para. 175.

State claiming non-exhaustion of domestic remedies has an obligation to prove that the domestic remedies remain to be exhausted and that they are effective.”<sup>28</sup>

93. The Inter-American Commission on Human Rights expressly stated that the burden of proving that effective local remedies exist and that they had not been exhausted fell upon the government making such a claim.<sup>29</sup>

94. A similar view regarding the burden of proof was taken by the United Nations Human Rights Committee whereby a Respondent State “...had failed to provide.... sufficient information on effective remedies.”<sup>30</sup> Equally, the European Court and Commission of Human Rights have held that the government shoulders the burden of proving that there are effective remedies.

95. Similarly, the Grand Chamber of the European Court for Human Rights has expressed the opinion that “it is incumbent on the Government claiming non-exhaustion of domestic remedies to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time.”<sup>31</sup> The Court continued:“ ...that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success.”<sup>32</sup> Only once this burden of proof has been met does the petitioner have to establish that the local remedy “was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances.”<sup>33</sup>

96. The Complainant urges the Commission to apply the standards articulated above, which require the Respondent State to prove that effective local remedies exist in Sudan and that they are reasonably accessible. The Complainant submits further that it is evident that the Respondent State has not met this burden of proof. It has not shown that the refugees had adequate and effective remedies. The Government had itself prevented refugees accessing any remedies - irrespective of their effectiveness and adequacy - that it alleges are available.

97. The Complainant submits that Communication 235/00 involves massive and serious violations of human rights. He states that the African Commission has found that actions threatening the life and welfare of less than a thousand people amount to serious and massive violations of human rights.<sup>34</sup>

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<sup>28</sup> Loayza Tamayo Case, Preliminary Objections, Ser. C, No. 25 (31 January 1996) at para. 40.

<sup>29</sup> Article 37(3) of the Regulations adopted in OAS Doc. OAE.Ser.L.V/II.82 doc. 6, rev.1 at 103 (1992).

<sup>30</sup> Famara Kone v. Senegal, Comm. No. 386/1989, views adopted 21 October 1994, at para 5.3.

<sup>31</sup> See *Akdivar v. Turkey* at para. 68.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Commission Nationale des Droits de l’Homme at des Libertes vs. Chad, Comm. No. 74/92. Ninth Annual Activity Report (1996) at paras. 1-6.

98. The Complainant alleges that the present Communication involves more than fourteen thousand (14,000) Ethiopian Refugees, whose daily survival is threatened and who cannot approach the authorities for fear that their refugee identity documents would be confiscated and they would be deported without the due process of law.
99. The Complainant states that the Respondent State has suggested that the refugees could have theoretically relied on Administrative and Constitutional procedures in “Article 20 of the 1996 Constitutional and Administrative code, and in accordance with Article 120 (2)(b) of the Constitution.” The Complainant alleges that this would not have been an adequate remedy because the Judiciary in Sudan is not independent.
100. The Complainant points to the fact that the Commission noted that the Respondent State had dismissed over 100 judges when it came to power approximately twelve years earlier.<sup>35</sup> The Complainant further alleges that since 1989, the appointment of Judges is done in close coordination with the President. The Complainant goes on to state that the 1998 Constitution of Sudan intentionally enhanced the powers of the President.<sup>36</sup>
101. The Complainant alleges that on 12 December 1999, the President declared a State of Emergency and prolonged his control over the Judiciary until 2001. Cases brought to the Court challenging this declaration of emergency have been dismissed with little or no attention to international human rights law. Instead the Courts have relied on vague references to customary presidential powers that override the clear words of the Constitution.<sup>37</sup> The Complainant concludes that the Sudanese Courts have been under the control of the Sudanese Executive since 1989, and that an independent Judiciary does not exist in Sudan.
102. The Complainant submits that the Respondent State has no system in place that can protect human rights in the overwhelming majority of cases. He points to examples of *Amal Aba al-Ajab v. Government of Sudan* case in which the Court refused to apply international human rights law.<sup>38</sup> He also points to a similar situation in the case of *Abdelraham et al v. Sudan, Case No. 7/98 of 13 August 1998*.<sup>39</sup>

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<sup>35</sup> See Sudan Case at para. 37.

<sup>36</sup>Doebbler, C.F. and Suleiman, G., “Human Rights in Sudan in the Wake of the New Constitution.” 6(1) Human Rights Brief 1,2 (1998).

<sup>37</sup> See Ibrahim Yusif Habani et al v. Government of Sudan, Case No. MD/GD/1/2000 (unreported, 8 March 2000), cited and discussed in Bantekas, I., and Abu-Sabeib, H., “Reconciliation of Islamic Law with Constitutionalism: The Protection of Human Rights in Sudan’s New Constitution.” 12 RADIC 531 (2000).

<sup>38</sup> *Amal Aba al-Ajab v. Government of Sudan*, Case No. MD/GD/8/99, Judgment of 10 August 1999 (unreported),

<sup>39</sup> *Abdelraham, et al, v. Sudan*, Case No. 7/98 of 13 August 1998.



103. The Complainant submits that the lack of independence of the Judiciary is the result of several steps taken by the Sudanese Government since it came to power in 1989. He cites the reports of Mr. Leonard Franco, the UN Special Rapporteur on the Situation of Human Rights in Sudan as well as numerous non-governmental organizations to demonstrate the lack of independence of the Judiciary in Sudan.<sup>40</sup>

104. The Complainant argues that although a new Constitution was adopted on 1 July 1998, the Executive still exercises broad powers over the Judiciary: Section 5 of the Constitutional decree 13/1995, entitled 'Powers of the President' provides that ... "the President shall be the Guardian of the Judiciary and the Council of Justice in accordance with the Constitution and the Law", ... "A Judge shall be guided by the concept of supremacy of the Constitution, Law and general guidance of Sharia." Section 61 (1-3) provides that: "The Judiciary is responsible before the President for the performance of its functions effectively and honestly for the prevalence of justice; its function is to adjudicate fairly in constitutional, administrative, family, civil and criminal disputes and to exercise its judgment in accordance with the law."

105. The Complainant alleges that Sudan is ruled under a State of Emergency whereby the President exercises almost complete control over the Executive, Legislative and Judicial functions. The Complainant alleges further that for the foregoing reasons, no adequate and effective remedies exist in Sudan that the refugees should be required to exhaust.

106. The Complainant submits that in the present case, the Respondent State has repeatedly denied the victims access to their legal representative, Dr. Curtis F. J. Doebbler, by repeatedly refusing to grant him a visa to enter the country. The Government has also failed to make facilities available to the refugees, even when they are in custody, to contact their legal representative.

107. The Complainant rejected the submission by the Respondent State that redress by way of an appeal to the UNHCR or an appeal to the Sudanese Courts was available to the refugees.

108. He submitted that neither of these means of redress was adequate. An appeal to the UNHCR was ineffective because the refugees were denied legal representation. He argues that UNHCR decision makers refused to apply the African Charter on Human and Peoples' Rights and the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa. Secondly, appeals to the Sudanese Courts were not possible, because there was no decision made by a Sudanese administrative body.

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<sup>40</sup> International Human Rights Watch and the Lawyers Committee for Human Rights. These include UN Doc. E/CN.4/1999/38/Add1 (17 May 1999) at para.34, UN Doc. E/CN.4/2000/36 (19 April 2000) at para. 11b, as well as reports by Amnesty.

109. The Complainant submitted that the Respondent State denied responsibility for the protection of Ethiopian refugees under its jurisdiction.

110. The Complainant stated that the Sudanese Government's position is in contrast to the position expressed by the Commission, that: "the Charter specifies in Article 1 that the State Parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also "undertake.....measures to give effect to them." Therefore, 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.<sup>41</sup>

111. The Complainant submitted further that the process offered by the UNHCR was flawed in several serious matters. Despite repeated requests to represent the refugees in procedures before the UNHCR, the refugees were denied the right to legal representation.

112. The UNHCR recruited translators from the Ethiopian Embassy in Sudan to interview the Complainants. Because the procedures applied by UNHCR, did not apply the most basic standards of due process, it cannot be considered effective or adequate for protecting the rights of the refugees that are guaranteed in the African Charter.

113. Moreover, the Complainant submitted that the right to appeal from procedures that do not meet the standards of due process is illusory and cannot be deemed an effective remedy. The refugees could not appeal a decision by the UNHCR to the Sudanese administrative bodies. Only administrative decisions made by Sudanese Government Authorities may be appealed. The Government of Sudan itself admitted that it had nothing to do with the decision of the UNHCR. Consequently, there was no domestic remedy that could adequately and effectively protect the victims' human rights.

114. The Respondent State reiterated its position that the Complainant neither approached the UNHCR nor any Court or Administrative Body to denounce the alleged violation of the rights of pre-1991 Ethiopian refugees. The Respondent State stressed that the Complainant could have challenged the manner in which the repatriation exercise was carried out by lodging an appeal to the Supreme Court in accordance with Article 20 of the 1996 Code of Administrative Courts. Article 20 of the Code provides that anyone can lodge an appeal to the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the Government of any region or Federal or Regional Minister.

115. The Respondent State added that the Complainant did not cite any case of refugees who had been illegally or forcibly returned to Ethiopia. The Respondent State acknowledged that the situation prevailing in Ethiopia in March 2000 was not

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<sup>41</sup> Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehova v. Zaire, Comms. 25/89, 47/90, 56/91 and 100/93, Ninth Annual Activity Report (1996) at para.20.

favourable to the repatriation of those refugees fearing persecution in their country of origin. It stated however that the repatriation process followed the principles laid down in the Trilateral Agreement signed between the Government of Sudan, the Government of Ethiopia and the UNHCR in August 2000.

116. The African Commission is of the view that, even if certain domestic remedies were available, it was not reasonable to expect refugees to seize the Sudanese Courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation. The Commission notes that the refugees' legal representative was repeatedly denied entry into the country by the Respondent State's authorities.

117. Furthermore, even accepting the argument of the Respondent State that the refugees could have challenged the decision to repatriate them before the Administrative Courts or appealed to the Supreme Court, the Commission holds the view, which it has stated oftentimes before, that where the violations involve many victims, it becomes neither practical nor desirable for the complainants or the victims to pursue such internal remedies in every case of violation of human rights.<sup>42</sup>

**For all these reasons, the African Commission declares this Communication Admissible.**

### **Consideration of Merits**

118. The present Communication alleges that the Respondent State has violated the human rights of an estimated fourteen thousand Ethiopian refugees, following the invocation by the UNHCR of the Cessation Clause under Article 1(C)(5) of the 1951 United Nations Refugees Convention.

### **Complainant's submission on the Merits**

119. The Complainant states that some time in September 1999, the Respondent State and the UNHCR concluded an agreement, which *inter alia* stipulated that by 1 March 2000 Ethiopian refugees in Sudan would lose their right to work or receive any social assistance as a way of coercing them into forced repatriation.

120. The Complainant states that the said refugees were subsequently repatriated involuntarily to Ethiopia, or were threatened with arrest or involuntary repatriation by the Respondent State upon protesting the repatriation. Others were forced to leave Sudan for third countries.

121. The Complainant alleges that the Respondent State violated Articles 4, 5, 6, and 12 (3), (4) and (5) of the African Charter as a result of the failure to protect the Ethiopian refugees against the involuntary repatriation, and from threats of arrest. He states

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<sup>42</sup> See para 85, Malawi African Association, et al versus Mauritania, Consolidated Comm. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98.

further that by failing to protect the refugees, it forced them to live under inhumane conditions, without the basic necessities of life. The Complainant is alleging that the Ethiopians are *de facto* refugees, and thus protected by Article 12 of the African Charter of Human and Peoples' Rights.

122. The Complainant submits that the Respondent State has an obligation to ensure respect for the right to life, the right to humane treatment and the right to security of person for every individual under its jurisdiction. It also has an obligation under Article 7 of the African Charter, which requires that every individual has a right to a fair determination of his human rights as protected in the Charter.

123. The Complainant draws the attention of the African Commission to Article 60 of the Charter, to draw inspiration from the UN Convention on Refugees of 1951<sup>43</sup> and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, instruments which the Respondent State has signed and ratified <sup>44</sup> when determining the meaning of the above Articles in the Charter in relation to those instruments.

124. The Complainant argues that since the African Charter is a treaty that is *later in time*, than either the UN Refugees Convention, or the African Refugees Convention, the general principle of international law to be applied to resolve any conflict between treaties is that the latter treaty prevails over the former treaty that are not compatible. The Complainant relies on Article 30(3) of the Vienna Convention on the Law of Treaties,<sup>45</sup> which states that "*the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.*" He argues that by applying this principle, any provisions of the UN Refugees Convention that are incompatible with either the African Refugee Convention or the Charter must be deemed to be overridden by these latter two instruments.

125. The Commission wishes to state that it does not find any conflict or incompatibility between the African Charter and the two refugees' convention, or between the UN and the OAU Refugees Conventions. The 1969 OAU Convention stipulates that it is a complement to the 1951 UN Refugees Convention. Paragraph 9 of its preamble recognises the 1951 UN Convention and the 1967 Protocol as the basic and universal instruments relating to the status of refugees. Article VIII of the OAU Convention enjoins Member States to cooperate with the UNHCR, and states further that the OAU Convention is a regional complement to the 1951 UN Convention.

126. In that respect the Commission shall read the provisions of the three instruments as complementing each other. The Complainant's argument that the provisions of the latter convention prevail over the former do not in any way affect the interpretation the Commission will give to the applicable provisions, should it be necessary to do so

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<sup>43</sup> Convention relating to the Status of Refugees, 189 UNTS 150, entered into force 22 April 1954.

<sup>44</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001, UNTS 45, entered into force 20 June 1974 and ratified by the Government of Sudan on 24 December 1972.

<sup>45</sup> 1155 UNTS 331, which entered into force on 27 January 1980.

under this Communication. This is because the provisions are at most complementary to each other and not mutually exclusive.

127. Concerning the said violations, the Complainant submits that the Respondent State did not deny the facts as presented; rather it has merely alleged that the problem is the responsibility of the UNHCR. He states that both the Government of Sudan and the UNHCR recognized all of the refugees in the 1990s. The Complainant states that while the Respondent State claims that the refugees no longer need protection, the refugees, nevertheless, refute this claim. He argues that the refugees still deserve protection and, at the very least, they deserve a fair process to determine this question in each of their individual cases. He argues that since the Respondent State has denied the refugees protection, and a fair determination process, it is necessary to examine the *de jure* status individually.

128. The Complainant argues that both customary international law and the African Charter provide special protection to individuals who are unable to seek the protection of their own country. These persons – refugees and asylum seekers – are recognized as being in particularly vulnerable positions. States are under a legal obligation to consider refugees' claims to protection through a fair procedure and to provide them protection if their claims are found to be well-founded.

129. Referring the Commission to Article 12 of the African Charter, the Complainant argues that the Charter specifically recognizes the need to protect such individuals, notwithstanding that it does not define in detail who qualifies as a refugee, except to describe them as any person who is persecuted. He goes on to state that the second preambular paragraph of Resolution No. 72/(XXXVI)/04, creating the Commission's Special Rapporteur, reiterates this protection, while also drawing States' attention to their obligations under relevant international instruments.<sup>46</sup>

130. The Complainant further argues that the Convention Relating to the Status of Refugees is *lex specialis* in relation to the African Charter.<sup>47</sup>

131. He argues that the Convention Governing the Specific Aspects of Refugee Problems in Africa is *lex specialis* to both the Charter and the Convention Relating to the Status of Refugees. He states that this instrument elaborates and strengthens the definition of a refugee deserving the protection of asylum. This treaty, he maintains, extends the definition of a refugee by stating in paragraph 2 of Article 1 that not only is a refugee a person as described by the UN Refugees Convention, but also that:

*[t]he term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave*

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<sup>46</sup> Preambular para. 2 and para.1(g) of Commission Resolution No.72(XXXVI) 04.

<sup>47</sup>Article 1(A) (2) of the Convention Relating to the Status of Refugees. Although this treaty was once temporally limited to events occurring before 1 January 1951, this temporal restriction has been removed in countries like Sudan which have ratified the additional 1967 Protocol relating to the Status of Refugees, 606 UNTS 267 (entered into force 4 October 1967).

*his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*

132. The Complainant concludes that, in the instance case, this expanded definition applies to the Ethiopian refugees in addition to the definition in the UN Refugee Convention. This expanded definition must also be the basis of the interpretation and implementation of Article 12 by the Commission because it provides individuals cumulatively the most adequate protection of their human rights in accordance with the international legal obligations that the Government of Sudan has voluntarily undertaken.

### **Respondent State's Submission on the Merits**

133. The Respondent State in its submission states that Sudan is always committed to the implementation of international human rights instruments and continues to cooperate with the UN High Commission for Refugees which has the responsibility of monitoring international and regional conventions on refugees.

134. The Respondent State denies all the Complainant's allegations. It argues that as a signatory to the African Charter and various refugee instruments, it was merely cooperating with the UNHCR "...in performing its functions, and assist it in facilitating its duties and carrying out its assignments to monitor and implement the provisions" of the Geneva Convention.<sup>48</sup> The Respondent State argues that refugees are only entitled to receive support from the UN, where fear from persecution which caused him/her to flee, still persists.

135. The Respondent State argues that following the fall of Mengistu's regime in 1991, the UNHCR was of the view that the circumstances which led to the flight of Ethiopians to Sudan and to the other countries of the world, no longer existed. The Respondent State states that the UNHCR believed that the situation in Ethiopia after Mengistu's fall had sufficiently changed for the return of large numbers of refugees to that country. It nevertheless argues that the announcement of the Termination of Refugee Status for Ethiopian refugees was not supposed to take place before an adequate period of time elapsed, to ensure stability and sustainability of the change in the country of origin.

136. The Respondent State, quoting Article 1 (C) paragraphs 1 to 6, of the 1951 UN Refugees Convention, which defines the six conditions under which refugee status ceases, argues that in the case of the Ethiopian refugees, the conditions no longer justified their continued stay in Sudan. The Respondent State argues that these six conditions are based on the consideration that international protection is not usually granted when it is not justified.

137. It cites the Cessation Clause, Article 1(C) (5) as the source of the current dispute, which was not only directed at the Ethiopian refugees in Sudan, but to Ethiopian refugees elsewhere in the world. The Respondent State argues that indeed the UNHCR had issued similar Cessation Clauses in the past for other refugees from Zimbabwe,

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<sup>48</sup> Paras 3 and 4 of the Respondent State Submission on the Merits.

Malawi, Mozambique, Namibia, South Africa and Chile, when the situation in those countries normalised. The Respondent State submitted that since Sudan hosts a large number of Ethiopian refugees, to avoid the consequences which a hasty implementation would cause to the refugees and to the Sudanese as well, it requested the Third Committee of the United Nations in New York for a gradual implementation of the Cessation Clause to the Ethiopian refugees in the Sudan.

138. The Respondent State states that a Tripartite Agreement between Sudan, Ethiopia and the UNHCR was executed in 1993. Under this Agreement a programme of voluntary repatriation began to be implemented in 1993 and continued into 1998. The Respondent State submits further that, according to this Agreement, 720,000 refugees returned voluntarily. However, at the end of the programme, a considerable number of the refugees remained in the Sudan.

139. The Respondent State stated that, both Ethiopia and Sudan requested the UNHCR on 29 December 1999 and 1 February 2000 respectively for a postponement of the repatriation due to the outbreak of the war with Eritrea. The Respondent State, Ethiopia and the UNHCR later concluded another Tripartite Agreement on 25 August 2000 to repatriate refugees at the end of the war with Eritrea, and the end of the rainy season.

140. The August 2000 agreement provided, *inter alia*, for transport modalities, provision of return packages for the returnees, such as cups, blankets, food allowances and other non food items. It also established a mechanism for a residual caseload of individuals with compelling reasons for international protection, and those who for social and economic reasons wished to remain in Sudan.

141. A screening process was carried out jointly by the Sudanese Commission on Refugees and the UNHCR to determine those who continued to need international protection. It was agreed that the regularisation for those wishing to remain in Sudan was a matter for bilateral discussion between the two governments. The screening process was envisaged to end in November 2000. Repatriation would be conducted between 1 and 31 December 2000, since food and funding would not be available in 2001. The implementation for repatriation was delayed to a later date (14 March 2001) to allow for proper implementation and assessment.

142. The Respondent State argues that the UNHCR brought in the best cadres serving in different parts of the world to take part in this exercise, so as to ensure equity and justice. The Respondent State submits that the repatriation was voluntary. It denies that any refugees were imprisoned, tortured or were subjected to involuntary return. It submits further that no person was denied social services, such as medical care, food or shelter. Assistance was extended to refugees throughout up to their final place of residence. Those remaining were assisted until all phases of the implementation of the cessation clause were exhausted, including the reconciliation of their legal status.

143. The Respondent State submitted further that of those who did not opt for voluntary repatriation, 282 were granted protection, while 2753 were not. The determination was done in accordance with the 1977 UNHCR Executive Committee

(EXCOM) decision, which requires Member States to adopt comprehensive procedures to ensure that asylum seekers are given adequate time to make an appeal for reconsideration of a decision to accredit them, to the same committee or another authority.

144. By June 2001, the Respondent State had registered 7,072 Ethiopians from both the 1993 to 1998, and the 2000 repatriation phases and issued them with an annually renewable residence permits, pursuant to UNHCR Executive Committee (EXCOM) decision No 69, which requires Member States implementing the cessation clause to make appropriate arrangements to enable persons expected to leave the country to take care of strong family and other social and economic engagements.

145. The Respondent State drew that attention of the Commission to the date the Communication was received at the Commission's Secretariat on the 22 February 2000. It submitted that the Communication was received prior to the date of the implementation of the Cessation clause. The Respondent State submitted that "10,000 Ethiopian refugees actually returned to their country voluntarily in the wake of the implementation of the clause... ." It argues that such returnees cannot be deemed to be included in the Communication.

#### **Commission's Decision on Merits**

146. The present Communication turns on issues relating to the application of two important principles in international refugee and human rights law. The first issue is the effect of the Cessation Clause and its application under the 1951 United Nations Convention on Status of Refugees *vis-a-vis* a State Party to the African Charter. The second issue is the applicability of the *non-refoulement* principle based on the actions taken by the Respondent State as a consequence of the Cessation Clause. The African Commission is therefore required to determine whether or not the Respondent State, in applying the Cessation Clause, acted in a manner which amounted to the *refoulement* of refugees to their country of origin where they feared persecution, and hence constituting a violation of the African Charter.

147. Before analysing the instant case, it is important to clarify these concepts, namely the "cessation clause," "refoulement" and "non-refoulement."

148. Article 1(C)(5) of the 1951 UN Convention on the Status of Refugees stipulates one of the six conditions which brings to an end the refugee status and hence the protection hitherto enjoyed by a refugee during asylum in a host country, after fleeing persecution or the fear of persecution in his/her home country. Article 1( C) (5) of the 1951 UN Refugees Convention reads as follows:

*[t]his Convention shall cease to apply to any person, (i.e. a refugee) if [h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;*



*Provided that this paragraph shall not apply to a refugee ...who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.*

149. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa stipulates a cessation clause of its own. Article I (4) (e) reads as follows:

*[t]his Convention shall cease to apply to any refugee if (e) he can no longer, because of the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.*

According to the two conventions the status of a refugee ceases when circumstances which caused the person to assume refugee status cease to exist. Such a person can no longer refuse the protection of his or her country. International protection is granted to refugees because they do not enjoy the protection of their own home countries. The Cessation Clause does not apply when compelling reasons arising out of previous persecution force a person to refuse the protection of ones country.

150. “*Non-refoulement*”, on the other hand, is a principle which has taken an increasingly fundamental character, as one of the cornerstones of international refugee law. It prohibits the return of an individual to a country in which he or she may be persecuted.<sup>49</sup> This principle is set out in the 1951 UN Refugee Convention, Article 33 (1) of which states that: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.”<sup>50</sup>

151. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>51</sup> enshrines the principle of *non-refoulement* in Article II (3) of this Convention. It reads as follows: “[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.”

152. Paragraphs 1 and 2 of Article I of the OAU Convention define the conditions which compel an individual to flee the country of his habitual residence and seek asylum in another country.

153. Having seen the applicable provisions, it is incumbent upon the Commission to determine whether the Respondent State violated the African Charter.

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<sup>49</sup> Guy S. Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 120. See also Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* (UNHCR), ¶ 2 (2001).

<sup>50</sup> Convention Relating to the Status of Refugees, *adopted* July 28, 1951, Art. 33, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (*entered into force* 22 April 1954) [hereinafter “1951 Convention”].

<sup>51</sup> Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45.

154. The Complainant submitted that the Respondent State denied 14,000 Ethiopian refugees the protection they deserved and a fair determination process when it executed a joint agreement with the UNHCR in September 1999, giving effect to the cessation clause by 1 March 2000.

155. Did the actions of the Respondent State, in executing the joint agreement in September 1999 and posting the notice in February 2000, amount to committing a *refoulement*, ie the act of expelling the refugees? The mere execution of the agreement and posting of the notice did not constitute an act amounting to an expulsion or repatriation. The September 1999 and the subsequent notice clearly expressed the intent to apply the Cessation Clause. They created an atmosphere which triggered this Communication even before the Cessation Clause implementation was set in motion. The Repatriation process under the refugee conventions is conducted in a voluntary manner.

156. The Respondent State, being a party to the September 1999 agreement was thus responsible for whatever action that would follow the execution of the said agreement. The Respondent State cannot blame the UNHCR for its own actions. The Respondent State has however stated that it did not *refouler* the refugees. It has submitted that it did not forcibly repatriate them; it did not imprison them nor deny them the basic necessities of life as alleged by the Complainant.

157. The Respondent State denied that it repatriated refugees during the Eritrean-Ethiopian conflict. In fact it submitted that both Ethiopia and itself requested the UNHCR to postpone the repatriation during the Ethiopian Eritrean War. Repatriation resumed after the end of the conflict when a tripartite agreement was concluded in August 2000. The agreement provided for voluntary repatriation, inclusive of UNHCR assistance to the returnees as well as modalities for determination of a caseload of refugees who did not opt to be repatriated.

158. The Respondent State stated that the refugees were not denied assistance, in spite of the notice, till the end of the repatriation programme. 282 refugees continued receiving protection after the cessation clause.

159. The Complainant alleged that the Respondent State had mistreated the refugees for protesting their forcible repatriation. He alleged that the refugees were beaten, arrested, forcefully repatriated, and in other cases were threatened with forced repatriation for demanding to remain in Sudan for fear of persecution if they were returned to Ethiopia.

160. The African Commission wishes to state that the accounts by the two parties about the events subsequent to the Cessation Clause differ in certain respects. The Complainant, who claimed to represent 14,000 refugees, submitted that many of the refugees did not want to return to Ethiopia because they were aligned to the opposition EPRP and feared persecution. The Respondent State submitted that most of the pre-1991 refugees returned. A substantial number were granted further protection and others were issued with residence permits due to family or socio economic reasons. The Respondent State argues that by June 2001 it had issued residence permits to more than

7000 refugees who did not opt to be repatriated. At the same time it stated that other post 1991 refugees who had fled the current Ethiopian regime continued to remain in Sudan.

161. The African Commission has not found any substantive reasons to doubt the account by the Respondent State. The African Commission holds that thousands of refugees repatriated voluntarily under the tripartite arrangements and those who remained were accorded refugee status or assumed normal immigrant status upon being granted residence permits.

162. The African Commission states, however, that the allegations made by the Complainant could have been a case of a few refugees who feared the worst during the time immediately after the Cessation Clause was announced. The fear of the unknown by a substantial number of refugees who were able to communicate with their lawyer as well as the publicity generated by press reports, coupled with the frustrations of denial of visas by the Respondent State to the Complainant, compounded the perception that the Respondent State was about to *refouled* the refugees.

163. The Commission has found no evidence that refugees were *refouled* as a result of the cessation clause. The Commission has not established any cases of imprisonment, arrest, and forcible repatriation. There was no concrete evidence brought to the attention of the Commission to the effect that such cases, if any, were linked to the promulgation and implementation of the cessation clause. The Respondent State demonstrated by providing figures, which were not refuted, of refugees who repatriated voluntarily prior to and after the cessation clause, as well as those who were granted further protection or alternative solutions to repatriation. The Complainant allegations that Articles 4, 5, and 6 of the African Charter were violated have not been proved.

164. The Complainant argues that Article 7 of the African Charter requires that every individual has a right to a fair determination of the human rights protected in the Charter.

165. The Respondent State denied that it violated Article 7 of the African Charter. It argued that there is no uniform process for determination of refugee status and appeals under the international refugee regime. It stated that it had established a joint determination mechanism involving the Sudanese Commission of Refugees and the UNHCR to carry out determination for the refugees who did not opt for voluntary repatriation under EXCOM decision No 69. The Commission, while reiterating the need to adopt judicial remedies in the event of the failure of such administrative mechanisms, takes note of the EXCOM stipulated mechanism for the reconsideration of decisions by the same committee or another authority, in the event of dissatisfaction with a decision of the Joint Committee.

166. The Commission wishes to state that the Complainant raised issues which, in actual fact, had been taken care of. The Communication appears to have been instituted before the implementation of the Cessation Clause began. Hence when implementation

began, the alleged violation of the refugees' rights expressed by the Complainant were eventually taken care of by the Respondent State.

167. The Complainant submitted that the refugees continued to consider themselves as *de facto* refugees post-the cessation clause based on paragraphs 3, 4 and 5 of Article 12 of the African Charter:

*(3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.*

*(4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.*

*(5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.*

Going by the aforesaid submission, the Commission finds that based on the information before it, there were only cases of refugees who repatriated voluntarily, or those who remained within the Respondent State under various recognised legal status, namely those who retained their status or those who became immigrants upon the grant of residence permits, and the post-1991 refugees who were, in any case, not the subject of the Communication. The Commission, therefore, finds that there was at no time any case of *de facto* refugees.

The Commission finds that the Communication was filed in anticipation of a violation, which did not happen in actual fact after the implementation of the cessation clause set in motion.

168. The Complainant's allegation that Article 12 of the African Charter was violated has also not been proved.

The African Commission finds that the allegations concerning violations of Articles 3, 4, 5, 6, 7, and 12 (3), (4), and (5) of the African Charter have not been proved.

**Done in Banjul, The Gambia at the 46<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 11 - 25 November 2009.**

## Annex 5

### Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

#### SUMMARY OF ALLEGED FACTS

1. The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (CORE - which submitted an *amicus curiae* brief) on behalf of the Endorois community. The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.
2. The Complainants allege that the Government of Kenya in violation of the African Charter on Human and Peoples' Rights (hereinafter the African Charter), the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.
3. The Complainants state that the Endorois are a community of approximately 60,000 people<sup>52</sup> who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The Complainants allege that since 1978 the Endorois have been denied access to their land.
4. The Complainants state that apart from a confrontation with the Masai over the Lake Bogoria region approximately three hundred years ago, the Endorois have been accepted by all neighbouring tribes as *bona fide* owners of the land and that they continued to occupy and enjoy undisturbed use of the land under the British colonial administration, although the British claimed title to the land in the name of the British Crown.
5. The Complainants state that at independence in 1963, the British Crown's claim to Endorois land was passed on to the respective County Councils. However, under Section 115 of the Kenyan Constitution, the Country Councils held this land in trust, on behalf of the

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<sup>52</sup> The Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiro, Tugen and Marakwet among others.

Endorois community, who remained on the land and continued to hold, use and enjoy it. The Endorois' customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the Government of Kenya. The Complainants state that the act of gazetting and, therefore, dispossession of the land is central to the present Communication.

6. The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. The Complainants state that Lake Bogoria is central to the Endorois religious and traditional practices. They state that the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are around Lake Bogoria. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. The Complainants claim that the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the Lake. The Complainants further claim that the Endorois believe that the Monchongoi forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

7. The Complainants state that despite the lack of understanding of the Endorois community regarding what had been decided by the Respondent State, the Kenyan Wildlife Service (hereinafter KWS) informed certain Endorois elders shortly after the creation of the Game Reserve that 400 Endorois families would be compensated with plots of "fertile land." The undertaking also specified, according to the Complainants, that the community would receive 25% of the tourist revenue from the Game Reserve and 85% of the employment generated, and that cattle dips and fresh water dams would be constructed by the Respondent State.

8. The complainants allege that after several meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide 3,150 Kenya Shillings per family. The Complainants allege that none of these terms have been implemented and that only 170 out of the 400 families were eventually given some money in 1986, years after the agreements were concluded. The Complainants state that the money given to the 170 families was always understood to be a means of facilitating relocation rather than compensation for the Endorois' loss.

9. The Complainants state that to reclaim their ancestral land and to safeguard their pastoralist way of life, the Endorois petitioned to meet with President Daniel Arap Moi, who was their local Member of Parliament. A meeting was held on 28 December 1994 at his Lake Bogoria Hotel.

10. The Complainants state that as a result of this meeting, the President directed the local authority to respect the 1973 agreement on compensation and directed that 25% of annual income towards community projects be given to the Endorois. In November of the following

year, upon being notified by the Endorois community that nothing had been implemented, the Complainants state that President Moi again ordered that his directives be followed.

11. The Complainants state that following the non-implementation of the directives of President Moi, the Endorois began legal action against Baringo and Koibatek County Councils. Judgment was given on 19 April 2002 dismissing the application.<sup>53</sup> Although the High Court recognised that Lake Bogoria had been Trust Land for the Endorois, it stated that the Endorois had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and in 1974. It concluded that the money given in 1986 to 170 families for the cost of relocating represented the fulfilment of any duty owed by the authorities towards the Endorois for the loss of their ancestral land.

12. The Complainants state that the High Court also stated clearly that it could not address the issue of a community's collective right to property, referring throughout to "individuals" affected and stating that "there is no proper identity of the people who were affected by the setting aside of the land ... that has been shown to the Court". The Complainants also claim that the High Court stated that it did not believe Kenyan law should address any special protection to a people's land based on historical occupation and cultural rights.

13. The Complainants allege that since the Kenyan High Court case in 2000, the Endorois community has become aware that parts of their ancestral land have been demarcated and sold by the Respondent State<sup>54</sup> to third parties.

14. The Complainants further allege that concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery. The Complainants claim that these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use by their livestock. Both mining operations and the demarcation and sale of land have continued despite the request by the African Commission to the President of Kenya to suspend these activities pending the outcome of the present Communication.

15. The Complainants state that following the commencement of legal action on behalf of the community, some improvements were made to the community members' access to the Lake. For example, they are no longer required to pay Game Reserve entrance fees. The Complainants, nevertheless, allege that this access is subject to the Game Reserve authority's discretion. They claim that the Endorois still have limited access to Lake Bogoria for grazing their cattle, for religious purposes, and for collecting traditional herbs. They also state that the lack of legal certainty surrounding access rights and rights of usage renders the Endorois

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<sup>53</sup> *William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council*, High Court Judgment of 19 April 2002, Civil Case No. 183 of 2000, p. 6.

<sup>54</sup> Depending on the context, *Kenyan Authorities* and *Respondent State* are used in this text interchangeably to mean the Government of Kenya.

completely dependent on the Game Reserve authority's discretion to grant these rights on an *ad hoc* basis.

16. The Complainants claim that land for the Endorois is held in very high esteem, since tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life. Land, they claim, belongs to the community and not the individual and is essential to the preservation and survival as a traditional people. The Complainants claim that the Endorois health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria.

17. The Complainants claim that at present the Endorois live in a number of locations on the periphery of the Reserve – that the Endorois are not only being forced from fertile lands to semi-arid areas, but have also been divided as a community and displaced from their traditional and ancestral lands. The Complainants claim that for the Endorois, access to the Lake Bogoria region, is a right for the community and the Government of Kenya continues to deny the community effective participation in decisions affecting their own land, in violation of their right to development.

18. The Complainants further allege that the right to legal representation for the Endorois is limited, in that Juma Kiplenge, the lawyer and human rights defender who was representing the 20,000 Endorois nomadic pastoralists, was arrested in August 1996 and accused of “belonging to an unlawful society”. They claim that he has also received death threats.

19. The Complainants allege that the Government’s decision to gazette Endorois traditional land as a Game Reserve, which in turn denies the Endorois access to the area, has jeopardized the community’s pastoral enterprise and imperilled its cultural integrity. The Complainants also claim that 30 years after the evictions began, the Endorois still do not have full and fair compensation for the loss of their land and their rights on to it. They further allege that the process of evicting them from their traditional land not only violates Endorois community property rights, but spiritual, cultural and economic ties to the land are severed.

20. The Complainants allege that the Endorois have no say in the management of their ancestral land. The Endorois Welfare Committee, which is the representative body of the Endorois community, has been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. This failure to register the Endorois Welfare Committee, according to the Complainants, has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent ‘on behalf’ of the community. The Complainants further submit that the denial of domestic legal title to their traditional land, the removal of the community from their ancestral home and the severe restrictions placed on access to the Lake Bogoria region today, together with a lack of adequate compensation, amount to a serious violation of the African Charter. The Complainants state that the Endorois community claims these violations both for themselves as a people and on behalf of all the individuals affected.



21. The Complainants allege that in the creation of the Game Reserve, the Respondent State disregarded national law, Kenyan Constitutional provisions and, most importantly, numerous articles of the African Charter, including the right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life and the right to development.

### **Articles Alleged to Have Been Violated**

22. The Complainants seek a declaration that the Republic of Kenya is in violation of Articles 8, 14, 17, 21 and 22 of the African Charter. The Complainants are also seeking:

- **Restitution** of their land, with legal title and clear demarcation.
- **Compensation** to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture.

### **PROCEDURE**

23. On 22 May 2003, the Centre for Minority Rights and Development (CEMIRIDE) forwarded to the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) a formal letter of intent regarding the forthcoming submission of a Communication on behalf of the Endorois community.

24. On 9 June 2003, the Secretariat wrote a letter to the Centre for Minority Rights and Development, acknowledging receipt of the same.

25. On 23 June 2003, the Secretariat wrote a letter to Cynthia Morel of Minority Rights Group International, who is assisting the Centre for Minority Rights Development, acknowledging her Communication and informed her that the complaint would be presented to the upcoming 34<sup>th</sup> Ordinary Session of the African Commission.

26. A copy of the Complaint, dated 28 August 2003, was sent to the Secretariat on 29 August 2003.

27. At its 34<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 6 to 20 November 2003, the African Commission examined the Complaint and decided to be seized thereof.

28. On 10 December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward their written submissions on Admissibility before the 35<sup>th</sup> Ordinary Session.

29. As the Complainants had already sent their submissions, when the Communication was being sent to the Secretariat, the Secretariat wrote a reminder to the Respondent State to forward its written submissions on Admissibility.

30. By a letter of 14 April 2004, the Complainants requested the African Commission on Human and Peoples' Rights (the African Commission) to be allowed to present their oral submissions on the matter at the Session.
31. On 29 April 2004, the Secretariat sent a reminder to the Respondent State to forward its written submissions on Admissibility of the Communication.
32. At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission examined the Complaint and decided to defer its decision on Admissibility to the next Session. The African Commission also decided to issue an Urgent Appeal to the Government of the Republic of Kenya, requesting it to stay any action or measure by the State in respect of the subject matter of this Communication, pending the decision of the African Commission, which was forwarded on 9 August 2004.
33. At the same Session, a copy of the Complaint was handed over to the delegation of the Respondent State.
34. On 17 June 2004, the Secretariat wrote to both parties informing them of this decision and requesting the Respondent State to forward its submissions on Admissibility before the 36<sup>th</sup> Ordinary Session.
35. A copy of the same Communication was forwarded to the Respondent State's High Commission in Addis Ababa, Ethiopia on 22 June 2004.
36. On 24 June 2004, the Kenyan High Commission in Addis Ababa, Ethiopia, informed the Secretariat that it had conveyed the African Commission's Communication to the Ministry of Foreign Affairs of Kenya.
37. The Secretariat sent a similar reminder to the Respondent State on 7 September 2004, requesting it to forward its written submissions on the Admissibility of the Communication before the 36<sup>th</sup> Ordinary Session.
38. During the 36<sup>th</sup> Ordinary Session held in Dakar, Senegal, from 23 November to 7 December 2004, the Secretariat received a hand-written request from the Respondent State for a postponement of the matter to the next Session. At the same Session, the African Commission deferred the case to the next session to allow the Respondent State more time to forward its submissions on Admissibility.
39. On 23 December 2004, the Secretariat wrote to the Respondent State informing it of this decision and requesting it to forward its submissions on Admissibility as soon as possible.
40. Similar reminders were sent out to the Respondent State on 2 February and 4 April 2005.
41. At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission considered this Communication and declared it Admissible after the Respondent State had failed to cooperate with the African Commission on the Admissibility procedure despite numerous letters and reminders of its obligations under the Charter.

42. On 7 May 2005, the Secretariat wrote to the parties to inform them of this decision and requested them to forward their arguments on the Merits.
43. On 21 May 2005, the Chairperson of the African Commission addressed an urgent appeal to the President of the Republic of Kenya on reports received alleging the harassment of the Chairperson of the Endorois Assistance Council who is involved in this Communication.
44. On 11 and 19 July 2005, the Secretariat received the Complainants' submissions on the Merits, which were forwarded to the Respondent State.
45. On 12 September 2005, the Secretariat wrote a reminder to the Respondent State.
46. On 10 November 2005, the Secretariat received an *amicus-curiae* brief on the case from COHRE.
47. At its 38<sup>th</sup> Ordinary Session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the Communication and deferred its decision on the Merits to the 39<sup>th</sup> Ordinary Session.
48. On 30 January 2006, the Secretariat informed the Complainants of this decision.
49. By a Note Verbale of 5 February 2006, which was delivered by hand to the Ministry of Foreign Affairs of the Republic of Kenya through a member of staff of the Secretariat who travelled to the country in March 2006, the Secretariat informed the Respondent State of this decision by the African Commission. Copies of all the submissions by the Complainants since the opening of this file were enclosed thereto.
50. By an email of 4 May 2006, the Senior Principal State Counsel in the Office of the Attorney General of the Respondent State requested the African Commission to defer the consideration of this Communication on the basis that the Respondent State was still preparing a response to the matter which it claimed to be quite protracted and involved many departments.
51. By a Note Verbale of 4 May 2006, which was received by the Secretariat on the same day, the Solicitor General of the Respondent State formally requested the African Commission to defer the matter to the next Session noting mainly that due to the wide range of issues contained in the Communication, its response would not be ready for submission before the 39<sup>th</sup> Ordinary Session.
52. At its 39<sup>th</sup> Ordinary Session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the Communication and deferred its consideration of the same to its 40<sup>th</sup> Ordinary Session to await the outcome of amicable settlement negotiations underway between the Complainants and the Respondent State.
53. The Secretariat of the African Commission notified the parties of this decision accordingly.

54. On 31 October 2006, the Secretariat of the African Commission received a letter from the Complainants reporting that the parties had had constructive exchanges on the matter and that the matter should be heard on the Merits in November 2006 by the African Commission. The Complainants also applied for leave to have an expert witness heard during the 40<sup>th</sup> Ordinary Session.

55. At the 40<sup>th</sup> Ordinary Session, the African Commission deferred its decision on the Merits of the Communication after having heard the expert witness called in by the Complainant. The Respondent State also made presentations. Further documents were submitted at the session and, later on, during the intersession; more documentation was received from both parties before the 41<sup>st</sup> Ordinary Session.

56. During the 41<sup>st</sup> Ordinary Session, the Complainants submitted their final comments on the last submission by the Respondent State.

### **DECISION ON ADMISSIBILITY**

57. The Respondent State has been given ample opportunity to forward its submissions on Admissibility on the matter. Its delegates at the previous two Ordinary Sessions of the African Commission were supplied with hard copies of the Complaint. There was no response from the Respondent State. The African Commission has no option but to proceed with considering the Admissibility of the Communication based on the information at its disposal.

58. The Admissibility of Communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a complainant for a Communication to be Admissible.

59. In the present Communication, the Complaint indicates its authors (Article 56(1)), is compatible with the Organisation of African Unity / African Union Charters and that of the African Charter on Human and Peoples' Rights (Article 56(2)), and it is not written in disparaging language (Article 56(3)). Due to lack of information that the Respondent State should have supplied, if any, the African Commission is not in a position to question whether the Complaint is exclusively based on news disseminated through the mass media (Article 56(4)), has exhausted local remedies (Article 56(5)), and has been settled elsewhere per Article 56(7) of the African Charter. With respect to the requirement of exhaustion of local remedies, in particular, the Complainants approached the High Court in Nakuru, Kenya, in November 1998. The matter was struck out on procedural grounds. A similar claim was made before the same Court in 2000 as a constitutional reference case, in which order was sought as in the previous case. The matter was, however, dismissed on the grounds that it lacked merits and held that the Complainants had been properly consulted and compensated for their loss. The Complainants thus claim that as constitutional reference cases could not be appealed, all possible domestic remedies have been exhausted.

60. The African Commission notes that there was a lack of cooperation from the Respondent State to submit arguments on the Admissibility of the Communication despite numerous reminders. In the absence of such a submission, given the face value of the Complainants'

submission, the African Commission holds that the Complaint complies with Article 56 of the African Charter and hence declares the Communication Admissible.

61. In its submission on the Merits, the Respondent State requested the African Commission to review its decision on Admissibility. It argued that even though the African Commission had gone ahead to Admit the Communication, it would nevertheless, proceed to submit arguments why the African Commission should not be precluded from re-examining the Admissibility of the Communication, after the oral testimony of the Respondent State, and dismissing the Communication.

62. In arguing that the African Commission should not be a tribunal of first instance, the Respondent State argues that the remedies sought by the Complainants in the High Court of Kenya could not be the same as those sought from the African Commission.

63. For the benefit of the African Commission, the Respondent State outlined the issues put before the Court in Misc, Civil Case No: 183 of 2002:

(a) A Declaration that the land around Lake Baringo is the property of the Endorois community, held in trust for its benefit by the County Council of Baringo and the County Council of Koibatek, under Sections 114 and 115 of the Constitution of Kenya.

(b) A Declaration that the County Council of Baringo and the County Council of Koibatek are in breach of fiduciary duty of trust to the Endorois community, because of their failure to utilise benefits accruing from the Game Reserve to the benefit of the community contrary to Sections 114 and 115 of the Constitution of Kenya.

(c) A Declaration that the Complainants and the Endorois community are entitled to all the benefits generated through the Game Reserve exclusively and / or in the alternative the land under the Game Reserve should revert to the community under the management of Trustees appointed by the community to receive and invest the benefits in the interest of the community under Section 117 of the Constitution of Kenya.

(d) An award of exemplary damages arising from the breach of the Applicants' Constitutional rights under Section 115 of the Constitution of Kenya.

64. The Respondent State informs the African Commission that the Court held that procedures governing the setting apart of the Game Reserve were followed. The Respondent State further states that it went further to advise the Complainants that they should have exercised their right of appeal under Sections 10, 11 and 12 of the Trust Land Act, Chapter 288, Laws of Kenya, in the event that they felt that the award of compensation was not fairly handled. None of the Applicants had appealed, and the High Court was of the view that it was too late to complain.

65. The Respondent State also states that the Court opined that the application did not fall under Section 84 (Enforcement of Constitutional Rights) since the application did not plead any violations or likelihood of violations of their rights under Sections 70 – 83 of the Constitution.

66. It further argues that the Communication irregularly came before the African Commission as the Applicants did not exhaust local remedies regarding the alleged violations. This is because:

(a) The Complainants did not plead that their rights had been contravened or likely to be contravened by the High Court Misc. Civil Case 183 of 2002. It states that the issue of alleged violations of any of the rights claimed under the present Communication has, therefore, not been addressed by the local courts. This means that the African Commission will be acting as a court of first instance. The Respondent State argues that the Applicants should, therefore, be asked to exhaust local remedies before approaching the African Commission.

(b) The Complainants did not pursue other administrative remedies available to them. The Respondent State argues that the allegations that the Kenyan legal system has no adequate remedies to address the case of the Endorois are untrue and unsubstantiated. It argues that in matters of human rights the Kenya High Court has been willing to apply international human rights instruments to protect the rights of the individual.

67. The Respondent State further says that the Kenyan legal system has a very comprehensive description of property rights, and provides for the protection of all forms of property in the Constitution. It argues that while various international human rights instruments, including the African Charter, recognise the right to property, these instruments have a minimalist approach and do not satisfy the kind of property protected. The Respondent State asserts that the Kenyan legal system goes further than provided for in international human rights instruments.

68. The Respondent State further states that land as property is recognised under the Kenyan legal system and various methods of ownership are recognised and protected. These include private ownership (for natural and artificial persons), communal ownership either through the Land (Group Representatives) Act for adjudicated land, which is also called the Group Ranches or the Trust Lands managed by the County Council, within whose area of jurisdiction it is situated for the benefit of the persons ordinarily resident on that land. The State avers that the Land Group Act gives effect to such right of ownership, interests or other benefits of the land as may be available, under African customary law.

69. The Respondent State concludes that Trust Lands are established under the Constitution of Kenya and administered under an Act of Parliament and that the Constitution provides that Trust Land may be alienated through:

- Registration to another person other than the County Council;
- An Act of Parliament providing for the County Council to set apart an area of Trust Land.

70. Rule 118(2) of the African Commission's Rules of Procedure states that:

If the Commission has declared a Communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.

The African Commission notes the arguments advanced by the Respondent State to reopen its decision on admissibility. However, after careful consideration of the Respondent State's arguments, the African Commission is not convinced that it should reopen arguments on the Admissibility of the Communication. It therefore declines the Respondent State's request.

## SUBMISSIONS ON MERITS

### Complainants' Submission on the Merits

71. The arguments below are the submissions of the Complainants, taking also into consideration their oral testimony at the 40<sup>th</sup> Ordinary Session, all their written submissions, including letters and supporting affidavits.

72. The Complainants argue that the Endorois have always been the *bona fide* owners of the land around Lake Bogoria.<sup>55</sup> They argue that the Endorois' concept of land did not conceive the loss of land without conquest. They argue that as a pastoralist community, the Endorois' concept of "ownership" of their land has not been one of ownership by paper. The Complainants state that the Endorois community have always understood the land in question to be "Endorois" land, belonging to the community as a whole and used by it for habitation, cattle, beekeeping, and religious and cultural practices. Other communities would, for instance, ask permission to bring their animals to the area.<sup>56</sup>

73. They also argue that the Endorois have always considered themselves to be a distinct community. They argue that historically the Endorois are a pastoral community, almost solely dependent on livestock. Their practice of pastoralism has consisted of grazing their animals (cattle, goats, sheep) in the lowlands around Lake Bogoria in the rainy season, and turning to the Monchongoi Forest during the dry season. They claim that the Endorois have traditionally relied on beekeeping for honey and that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. They argue that Lake Bogoria is also the centre of the community's religious and traditional practices: around the Lake are found the community's historical prayer sites, the places for circumcision rituals, and other cultural ceremonies. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region.

74. The Complainants argue that the Endorois believe that spirits of all former Endorois, no matter where they are buried, live on in the Lake. Annual festivals at the Lake took place with the participation of Endorois from the whole region. They say that Monchongoi forest is considered the birthplace of the Endorois people and the settlement of the first Endorois community. They also state that the Endorois community's leadership is traditionally based

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<sup>55</sup> Op cit, paras 3, 4 and 5 of this Communication, where the Complainants advance arguments to prove ownership of their land.

<sup>56</sup> Op cit, paras 3, 4 and 5.

on elders. Though under the British colonial administration, chiefs were appointed, this did not continue after Kenyan independence. They state that more recently, the community formed the Endorois Welfare Committee (EWC) to represent its interests. However, the local authorities have refused to register the EWC despite two separate efforts to do so since its creation in 1996.

75. The Complainants argue that the Endorois are a 'people', a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Complainants argue that the African Commission has affirmed the rights of "peoples" to bring claims under the African Charter in the case of *'The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria'*, (the Ogoni Case) stating: "The African Charter in Articles 20 through 24 clearly provides for peoples' to retain rights as peoples', that is, as collectives. The importance of community and collective identity in African culture is recognised throughout the African Charter."<sup>57</sup> They further argue that the African Commission noted that when there is a large number of individual victims, it may be impractical for each individual Complainant to go before domestic courts. In such situations, as was with the *Ogoni case*, the African Commission can adjudicate the rights of a people as a collective. They therefore argue that the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

### **Alleged Violation of Article 8 – The Right to Practice Religion**

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.*

76. The Complainants allege violation to practice their religion. They claim that the Kenyan Authorities' continual refusal to give the community a right of access to religious sites to worship freely amounts to a violation of Article 8.

77. The Complainants argue that the African Commission has embraced the broad discretion required by international law in defining and protecting religion. In the case of *Free Legal Assistance Group and Others v. Zaire*, they argue that the African Commission held that the practices of the Jehovah's Witnesses were protected under Article 8.<sup>58</sup> In the present Communication, the Complainants state that the Endorois' religion and beliefs are protected by Article 8 of the African Charter and constitute a religion under international law. The Endorois believe that the Great Ancestor, *Dorios*, came from the Heavens and settled in the Mochongi Forest. After a period of excess and luxury, the Endorois believe that God

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<sup>57</sup> *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, (2001), para. 40.

<sup>58</sup> *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), para. 45.



became angry and, as punishment, sank the ground one night, forming Lake Bogoria. The Endorois believe themselves to be descendants of the families who survived that event.

78. They state that each season the water of the Lake turns red and the hot springs emit a strong odour. At this time, the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the Lake. The Endorois regard both Mochongoi Forest and Lake Bogoria as sacred grounds, and have always used these locations for key cultural and religious ceremonies, such as weddings, funerals, circumcisions, and traditional initiations.<sup>59</sup>

79. The Complainants argue that the Endorois, as an indigenous group whose religion is intimately tied to the land, require special protection. Lake Bogoria, they argue, is of fundamental religious significance to all Endorois. The religious sites of the Endorois people are situated around the Lake, where the Endorois pray, and religious ceremonies are regularly connected with the Lake. Ancestors are buried near the Lake, and as stated above, they claim that Lake Bogoria is considered the spiritual home of all Endorois, living and dead. The Lake, the Complainants argue, is therefore essential to the religious practices and beliefs of the Endorois.

80. The Complainants argue that by evicting the Endorois from their land, and by refusing the Endorois community access to the Lake and other surrounding religious sites, the Kenyan Authorities have interfered with the Endorois' ability to practice and worship as their faith dictates. In violation of Article 8 of the African Charter, the Complainants argue that religious sites within the Game Reserve have not been properly demarcated and protected. They further argue that since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. Access as of right for religious rituals – such as circumcisions, marital rituals, and initiation rights – has been denied the community. Similarly, the Endorois have not been able to hold or participate in their most significant annual religious ritual, which occurs when the Lake undergoes seasonal changes.

81. Citing the African Commission's jurisprudence in *Amnesty International v. Sudan*, the Complainants argue that the African Commission recognised the centrality of practice to religious freedom, noting that the State Party violated the authors' right to practice religion because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion.<sup>60</sup> In addition, they argue, the UN Declaration on the Rights of Indigenous Peoples gives indigenous peoples the right "to maintain, protect and have access in privacy to their religious and cultural sites..."<sup>61</sup> They

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<sup>59</sup> See World Wildlife Federation Report, p. 18, para. 2.2.7.

<sup>60</sup> *Amnesty International and Others v. Sudan*, (1999) African Commission on Human and Peoples' Rights, Comm No. 48/90, 50/91, 52/91, 89/93 (hereinafter *Amnesty International v. Sudan*).

<sup>61</sup> See Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), Article 13.

state that only through unfettered access will the Endorois be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs.

82. Citing the case of *Loren Laroye Riebe Star*,<sup>62</sup> the Complainants argue that the Inter-American Commission on Human Rights (IACmHR) has determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. In the above case, the Complainants argue that the IACmHR held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes. They further state that the IACmHR came to a similar conclusion in *Dianna Ortiz v. Guatemala*. This was a case concerning a Catholic nun who fled Guatemala after state actions prevented her from freely exercising her religion.<sup>63</sup> Here, the IACmHR decided that her right to freely practice her religion had been violated, because she was denied access to the lands most significant to her.<sup>64</sup>

83. The Complainants argue that the current management of the Game Reserve has failed both to fully demarcate the sacred sites within the Reserve and to maintain sites that are known to be sacred to the Endorois.<sup>65</sup> They argue that the Kenyan Authorities' failure to demarcate and protect religious sites within the Game Reserve constitutes a severe and permanent interference with the Endorois' right to practice their religion. Without proper care, sites that are of immense religious and cultural significance have been damaged, degraded, or destroyed. They cite "The UN Declaration on the Rights of Indigenous Peoples" which state in part that: "States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected."<sup>66</sup>

84. The Complainants also accuse the Kenyan Authorities of interfering with the Endorois' right to freely practice their religion by evicting them from their land, and then refusing to grant them free access to their sacred sites. This separation from their land, they argue, prevents the Endorois from carrying out sacred practices central to their religion.

85. They argue that even though Article 8 provides that states may interfere with religious practices "subject to law and order", the Endorois religious practices are not a threat to law

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<sup>62</sup> *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz/Mexico*, (1999) Inter-American Commission on Human Rights, Report No. 49/99, Case 11.610.

<sup>63</sup> *Dianna Ortiz v. Guatemala*, (1997) Inter-American Commission on Human Rights, Report 31/96, Case No. 10.526.

<sup>64</sup> Ibid.

<sup>65</sup> World Wildlife Federation, Lake Bogoria National Reserve Draft Management Plan, July 2004

<sup>66</sup> Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), Article 13.

and order, and thus there is no justification for the interference. They argue that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. In *Amnesty International v. Zambia*, the Complainants argue that the African Commission noted that it was "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."<sup>67</sup>

### **Alleged Violation of Article 14 - The Right to Property**

Article 14 of the African Charter states:

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

86. The Complainants argue that the Endorois community has a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. They argue that these property rights are derived both from Kenyan law and the African Charter, which recognise indigenous peoples' property rights over their ancestral land. The Complainants argue that the Endorois' property rights have been violated by the continuing dispossession of the Lake Bogoria land area. They argue that the impact on the community has been disproportionate to any public need or general community interest.

87. Presenting arguments that Article 14 of the Charter has been violated, the Complainants argue that for centuries the Endorois have constructed homes, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods around the Lake. They argue that in doing so, the Endorois exercised an indigenous form of tenure, holding the land through a collective form of ownership. Such behaviour indicated traditional African land ownership, which was rarely written down as a codification of rights or title, but was, nevertheless, understood through mutual recognition and respect between landholders. 'Land transactions' would take place only by way of conquest of land.

88. The Complainants argue that even under colonial rule when the British Crown claimed formal possession of Endorois land, the colonial authorities recognised the Endorois' right to occupy and use the land and its resources. They argue that in law, the land was recognised as the "Endorois Location" and in practice the Endorois were left largely undisturbed during colonial rule. They aver that the Endorois community continued to hold such traditional rights, interests and benefits in the land surrounding Lake Bogoria even upon the creation of

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<sup>67</sup> *Amnesty International v. Zambia*, African Commission on Human and Peoples' Rights, Communication No. 212/98 (1999).

the independent Republic of Kenya in 1963. They state that on 1 May 1963, the Endorois land became 'Trust Land' under Section 115(2) of the Kenyan Constitution, which states:

*Each County Council shall hold the Trust Land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.*

89. They argue that through centuries of living and working on the land, the Endorois were "ordinarily resident on [the] land", and their traditional form of collective ownership of the land qualifies as a "right, interest or other benefit... under African customary law" vested in "any tribe, group [or] family" for the purposes of Section 115(2). They, therefore, argue that as a result, under Kenyan law, the Baringo and Koibatek County Councils were – and indeed still are – obligated to give effect to the rights and interests of the Endorois as concerns the land.

#### *Property Rights and Indigenous Communities*

90. The Complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems, which include the lack of "formal" title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. They state that this situation has led to many cases of displacement from a people's historic territory, both by the colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities.

91. In pursuing that line of reasoning, the Complainants argue that the African Commission itself has recognised the problems faced by traditional communities in the case of dispossession of their land in a Report of the Working Group on Indigenous Populations/Communities, where it states:

*[...] their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land. Collective tenure is fundamental to most indigenous pastoralist and hunter-gatherer communities and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure.<sup>68</sup>*

92. They argue that the jurisprudence of the African Commission notes that Article 14 includes the right to property both individually and collectively.

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<sup>68</sup> Report of the African Commission's Working Group of Experts, submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", adopted by the African Commission on Human and Peoples' Rights at its 28<sup>th</sup> Ordinary Session (2003).

93. Quoting the case of *The Mayagna (Sumo) Awas Tingni v Nicaragua*,<sup>69</sup> they argue that indigenous property rights have been legally recognised as being communal property rights, where the Inter-American Court of Human Rights (IActHR) recognised that the Inter-American Convention protected property rights “in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.”<sup>70</sup>

94. The Complainants further argue that the courts have addressed violations of indigenous property rights stemming from colonial seizure of land, such as when modern states rely on domestic legal title inherited from colonial authorities. They state that national courts have recognised that right. Such decisions were made by the United Kingdom Privy Council as far back as 1921,<sup>71</sup> the Canadian Supreme Court<sup>72</sup> and the High Court of Australia.<sup>73</sup> Quoting the *Richtersveld* case, they argue that the South African Constitutional Court held that the rights of a particular community survived the annexation of the land by the British Crown and could be held against the current occupiers of their land.<sup>74</sup>

95. They argue that the protection accorded by Article 14 of the African Charter includes indigenous property rights, particularly to their ancestral lands. The Endorois’ right, they argue, to the historic lands around Lake Bogoria are therefore protected by Article 14. They aver that property rights protected go beyond those envisaged under Kenyan law and include a collective right to property.

96. They argue that as a result of the actions of the Kenyan Authorities, the Endorois’ property has been encroached upon, in particular by the expropriation, and in turn, the effective denial of ownership of their land. They also state that the Kenyan justice system has not provided any protection of the Endorois’ property rights. Referring to the High Court of Kenya, they argue that it stated that it could not address the issue of a community’s right to property.<sup>75</sup>

97. The Complainants argue that the judgment of the Kenyan High Court also stated in effect that the Endorois had lost any rights under the trust, without the need for compensation beyond the minimal amounts actually granted as costs of resettlement for 170 families. They

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<sup>69</sup> *The Awas Tingni Case* (2001), paras. 140(b) and 151.

<sup>70</sup> *Ibid* at para. 148.

<sup>71</sup> See *Amodu Tijani v. Southern Nigeria*, United Kingdom Privy Council, 2 AC 399, (1921).

<sup>72</sup> *Calder et al v. Attorney-General of British Columbia*, Supreme Court of Canada, 34 D.L.R. (3d) 145 (1973).

<sup>73</sup> *Mabo v. Queensland*, High Court of Australia, 107 A.L.R. 1, (1992).

<sup>74</sup> *Alexkor Ltd v Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03, (2003).

<sup>75</sup> *Op cit*, para 12.

argue that the judgment also denies that the Endorois have rights under the trust, despite being “ordinarily resident” on the land. The Court, they claimed, stated:

*What is in issue is a national natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.*

98. They argue that in doing so, the High Court dismissed those arguments based not just on the trust, but also on the Endorois’ rights to the land as a ‘people’ and as a result of their historic occupation of Lake Bogoria.

99. The Complainants cite a number of encroachments, they claim, that go to the core of the community’s identity as a ‘people’, including:

(a) the failure to provide adequate recognition and protection in domestic law of the community’s rights over the land, in particular the failure of Kenyan law to acknowledge collective ownership of land;

(b) the declaration of the Game Reserve in 1973/74, which purported to remove the community’s remaining property rights over the land, including its rights as beneficiary of a trust under Kenyan law;

(c) the lack of and full compensation to the Endorois community for the loss of their ability to use and benefit from their property in the years after 1974;

(d) the eviction of the Endorois from their land, both in the physical removal of Endorois families living on the land and the denial of the land to the rest of the Endorois community, and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives;

(e) the significant loss by the Endorois of cattle as a result of the eviction;

(f) the denial of benefit, use of and interests in their traditional land since eviction, including the denial of any financial benefit from the lands resources, such as that generated by tourism;

(g) the awarding of land to title to private individuals and the awarding of mining concessions on the disputed land.

100. The Complainants argue that an encroachment upon property will constitute a violation of Article 14, unless it is shown that it is in the general or public interest of the community and in accordance with the provisions of appropriate laws. They further argue that the test laid out in Article 14 of the Charter is *conjunctive*, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out

in accordance with appropriate laws and must be proportional. Quoting the Commission's own case law, the Complainants argue that: *'The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.'*<sup>76</sup> They argue that both the European Court of Human Rights<sup>77</sup> and the IAcHR have held that limitations on rights must be "proportionate and reasonable."<sup>78</sup>

101. They argue that in the present Communication, in the name of creating a Game Reserve, the Kenyan Authorities have removed the Endorois from their land, and destroyed their possessions, including houses, religious constructions, and beehives. They argue that the upheaval and displacement of an entire community and denial of their property rights over their ancestral lands are disproportionate to any public need served by the Game Reserve. They state that even assuming that the creation of the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need.

102. They further argue that the encroachment on to Endorois property rights must be carried out in accordance with "appropriate laws" in order to avoid a violation of Article 14, and that this provision must, at the minimum mean that both Kenyan law and the relevant provisions of international law were respected. They argue that the violation of the Endorois' rights failed to respect Kenyan law on at least three levels: (i) there was no power to expel them from the land; (ii) the trust in their favour was never legally extinguished, but simply ignored; and (iii) adequate compensation was never paid.

103. The Complainants state that the traditional land of the Endorois is classified as Trust Land under Section 115 of the Constitution, and that this obliges the County Council to give effect to "such rights, interests or other benefits in respect of the land as may under the African customary law, for the time being in force." They argue that it created a beneficial right for the Endorois over their ancestral land.

104. They further argue that the Kenyan Authorities created the Lake Hannington Game Reserve, including the Endorois indigenous land, on 9 November 1973, but changed the name to Lake Bogoria Game Reserve in a Second Notice in 1974.<sup>79</sup> The 1974 'Notice' was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA).<sup>80</sup> WAPA, the Complainants informs the African Commission, applied to Trust

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<sup>76</sup> *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, (1999), African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95, para. 42 (*The Constitutional Rights Project Case*).

<sup>77</sup> *Handyside v. United Kingdom*, No. 5493/72 (1976) Series A.24 (7 December), para. 49.

<sup>78</sup> *X & Y v. Argentina*, (1996) Report No. 38/96, Case 10.506 (15 October), para. 60.

<sup>79</sup>They state that pursuant to Kenyan law, the authorities published Notice 239/1973 in the Kenya Reserve to declare the creation of "Lake Hannington Game Reserve." Gazette Notice 270/1974 was published to revoke the earlier notice and changed the name of the Game Reserve on 12 October 1974: "the area set forth in the schedule hereto to be a Game Reserve known as Lake Bogoria Game Reserve."

Land as it did to any other land, and did not require that the land be taken out of the Trust before a Game Reserve could be declared over that land. They argue that the relevant legislation did not give authority for the removal of any individual or group occupying the land in a Game Reserve. Instead, WAPA merely prohibited the hunting, killing or capturing of animals within the Game Reserve.<sup>81</sup> Yet, the Complainants argue, despite a lack of legal justification, the Endorois Community were informed from 1973 onwards that they would have to leave their ancestral lands.

105. Moreover, they argue, the declaration of the Lake Bogoria Game Reserve by way of the 1974 notice did not affect the status of the Endorois' land as Trust Land. The obligation of Baringo and Koibatek County Councils to give effect to the rights and interests of the Endorois community continued. They state that the only way under Kenyan law in which the Endorois benefits under the Trust could have been dissolved is through the County Council or the President of Kenya having to "set apart" the land. However, the Trust Land Act required that to be legal, such setting apart of the land must be published in the *Kenyan Gazette*.<sup>82</sup>

106. The Complainants argue that as far as the Community is aware, no such notice was published. Until this is done, they argue, Trust Land encompassing Lake Bogoria cannot have been set apart and the African customary law rights of the Endorois people continue under Kenyan law.<sup>83</sup> They state that the Kenyan High Court failed to protect the Endorois' rights under the Trust to a beneficial property right, and the instruction given to the Endorois to leave their ancestral lands was also not authorised by Kenyan law.

107. They conclude that as a result, the Kenyan Authorities have acted in breach of trust and not in 'accordance with the provisions of the law' for the purposes of Article 14 of the Charter.

108. They further argue that even if Endorois land had been set apart, Kenyan law still requires the compensation of residents of lands that are set apart; that the Kenyan Constitution states that where Trust Land is set apart, the Government must ensure:

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<sup>80</sup>The Complainants state that Section 3(2) of WAPA was subsequently revoked on 13 February 1976 by S.68 of the Wildlife Conservation and Management Act.

<sup>81</sup> The Complainants argue that Section 3(20) of WAPA did not allow the Kenyan Minister for Tourism and Wildlife to remove the present occupiers.

<sup>82</sup> The Complainants argue that the process of such a 'setting apart' of Trust Land under S. 117 or S.118 of the Constitution are laid down by the Kenyan Trust Land Act. They state that publication is required by S. 13(3) and (4) of the Trust Land Act in respect of S.117 Constitution, and by S.7(1) and (4) of the Trust land Act in respect of S.118 Constitution.

<sup>83</sup> They also argue that recently the area has been referred to as Lake Bogoria National Reserve. Even if there has been a legal change in title, this still would not mean that the Endorois' trust has been ended under Kenyan law without the "setting aside".



*[T]he prompt payment of full compensation to any resident of the land set apart who – (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land.*<sup>84</sup>

109. Citing Kenyan law, the Complainants argue that the Kenyan Land Acquisition Act outlines factors that should be considered in determining the compensation to be paid,<sup>85</sup> starting with the basic principle that compensation should be based on the market value of the land at the time of the acquisition. Other considerations include: damages to the interested person caused by the removal from the land and other damages including lost earnings, relocation expenses and any diminution of profits of the land. The Land Acquisition Act provides for an additional 15% of the market value to be added to compensate for disturbances. Under Kenyan law if a court finds the amount of compensation to be insufficient, 6% interest per year must be paid on the difference owed to the interested parties.<sup>86</sup>

110. They state that only 170 families of at least 400 families forced to leave Endorois traditional land by the Kenyan Authorities have received some form of monetary assistance. In 1986, 170 families evicted in late 1973 from their homes within the Lake Bogoria Game Reserve, each received around 3,150 Kshs. At the time, this was equivalent to approximately £30.

111. They state that further amounts in compensation for the value of the land lost, together with revenue and employment opportunities from the Game Reserve, were promised by the Kenyan Authorities, but these have never been received by the community.

112. They argue that the Respondent State has itself recognised that the payment of 3,150 Kshs per family amounted only to 'relocation assistance', and did not constitute full compensation for loss of land. The Complainants argue that international law also lays down strict requirements for compensation in the case of expropriation of property.<sup>87</sup> They argue that the fact that such payment was made some 13 years after the first eviction, and that it does not represent the market value of the land gazetted as Lake Bogoria Game Reserve, means that the Respondent State would not have paid "prompt, full compensation" as required by the Constitution on the setting apart of the Trust Land. Therefore Kenyan law

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<sup>84</sup> Constitution of the State of Kenya, Section 117(4).

<sup>85</sup> Land Acquisition Act, "Principles on which Compensation is to be determined".

<sup>86</sup> See Kenya Land Acquisition Act, Part IV, para 29(3).

<sup>87</sup> The Complainants argue that in the European Court of Human Rights, for instance, compensation must be fair compensation, and the amount and timing of payment is material to whether a violation of the right to property is found. They cite the case of *Katkaridis and Others v. Greece*, European Court of Human Rights, Case No. 72/1995/578/664, (1996). The Complainants also cite Article 23(2) of the American Convention on Human Rights which provides that "no-one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

has not been complied with. Moreover, the Complainants argue, the fact that members of the Endorois community accepted the very limited monetary compensation does not mean that they accepted this as full compensation, or indeed that they accepted the loss of their land. They state that *even if* the Respondent State had formally set apart the Trust Land by way of Gazette Notice, the test of “in accordance with the provisions of law” required by Article 14 of the Charter would not have been satisfied, due to the payment of inadequate compensation.

113. The Complainants argue that the requirement that any encroachment on property rights be in accordance with the “appropriate laws” must also include relevant international laws. They argue that the Respondent State, including the courts, has failed to apply international law on the protection of indigenous land rights, which includes the need to recognise the collective nature of land rights, to recognise historic association, and to prioritise the cultural and spiritual and other links of the people to a particular territory. Instead, Kenyan law gives only limited acknowledgement to African customary law. The Trust Land system in Kenya provides in reality only minimal rights, as a trust (and therefore African customary law rights, such as those of the Endorois) can be extinguished by a simple decision of the executive. They argue that the crucial issue of recognition of the collective ownership of land by the Endorois is not acknowledged at all in Kenyan law, as is clearly shown by the High Court judgment. Encroachment on the Endorois’ property did not therefore comply with the appropriate international laws on indigenous peoples’ rights. They state that the Endorois have also suffered significant property loss as a result of their displacement as detailed above, including the loss of cattle, and that the only “compensation” received was the eventual provision of two cattle dips, which does not compensate for the loss of the salt licks around the Lake or the substantial loss of traditional lands.

114. They conclude that the fact that international standards on indigenous land rights and compensation were not met, as well as that provisions of Kenyan law were ignored, means that the encroachment upon the property of the Endorois community was not in accordance with the “appropriate laws” for the purposes of Article 14 of the Charter.

### **Alleged Violations of Article 17(2) and (3) – The Right to Culture**

Article 17(2) and (3) states 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 recognized by the community shall be the duty of the State.*

115. The Complainants argue that the Endorois community’s cultural rights have been violated as a result of the creation of a Game Reserve. By restricting access to Lake Bogoria, the Kenyan Authorities have denied the community access to a central element of Endorois cultural practice. After defining culture to mean the sum total of the material and spiritual

activities and products of a given social group that distinguishes it from other similar groups,<sup>88</sup> they argue that the protection of Article 17 can be invoked by any group that identifies with a particular culture within a state. But they argue that it does more than that. They argue that Article 17 extends to the protection of indigenous cultures and ways of life.

116. They argue that the Endorois have suffered violations of their cultural rights on two counts. In the first instance, the community has faced systematic restrictions on access to sites, such as the banks of Lake Bogoria, which are of central significance for cultural rites and celebrations. The community's attempts to access their historic land for these purposes was described as "trespassing" and met with intimidation and detention. Secondly, and separately, the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.

117. With mining concessions now underway in proximity to Lake Bogoria, the Complainants argue that further threat is posed to the cultural and spiritual integrity of the ancestral land of the Endorois.

118. They also argue that unlike Articles 8 and 14 of the African Charter, Article 17 does not have an express clause allowing restrictions on the right under certain circumstances. They state that the absence of such a clause is a strong indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. However, if there is any restriction, the restriction must be proportionate to a legitimate aim and in line with principles of international law on human and peoples' rights. The Complainants argue that the principle of proportionality requires that limitations be the least restrictive possible to meet the legitimate aim.

119. The Complainants thus argue that even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State's failure to secure access by right for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim.

### **Alleged Violation of Article 21 – Rights to Free Disposition of Natural Resources**

Article 21 of the Charter states that:

- 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*
- 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.*

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<sup>88</sup> The Complainants refer to Rodolfo Stavenhagen et al. eds, (2001), "Cultural Rights: A Social Science, Perspective," in *Economic, Social and Cultural Rights*, (Asbjørn Eide) 2nd ed., pp. 85, 86-88. see also Rachel Murray and Steven Wheatley (2003), 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, Vol. 25, p. 222.

120. The Complainants argue that the Endorois community are unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve. The medicinal salt licks and fertile soil that kept the community's cattle healthy are now out of the community's reach. Mining concessions to Endorois land have been granted without giving the Endorois a share in these resources. Consequently, the Endorois suffer a violation of Article 21: Right to Natural Resources.

121. They argue that in the Ogoni case the right to natural resources contained within their traditional land was vested in the indigenous people and that a people inhabiting a specific region within a state can claim the protection of Article 21.<sup>89</sup> They argue that the right to freely dispose of natural resources is of crucial importance to indigenous peoples and their way of life. They quote from the report of the African Commission's Working Group of Experts on Indigenous Populations/Communities which states:

*Dispossession of land and natural resources is a major human rights problem for indigenous peoples ... .The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them ... This [the loss of fundamental natural resources] is a serious violation of the African Charter (Article 21(1) and 21 (2)), which states clearly that all peoples have the right to natural resources, wealth and property.<sup>90</sup>*

122. Citing the African Charter, the Complainants argue that the Charter creates two distinct rights to both property (Article 14) and the free disposal of wealth and natural resources (Article 21). They argue that in the context of traditional land, the two rights are very closely linked and violated in similar ways. They state that Article 21 of the African Charter is, however, wider in its scope than Article 14, and requires respect for a people's right to use natural resources, even where a people does not have title to the land.

123. The Complainants point out that the World Bank's Operational Directive 4.10 states that: "Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction."<sup>91</sup>

124. They state that the Endorois as a people enjoy the protection of Article 21 with respect to Lake Bogoria and the wealth and natural resources arising from it. They argue that for the Endorois, the natural resources include traditional medicines made from herbs found around the Lake and the resources, such as salt licks and fertile soil, which provided support

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<sup>89</sup> The Ogoni Case (2001), paras 56-58.

<sup>90</sup> Report of the African Commission's Working Group of Experts, p. 20.

<sup>91</sup> World Bank Operational Directive 4.10.  
27<sup>th</sup> Activity Report of the ACHPR

for their cattle and therefore their pastoralist way of life. These, the Complainants argue, were natural resources from which the community benefited before their eviction from their traditional land. In addition, Article 21 also protects the right of the community to the potential wealth of their land, including tourism, rubies, and other possible resources. They state that since their eviction from Lake Bogoria, the Endorois, in violation of Article 21, have been denied unhindered access to the land and its natural resources, as they can no longer benefit from the natural resources and potential wealth, including that generated by recent exploitation of the land, such as the revenues and employment created by the Game Reserve and the product of mining operations.

### **Alleged Violation of Article 22 – The Right to Development**

Article 22 of the African Charter states that:

*All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.*

125. On the issue of the right to development, the Complainants argue that the Endorois' right to development has been violated as a result of the Respondent State's failure to adequately involve the Endorois in the development process and the failure to ensure the continued improvement of the Endorois community's well-being.

126. The Complainants argue that the Endorois have seen the set of choices and capabilities open to them shrink since their eviction from the Game Reserve. They argue that due to the lack of access to the Lake, the salt licks and their usual pasture, the cattle of the Endorois died in large numbers. Consequently, they were not able to pay their taxes and, as a result, the Kenyan Authorities took away more cattle.

127. They stress the point that the Endorois had no choice but to leave the Lake. They argue that this lack of choice for the community directly contradicts the guarantees of the right to development. They state that if the Kenyan Authorities had been providing the right to development as promised by the African Charter, the development of the Game Reserve would have increased the capabilities of the Endorois.

128. Citing the Ogoni Case, the Complainants argue that the African Commission has noted the importance of choice to well-being. They state that the African Commission noted that the state must respect rights holders and the "liberty of their action."<sup>92</sup> They argue that the liberty recognised by the Commission is tantamount to the choice embodied in the right to development. By recognising such liberty, they argue, the African Commission has started to embrace the right to development as a choice. Elaborating further on the right to development, they argue that the same 'liberty of action' principle can be applied to the Endorois community in the instant Communication.

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<sup>92</sup> *The Ogoni Case*, (2001), para. 46.

129. They argue that choice and self-determination also include the ability to dispose of natural resources as a community wishes, thereby requiring a measure of control over the land. They further argue that for the Endorois, the ability to use the salt licks, water, and soil of the Lake Bogoria area has been eliminated, undermining this partner (the Endorois community) of self-determination. In that regard, the Complainants argue, it is clear that development should be understood as an increase in peoples' well-being, as measured by capacities and choices available. The realisation of the right to development, they say, requires the improvement and increase in capacities and choices. They argue that the Endorois have suffered a loss of well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them.

130. Citing the Human Rights Committee (HRC), they argue that the Committee addressed the effectiveness of consultation procedures in *Mazurka v. New Zealand*.<sup>93</sup> The Complainants argue that the HRC found that the broad consultation process undertaken by New Zealand had effectively provided for the participation of the Maori people in determining fishing rights. The New Zealand authorities had negotiated with Maori representatives and then allowed the resulting Memorandum of Understanding to be debated extensively by Maoris throughout the country.<sup>94</sup> The Complainants argue that the Committee specifically noted that the consultation procedure addressed the cultural and religious significance of fishing to the Maori people, and that the Maori representatives were able to affect the terms of the final Settlement.

131. The inadequacy of the consultations undertaken by the Kenyan Authorities, the Complainants argue, is underscored by Endorois actions after the creation of the Game Reserve. The Complainants inform the African Commission that the Endorois believed, and continue to believe even after their eviction, that the Game Reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry into their land. They assert that in failing to understand the reasons for their permanent eviction, many families did not leave the location until 1986.

132. They argue that the course of action left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. They state that if consultations had been conducted in a manner that effectively involved the Endorois, there

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<sup>93</sup> *Apirana Mahuika et al v. New Zealand*, Human Rights Committee, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000), paras. 5.7-5.9.

<sup>94</sup> *Apirana Mahuika et al v. New Zealand* (2000) Human Rights Committee, Comm. No. 547/1993, UN Doc. CCPR/C/70/D/547/1993, paras. 5.7-5.9.

would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.

133. They further say that the requirement of prior, informed consent has also been delineated in the case law of the IAcMHR. Referring the African Commission to the case of *Mary and Carrie Dan v. USA*, they argue that the IAcMHR noted that convening meetings with the community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation.<sup>95</sup> They state that to have a process of consent that is fully informed “requires at a minimum that *all* of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.”<sup>96</sup>

134. The Complainants are also of the view that the Respondent State violated the Endorois’ right to development by engaging in coercive and intimidating activity that has abrogated the community’s right to meaningful participation and freely given consent. They state that such coercion has continued to the present day. The Complainants say that Mr Charles Kamuren, the Chair of the Endorois Welfare Council, had informed the African Commission of details of threats and harassment he and his family and other members of the community have received, especially when they objected to the issue of the granting of mining concessions.

135. The Complainants further argue that the Endorois have been excluded from participating or sharing in the benefits of development. They argue that the Respondent State did not embrace a rights-based approach to economic growth, which insists on development in a manner consistent with, and instrumental to, the realisation of human rights and the right to development through adequate and prior consultation. They assert that the Endorois’ development as a people has suffered economically, socially and culturally. They further conclude that the Endorois community suffered a violation of Article 22 of the Charter.

### **Respondent State Submissions on Merits**

136. In response to the brief submitted by the Complainants on the Merits including the *Amicus Curiae Brief* by COHRE, the Respondent State, the Republic of Kenya, submitted its reply on the Merits of the Communication to the African Commission.

137. The arguments below are the submissions of the Respondent State, taking into consideration their oral testimony at the 40<sup>th</sup> Ordinary Session of the African Commission,

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<sup>95</sup> *Mary and Carrie Dann vs. USA* (2002), para. 136.

<sup>96</sup> *Ibid* at para. 140. Antoanella-Iulia Motoc and the Tebtebba Foundation, *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept*. U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), para. 14 (a).

all their written submissions, including letters, supporting affidavits, video evidence and the 'Respondents Submissions and Further Clarifications Arising Out of the Questions by the Commissioner During the Merits Hearing of the Communication.'

138. The Respondent State argues that most of the tribes do not reside in their ancestral lands owing to movements made due to a number of factors, including search for pastures for their livestock; search for arable land to carry out agriculture; relocation by Government to facilitate development; creation of irrigation schemes, national parks, game reserves, forests and extraction of natural resources, such as minerals.

139. The Respondent State argues that it has instituted a programme for universal free primary education and an agricultural recovery programme, which aims at increasing the household income of the rural poor, including the Endorois. It states that it has not only initiated programmes for the equitable distribution of budgetary resources, but has also formulated an economic recovery strategy for wealth and employment creation, which seeks to eradicate poverty and secure the economic and social rights of the poor and the marginalised, including the Endorois.

140. The Respondent State argues that the land around the Lake Bogoria area is occupied by the **Tugen** tribe, which comprises four clans:

141. The **Endorois** - who have settled around **Mangot, Mochongoi** and **Tangulmbei**;

**The Lebus** - who have settled around Koibatek District;

**The Somor** - who live around Maringati, Sacho, Tenges and Kakarnet and,

**The Alor** - living around Kaborchayo, Paratapwa, Kipsalalar and Buluwesa.

142. The Respondent State argues that all the clans co-exist in one geographical area. It states that it is noteworthy that they all share the same language and names, which means that they have a lot in common. The Respondent State disputes that the Endorois are indeed a community / sub-tribe or clan on their own, and it argues that it is incumbent on the Complainants to prove that the Endorois are distinct from the other **Tugen** sub-tribe or indeed the larger Kalenjin tribe before they can proceed to make a case before the African Commission.

143. The Respondent State maintains that following the Declaration of the Lake Bogoria Game Reserve, the Government embarked on a re-settlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme. It argues that this was over and above the compensation paid to the Endorois after their ancestral land around Lake was gazetted. It further states that there is no such thing as *Mochongoi Forest in Kenya* and the only forest in the area is Ol Arabel Forest.

### **Decision on Merits**

144. The present Communication alleges that the Respondent State has violated the human rights of the Endorois community, an indigenous people, by forcibly removing them from



their ancestral land, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people.

145. Before addressing the articles alleged to have been violated, the Respondent State has requested the African Commission to determine whether the Endorois can be recognised as a 'community' / sub-tribe or clan on their own. The Respondent State disputes that the Endorois are a distinct community in need of special protection. The Respondent State argues that the Complainants need to prove this distinction from the **Tugen** sub-tribe or indeed the larger Kalenjin tribe. The immediate questions that the African Commission needs to address itself to are:

146. Are the Endorois a distinct community? Are they indigenous peoples and thereby needing special protection? If they are a distinct community, what makes them different from the **Tugen** sub-tribe or indeed the larger Kalenjin tribe?

147. Before responding to the above questions, the African Commission notes that the concepts of "peoples" and "indigenous peoples / communities" are contested terms.<sup>97</sup> As far as "indigenous peoples" are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances. The relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of "peoples." The African Commission is thus aware of the political connotation that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of "people(s)."<sup>98</sup> In its Report of the Working Group of Experts on Indigenous Populations/Communities,<sup>99</sup> the African Commission describes its dilemma of defining the concept of "peoples" in the following terms:

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

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<sup>97</sup> See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on "Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/32/Add.3, 26 February 2007: "Mission to Kenya" from 4 to 14 December 2006, at ¶ 9.

<sup>98</sup> See the Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, The Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rpt. Rpt (II)), p.4.

<sup>99</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005.

148. The African Commission, nevertheless, notes that while the terms 'peoples' and 'indigenous community' arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.

149. The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of "peoples."<sup>100</sup> It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three "generations" of rights: civil and political rights; economic, social, and cultural rights; and group and peoples' rights. In that regard, the African Commission notes its own observation that the term "indigenous" is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission.<sup>101</sup> In the context of the African Charter, the Working Group notes that the notion of "peoples" is closely related to collective rights.<sup>102</sup>

150. The African Commission also notes that the African Charter, in Articles 20 through 24, provides for peoples to retain rights as peoples, that is, as collectives.<sup>103</sup> The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples.<sup>104</sup> These are: the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or

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<sup>100</sup> The African Charter is not an accident of history. Its creation by the OAU came at a time of increased scrutiny of states for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special resonance for several reasons, including the fact that post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination and the need to reclaim international legitimacy and salvage its image .

<sup>101</sup> Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *supra* n. 47.

<sup>102</sup> *Ibid.*

<sup>103</sup> See *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*. (SERAC and CESR) or *The Ogoni case 2001*. African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria (27 May 2002), *Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002*.

<sup>104</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

discrimination. The Working Group also demarcated some of the shared characteristics of African indigenous groups:

*... first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists...*

*... A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.<sup>105</sup>*

151. The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as “peoples”, viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.<sup>106</sup>

152. As far as the present matter is concerned, the African Commission is also enjoined under Article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter.<sup>107</sup> It takes note of the working definition proposed by the UN Working Group on Indigenous Populations:

*... that indigenous peoples are ...those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>108</sup>*

153. But this working definition should be read in conjunction with the 2003 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, which is the basis of its ‘definition’ of indigenous

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<sup>105</sup>Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

<sup>106</sup> Ibid.

<sup>107</sup> See Article 60 of the African Charter.

<sup>108</sup> Jose Martinez Cobo (1986), Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add.4.

populations.<sup>109</sup> Similarly it notes that the International Labour Organisation has proffered a definition of indigenous peoples in Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries:<sup>110</sup>

*Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*<sup>111</sup>

154. The African Commission is also aware that though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims. In terms of ILO Convention 169, even though many African countries have not signed and ratified the said Convention, and like the UN Working Groups' conceptualisation of the term, the African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture. In that regard, the African Commission notes the observation of the UN Special Rapporteur, where he states that in Kenya indigenous populations/communities include pastoralist communities such as the *Endorois*,<sup>112</sup> Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. The UN Special Rapporteur further observed that the Endorois community have lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973.<sup>113</sup>

155. In the present Communication the African Commission wishes to emphasise that the Charter recognises the rights of peoples.<sup>114</sup> The Complainants argue that the Endorois are a people, a status that entitles them to benefit from provisions of the African Charter that

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<sup>109</sup> The UN Working Group widens the analysis beyond the African historical experience and also raises the slightly controversial issue of “first or original occupant” of territory, which is not always relevant to Africa.

<sup>110</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991, Article 1(1)(b).

<sup>111</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991, Article 1(1)(b).

<sup>112</sup> See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit.*, *Supra* n. 47 - Emphasis added.

<sup>113</sup> See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit.*, *supra* note 47.

<sup>114</sup> The Commission has affirmed the right of peoples to bring claims under the African Charter. See the case of *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*. Here the Commission stated: “The African Charter, in its Articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives.”

protect collective rights. The Respondent State disagrees.<sup>115</sup> The African Commission notes that the Constitution of Kenya, though incorporating the principle of non-discrimination and guaranteeing civil and political rights, does not recognise economic, social and cultural rights as such, as well as group rights. It further notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.

156. After studying all the submissions of the Complainants and the Respondent State, the African Commission is of the view that Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands - Lake Bogoria and the surrounding area. It agrees that Lake Bogoria and the Monchongoi Forest are central to the Endorois' way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.

157. In addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples.<sup>116</sup> The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed indigenous.<sup>117</sup> The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as 'peoples' is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems.<sup>118</sup> The African Commission further notes that the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples' self-identification is an important ingredient to the concept of peoples' rights as laid out in the Charter. It agrees

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<sup>115</sup> The Commission has also noted that where there is a large number of victims, it may be impractical for each individual complainant to go before domestic courts. In such situations, as in the *Ogoni case*, the Commission can adjudicate the rights of a people as a collective. Therefore, the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

<sup>116</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

<sup>117</sup> See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para. 53.

<sup>118</sup> See also Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth Session, 1990), U.N. Doc. A/45/18 at 79 (1991). "The Committee", in General Recommendation VIII stated that membership in a group, "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned".

that the alleged violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that Self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.<sup>119</sup>

158. Furthermore, in drawing inspiration from international law on human and peoples’ rights, the African Commission notes that the IACtHR has dealt with cases of self-identification where Afro-descendent communities were living in a collective manner, and had, for over 2-3 centuries, developed an ancestral link to their land. Moreover, the way of life of these communities depended heavily on the traditional use of their land, as did their cultural and spiritual survival due to the existence of ancestral graves on these lands.<sup>120</sup>

159. The African Commission notes that while it has already accepted the existence of indigenous peoples in Africa through its WGIP reports, and through the adoption of its Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, it notes the fact that the Inter-American Court has not hesitated in granting the collective rights protection to groups beyond the “narrow/aboriginal/pre-Colombian” understanding of indigenous peoples traditionally adopted in the Americas. In that regard, the African Commission notes two relevant decisions from the IACtHR: *Moiwana v Suriname*<sup>121</sup> and *Saramaka v Suriname*. The Saramaka case is of particular relevance to the Endorois case, given the views expressed by the Respondent State during the oral hearings on the Merits.<sup>122</sup>

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<sup>119</sup> See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para. 100, where he argues that self-identification is a key criterion for determining who is indeed indigenous.

<sup>120</sup> Op. cit, *infra* n. 71.

<sup>121</sup> See *Moiwana Village v Suriname*, Judgment of June 15, 2005. Series C No. 124, paras 85 and 134-135. On 29 November 1986, the Suriname army attacked the N’djuka Maroon village of Moiwana and massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack fled into the surrounding forest, and then into exile or internal displacement. On 12 November 1987, almost a year later, Suriname simultaneously ratified the American Convention on Human Rights and recognized the jurisdiction of the Inter-American Court of Human Rights (IACtHR). Almost ten years later, on 27 June 1997, a petition was filed with the Inter-American Commission on Human Rights (IACmHR) and later on lodged with the IACtHR. The Commission stated that, while the attack itself predated Suriname’s ratification of the American Convention and its recognition of the Court’s jurisdiction, the alleged denial of justice and displacement of the Moiwana community occurring subsequent to the attack comprise the subject matter of the application. In this case the IACtHR recognised collective land rights, despite being an Afro-descendent community (i.e. not a traditional pre-Colombian / ‘autochtonous’ understanding of indigenusness in the Americas).

<sup>122</sup> The Respondent State during the oral hearings at the 40<sup>th</sup> Ordinary Session in Banjul, The Gambia, stated that: (a) the Endorois do not deserve special treatment since they are no different from the other Tungen sub-group, and that (b) inclusion of some of the members of the Endorois in “modern society” has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct legal personality (c) representation of the Endorois by the Endorois Welfare Council is allegedly not legitimate. See Inter-American Commission on Human Rights (IACHmR), Report No.9/06 *The Twelve Saramaka Clans (Los) v Suriname* (March 2, 2006) ; Inter-American Court of Human Rights (IACtHR), *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007) at paras 80-84.

160. In the Saramaka case, according to the evidence submitted by the Complainants, the Saramaka people are one of six distinct Maroon groups in Suriname whose ancestors were African slaves forcibly taken to Suriname during the European colonisation in the 17th century. The IACtHR considered that the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.

161. Like the State of Suriname, the Respondent State (Kenya) in the instant Communication is arguing that the inclusion of the Endorois in 'modern society' has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct group that is very different from the **Tugen** sub-tribe or indeed the larger Kalenjin tribe. That is, the Respondent State is questioning whether the Endorois can be defined in a way that takes into account the different degrees to which various members of the Endorois community adhere to traditional laws, customs, and economy, particularly those living within the Lake Bogoria area. In the Saramaka case, the IACtHR disagreed with the State of Suriname that the Saramaka could not be considered a distinct group of people just because a few members do not identify with the larger group. In the instant case, the African Commission, from all the evidence submitted to it, is satisfied that the Endorois can be defined as a distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner from the **Tugen** sub-tribe or indeed the larger Kalenjin tribe.

162. The IACtHR also noted that the fact that some individual members of the Saramaka community may live outside of the traditional Saramaka territory and in a way that may differ from other Saramakas who live within the traditional territory and in accordance with Saramaka customs does not affect the distinctiveness of this tribal group, nor its communal use and enjoyment of their property. In the case of the Endorois, the African Commission is of the view that the question of whether certain members of the community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves in accordance with their own traditional customs and norms and not by the State. The Endorois cannot be denied a right to juridical personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community.

*From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfil the criterion of 'distinctiveness.' The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a "people", a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one's identity through identification with ancestral lands.*

### **Alleged Violation of Article 8**

163. The Complainants allege that Endorois' right to freely practice their religion has been violated by the Respondent State's action of evicting the Endorois from their land, and refusing them access to Lake Bogoria and other surrounding religious sites. They further allege that the Respondent State's has interfered with the Endorois' ability to practice and worship as their faith dictates; that religious sites within the Game Reserve have not been properly demarcated and protected and since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. They claim that access as of right for religious rituals - such as circumcisions, marital rituals, and initiation rights - has been denied the community. Similarly, they state that the Endorois have not been able to hold or participate in their most significant annual religious ritual, which occurs when the Lake undergoes seasonal changes.

164. The Complainants further argue that the Endorois have neither been able to practice the prayers and ceremonies that are intimately connected to the Lake, nor have they been able to freely visit the spiritual home of all Endorois, living and dead. They argue that the Endorois' spiritual beliefs and ceremonial practices constitute a religion under international law. They point out that the term "religion" in international human rights instruments covers various religious and spiritual beliefs and should be broadly interpreted. They argue that the HRC states that the right to freedom of religion in the International Covenant on Civil and Political Rights (ICCPR):

*protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.*<sup>123</sup>

To rebut the allegation of a violation of Article 8 of the African Charter, the Respondent State argues that the Complainants have failed to show that the action of the Government to gazette the Game Reserve for purposes of conserving the environment and wildlife and to a great extent the Complainants' cultural grounds fails the test of the constitution of reasonableness and justifiability. It argues that through the gazetting of various areas as protected areas, National Parks or Game Reserves or falling under the National Museums, it has been possible to conserve some of the areas which are threatened by encroachment due to modernisation. The Respondent State argues that some of these areas include 'Kayas' (forests used as religious ritual grounds by communities from the coast province of Kenya) which has been highly effective while the communities have continued to access these grounds without fear of encroachment.

165. Before deciding whether the Respondent State has indeed violated Article 8 of the Charter, the Commission wishes to establish whether the Endorois' spiritual beliefs and ceremonial practices constitute a religion under the African Charter and international law.

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<sup>123</sup> Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\ GEN\1\ Rev.1 (1994), 35.



In that regard, the African Commission notes the observation of the HRC in paragraph 164 (above). It is of the view that freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb.<sup>124</sup> The African Commission notes its own observation in *Free Legal Assistance Group v. Zaire*, that it has held that the right to freedom of conscience allows for individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief.<sup>125</sup>

166. This Commission is aware that religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion. The Endorois' cultural and religious practices are centred around lake Bogoria and are of prime significance to all Endorois. During oral testimony, and indeed in the Complainants' written submission, this Commission's attention was drawn to the fact that religious sites are situated around Lake Bogoria, where the Endorois pray and where religious ceremonies regularly take place. It takes into cognisance that Endorois' ancestors are buried near the Lake, and has already above, Lake Bogoria is considered the spiritual home of all Endorois, living and dead.

167. It further notes that one of the beliefs of the Endorois is that their Great Ancestor, *Dorios*, came from the Heavens and settled in the Mochongoi Forest.<sup>126</sup> It notes the Complainants' arguments, which have not been contested by the Respondent State, that the Endorois believe that each season the water of the Lake turns red and the hot springs emit a strong odour, signalling a time that the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the Lake.

168. *From the above analysis, the African Commission is of the view that the Endorois spiritual beliefs and ceremonial practices constitute a religion under the African Charter.*

169. The African Commission will now determine whether the Respondent State by its actions or inactions have interfered with the Endorois' right to religious freedom.

170. The Respondent State has not denied that the Endorois' have been removed from their ancestral land they call home. The Respondent State has merely advanced reasons why the Endorois can no longer stay within the Lake Bogoria area. The Complainants argue that the Endorois' inability to practice their religion is a direct result of their expulsion from their land and that since their eviction the Endorois have not been able to freely practice their religion, as access for religious rituals has been denied the community.

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<sup>124</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Thirty-sixth session, 1981), U.N. GA Res. 36/55.

<sup>125</sup> See *Free Legal Assistance Group v. Zaire*, African Commission on Human and Peoples Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), para. 45. See also the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-sixth session, 1981), U.N. GA Res. 36/55.

<sup>126</sup> See paras 73 and 74.

171. It is worth noting that in *Amnesty International v. Sudan*, the African Commission recognised the centrality of practice to religious freedom.<sup>127</sup> The African Commission noted that the State Party violated the authors' right to practice their religion, because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion. The African Commission also notes the case of *Loren Laroye Riebe Star* from the IACmHR, which determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. It notes that the Court held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes.<sup>128</sup>

172. The African Commission agrees that in some situations it may be necessary to place some form of limited restrictions on a right protected by the African Charter. But such a restriction must be established by law and must not be applied in a manner that would completely vitiate the right. It notes the recommendation of the HRC that limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.<sup>129</sup> The *raison d'être* for a particularly harsh limitation on the right to practice religion, such as that experienced by the Endorois, must be based on exceptionally good reasons, and it is for the Respondent State to prove that such interference is not only proportionate to the specific need on which they are predicated, but is also reasonable. In the case of *Amnesty International v. Sudan*, the African Commission stated that a wide-ranging ban on Christian associations was "disproportionate to the measures required by the Government to maintain public order, security, and safety." The African Commission further went on to state that any restrictions placed on the rights to practice one's religion should be negligible. In the above mentioned case, the African Commission decided that complete and total expulsion from the land for religious ceremonies is not minimal.<sup>130</sup>

173. The African Commission is of the view that denying the Endorois access to the Lake is a restriction on their freedom to practice their religion, a restriction not necessitated by any significant public security interest or other justification. The African Commission is also not convinced that removing the Endorois from their ancestral land was a lawful action in pursuit of economic development or ecological protection. The African

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<sup>127</sup> *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Communication No. 48/90, 50/91, 52/91, 89/93 (1999) (hereinafter *Amnesty International v. Sudan*).

<sup>128</sup> *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz/Mexico*, Inter-American Commission on Human Rights, Report No. 49/99, Case 11.610, (1999). *Dianna Ortiz v. Guatemala*, Inter-American Commission on Human Rights, Report 31/96, Case 10.526, (1997).

<sup>129</sup> Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 (1994), 35, para. 8.

<sup>130</sup> The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in *Amnesty International v. Zambia*, where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter ... and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. See *Amnesty International v. Sudan* (1999), paras. 82 and 80.

Commission is of the view that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.

*The African Commission therefore finds against the Respondent State a violation of Article 8 of the African Charter. The African Commission is of the view that the Endorois' forced eviction from their ancestral lands by the Respondent State interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion.*

*The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in Amnesty International v. Zambia, where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter ... and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter."<sup>131</sup>*

#### **Alleged Violation of Article 14**

174. The Complainants argue that the Endorois community have a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. The Respondent State denies the allegation.

175. The Respondent State further argues that the land in question fell under the definition of Trust Land and was administered by the Baringo County Council for the benefit of all the people who were ordinarily resident in their jurisdiction which comprised mainly the four Tungen tribes. It argues that Trust Land is not only established under the Constitution of Kenya and administered under an Act of Parliament, but that the Constitution of Kenya provides that Trust Land may be alienated through registration to another person other than the County Council; an Act of Parliament providing for the County Council to set apart an area of Trust Land vested in it for use and occupation of public body or authority for public purposes; person or persons or purposes which, in the opinion of the Council, is likely to benefit the persons ordinarily resident in that area; by the President in consultation with the Council. It argues that Trust Land may be set apart as government land for government purposes or private land.

176. The Respondent State argues that when Trust Land is set apart for whatever purpose, the interest or other benefits in respect of that land that was previously vested in any tribe, group, family or individual under African customary law are extinguished. It, however, states that the Constitution and the Trust Land Act provide for adequate and prompt compensation for all residents. The Respondent State, in both its oral and written submissions, is arguing that the Trust Land Act provides a comprehensive procedure for assessment of compensation where the Endorois should have applied to the District Commissioner and lodged an appeal if they were dissatisfied. The Respondent State further

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<sup>131</sup>*Amnesty International v. Zambia*, African Commission on Human and Peoples' Rights, Communication No. 212/98 (1999).

argues that the Endorois have a right of access to the High Court of Kenya by the Constitution to determine whether their rights have been violated.

177. According to the Respondent State, with the creation of more local authorities, the land in question now comprises parts of Baringo and Koibatek County Councils, and through Gazette Notice No 239 of 1973, the land was first set apart as Lake Hannington Game Reserve, which was later revoked by Gazette Notice No 270 of 1974, where the Game Reserve was renamed Lake Baringo Game Reserve, and the boundaries and purpose of setting apart this area specified in the Gazette Notices as required by the Trust Land Act. It argues that the Government offered adequate and prompt compensation to the affected people, “a fact which the Applicants agree with.”<sup>132</sup>

178. In its oral and written testimonies, the Respondent State argues that the gazettelement of a Game Reserve under the Wildlife laws of Kenya is with the objective of ensuring that wildlife is managed and conserved to yield to the nation in general and to individual areas in particular optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation. The Respondent State also argues that National Reserves unlike National Parks, where the Act expressly excludes human interference save for instances where one has got authorisation, are subject to agreements as to restrictions or conditions relating to the provisions of the area covered by the reserve. It also states that communities living around the National Reserves *have in some instances* been allowed to drive their cattle to the Reserve for the purposes of grazing, so long as they do not cause harm to the environment and the natural habitats of the wild animals. It states that with the establishment of a National Reserve particularly from Trust Land, it is apparent that the community’s right of access is not extinguished, but rather its propriety right as recognised under the law (that is, the right to deal with property as it pleases) is the one which is minimised and hence the requirement to compensate the affected people.

179. Rebutting the claim of the Complainants that the Kenyan Authorities prevented them from occupying their other ancestral land, Muchongoi Forest, the Respondent State argued that the land in question was gazetted as a forest in 1941, by the name of Ol Arabel Forest, which means that the land ceased being communal land by virtue of the gazettelement. It states that some excisions have been made from the Ol Arabel Forest to create the Muchongoi Settlement Scheme to settle members of the four Tungen tribes of the Baringo district, one of which is the Endorois.

180. The Respondent State also argues that it has also gone a step further to formulate “Rules”, namely the “The Forests (Tugen-Kamasia) Rules” to enable the inhabitants of the Baringo District, including the Endorois to enjoy some privileges through access to the Ol Arabel Forest for some purposes. The Rules, it states, allow the community to collect dead wood for firewood, pick wild berries and fruits, take or collect the bark of dead trees for thatching beehives, cut and remove creepers and lianes for building purposes, take stock, including goats, to such watering places within the Central Forests as may be approved by the District Commissioner in consultation with the Forest Officer, enter the Forest for the purpose of holding customary ceremonies and rites, but no damage shall be done to any

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<sup>132</sup> See para 3.3.3 of the Respondent’s Merits brief.

tree, graze sheep within the Forest, graze cattle for specified periods during the dry season with the written permission of the District Commissioner or the Forest Officer and to retain or construct huts within the Forest by approved forest cultivators among others.

181. The Respondent State argues further that the above Rules ensure that the livelihoods of the community are not compromised by the gazettelement, in the sense that the people could obtain food and building materials, as well as run some economic activities such as beekeeping and grazing livestock in the Forest. They also say they were at liberty to practice their religion and culture. Further, it states that the due process of law regarding compensation was followed at the time of the said gazettelement.

182. Regarding the issue of dispossession of ancestral land in the alleged Mochongoi Forest, the Respondent State did not address it, as it argues that it was not part of the matters addressed by the High Court case, and therefore the African Commission would be acting as a tribunal of first instance if it did so.

183. The Respondent State does not dispute that the Lake Bogoria area of the Baringo and Koibatek Administrative Districts is the Endorois' ancestral land. One of the issues the Respondent State is disputing is whether the Endorois are indeed a distinct Community. That question has already been answered supra. In para 1.1.6 of the Respondent State Merits brief, the State said: "Following the Declaration of the Lake Bogoria Game Reserve, the Government embarked on a resettlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme. *This was over and above the compensation paid to the Endorois after their ancestral land around Lake was gazetted.*"<sup>133</sup>

184. It is thus clear that the land surrounding Lake Bogoria is the traditional land of the Endorois people. In para 1 of the Merits brief, submitted by the Complainants, they write: "The Endorois are a community of approximately 60, 000 people who, from time immemorial, have lived in the *Lake Bogoria area* of the Baringo and Koibatek Administrative Districts."<sup>134</sup> In para 47, the Complainants also state that: "For centuries the Endorois have constructed homes on the land, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods." The Complainants argue that apart from a confrontation with the Masai over the Lake Bogoria region three hundred years ago, the Endorois have been accepted by all neighbouring tribes, including the British Crown, as *bona fide* owners of their land. The Respondent State does not challenge those statements of the Complainants. The only conclusion that could be reached is that the Endorois community has a right to property with regard to its ancestral land, the possessions attached to it, and their animals.

185. Two issues that should be disposed of before going into the more substantive questions of whether the Respondent State has violated Article 14 are a determination of what is a 'property right' (within the context of indigenous populations) that accords with African and international law, and whether special measures are needed to protect such

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<sup>133</sup> Italics for emphasis.

<sup>134</sup> Italics for emphasis.

rights, if they exist and whether Endorois' land has been encroached upon by the Respondent State. The Complainants argue that "property rights" have an autonomous meaning under international human rights law, which supersedes national legal definitions. They state that both the European Court of Human Rights (ECHR) and IActHR have examined the specific facts of individual situations to determine what should be classified as 'property rights', particularly for displaced persons, instead of limiting themselves to formal requirements in national law.<sup>135</sup>

186. To determine that question, the African Commission will look, first, at its own jurisprudence and then at international case law. In [Malawi African Association and Others v. Mauritania](#), land was considered 'property' for the purposes of Article 14 of the Charter.<sup>136</sup> The African Commission in the *Ogoni* case also found that the 'right to property' includes not only the right to have access to one's property and not to have one's property invaded or encroached upon,<sup>137</sup> but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.<sup>138</sup> The African Commission also notes that the ECHR have recognised that 'property rights' could also include the economic resources and rights over the common land of the applicants.<sup>139</sup>

187. The Complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems. Common problems faced by indigenous groups include the lack of "formal" title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. This, they argue, has led to many cases of displacement from a people's historic territory, both by colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities. The African Commission notes that its Working Group on Indigenous Populations/Communities has recognised that some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions and customs.<sup>140</sup> The African Commission is of the view that the first step in the protection of traditional African communities is the

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<sup>135</sup> See *The Mayagna Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights, (2001), para. 146 (hereinafter the *Awas Tingni Case 2001*). The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.

<sup>136</sup> [Malawi African Association and Others v. Mauritania](#), African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para. 128. See also *Communications 54/91 et al v Mauritania*, 13<sup>th</sup> Activity Report, para. 128.

<sup>137</sup> *The Ogoni Case (2001)*, para. 54.

<sup>138</sup> Communication No. 225/98 v Nigeria, 14<sup>th</sup> Annual Report, para. 52.

<sup>139</sup> See *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.

<sup>140</sup> See Report of the African Commission's Working Group of Experts, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", Adopted by the African Commission on Human and Peoples' Rights at its 28<sup>th</sup> Ordinary Session (2005).

acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.

188. The case of *Doğan and others v Turkey*<sup>141</sup> is instructive in the instant Communication. Although the Applicants were unable to demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that:

*[T]he notion 'possessions' in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision.*<sup>142</sup>

189. Although they did not have registered property, they either had their own houses constructed on the land of their ascendants or lived in the houses owned by their fathers and cultivate the land belonging to the latter. The Court further noted that the Applicants had unchallenged rights over the common land in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling.

190. The African Commission also notes the observation of the IActHR in the seminal case of *The Mayagna (Sumo) Awas Tingni v Nicaragua*,<sup>143</sup> that the Inter-American Convention protected property rights in a sense which include the rights of members of the indigenous communities within the framework of communal property and argued that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.

191. In the opinion of the African Commission, the Respondent State has an obligation under Article 14 of the African Charter not only to *respect* the 'right to property', but also to *protect* that right. In 'the *Mauritania Cases*',<sup>144</sup> the African Commission concluded that the confiscation and pillaging of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in Article 14. Similarly, in *The Ogoni case 2001*<sup>145</sup> the African Commission addressed factual situations involving removal of people from their homes. The African Commission held that the removal of people from their

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<sup>141</sup> *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.

<sup>142</sup> *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), para. 138-139.

<sup>143</sup> *The Awas Tingni Case* (2001), paras. 140(b) and 151.

<sup>144</sup> African Commission on Human and Peoples' Rights, Communications 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98.

<sup>145</sup> African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria (27 May 2002), Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, done at the 31st Ordinary Session of the African Commission held from 2 to 16 May 2002 in Pretoria, South Africa.

homes violated Article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14.<sup>146</sup>

192. The Saramaka case also sets out how the failure to recognise an indigenous/tribal group becomes a violation of the 'right to property.'<sup>147</sup> In its analysis of whether the State of Suriname had adopted an appropriate framework to give domestic legal effect to the 'right to property', the IACtHR addressed the following issues:

*This controversy over who actually represents the Saramaka people is precisely a natural consequence of the lack of recognition of their juridical personality.*<sup>148</sup>

193. In the Saramaka case, the State of Suriname did not recognise that the Saramaka people can enjoy and exercise property rights as a community. The Court observed that other communities in Suriname have been denied the right to seek judicial protection against alleged violations of their collective property rights precisely because a judge considered they did not have the legal capacity necessary to request such protection. This, the Court opined, placed the Saramaka people in a vulnerable situation where individual 'property rights' may trump their rights over communal property, and where the Saramaka people may not seek, as a juridical personality, judicial protection against violations of their 'property rights' recognised under Article 21 of the Convention.

194. As is in the instant case before the African Commission, the State of Suriname acknowledged that its domestic legal framework did not recognise the right of the members of the Saramaka people to the use and enjoyment of property in accordance with their system of communal property, but rather a privilege to use land. It also went on to provide reasons, as to why it should not be held accountable for giving effect to the Saramaka claims to a right to property, for example because the land tenure system of the Saramaka people, particularly regarding who owns the land, presents a practical problem for state recognition of their right to communal property. The IACtHR rejected all of the State's arguments. In the present Communication, the High Court of Kenya similarly dismissed any claims based on historic occupation and cultural rights.<sup>149</sup>

195. The IACtHR went further to say that, in any case, the alleged lack of clarity as to the land tenure system of the Saramakas should not present an insurmountable obstacle for the State, which has the duty to consult with the members of the Saramaka people and seek

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<sup>146</sup> African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights - Nigeria (27 May 2002) (citing Committee on Economic, Social and Cultural Rights, General Comment No. 7, The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions, para. 4, U.N. Doc. E/C.12/1997/4 (1997)).

<sup>147</sup> Inter- American Court of Human Rights, *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007).

<sup>148</sup> Inter- American Court of Human Rights, *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007).

<sup>149</sup> *Op. cit.*, paras 11 and 12.



clarification of this issue, in order to comply with its obligations under Article 21 of the Convention.

196. In the present Communication, the Respondent State (the Kenyan Government) during the oral hearings argued that legislation or special treatment in favour of the Endorois might be perceived as being discriminatory. The African Commission rejects that view. The African Commission is of the view that the Respondent State cannot abstain from complying with its international obligations under the African Charter merely because it might be perceived to be discriminatory to do so. It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance. The African Commission shares the Respondent State's concern over the difficulty involved; nevertheless, the State still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law. Besides, it is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.<sup>150</sup> Legislation that recognises said differences is therefore not necessarily discriminatory.

197. Again drawing on the *Saramaka v Suriname* case, which confirms earlier jurisprudence of the *Moiwana v Suriname*, *Yakye Axa v Paraguay*<sup>151</sup>, *Sawhoyamaxa v Paraguay*<sup>152</sup>, and *Mayagna Awas Tingni v Nicaragua*;<sup>153</sup> the *Saramaka* case has held that *Special measures of protection are owed to members of the tribal community to guarantee the full exercise of their rights*. The IACtHR stated that based on Article 1(1) of the Convention, members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regard to their enjoyment of 'property rights' in order to safeguard their physical and cultural survival.

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<sup>150</sup> See *ECHR, Connors v. The United Kingdom*, (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way of providing equality under the law). See also IACmHR Report on the Situation of Human Rights in Ecuador, (stating that "within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival - a right protected in a range of international instruments and conventions"). See also U.N. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.4 (stating that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination"), and UNCERD, General Recommendation No. 23, Rights of indigenous peoples, para. 4 (calling upon States to take certain measures in order to recognise and ensure the rights of indigenous peoples).

<sup>151</sup> *Indigenous Community Yakye Axa v. Paraguay* 17 June 2005, Inter American Court of Human Rights.

<sup>152</sup> Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006 Inter-American Court of Human Rights.

<sup>153</sup> See *The Mayagna Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights, (2001) hereinafter the *Awas Tingni Case 2001*.

198. Other sources of international law have similarly declared that such special measures are necessary. In the *Moiwana* case, the IACtHR determined that another Maroon community living in Suriname was also not indigenous to the region, but rather constituted a tribal community that settled in Suriname in the 17th and 18th century, and that this tribal community had “a profound and all-encompassing relationship to their ancestral lands” that was centred, not “on the individual, but rather on the community as a whole.” This special relationship to land, as well as their communal concept of ownership, prompted the Court to apply to the tribal Moiwana community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention.

199. The African Commission is of the view that even though the Constitution of Kenya provides that Trust Land may be alienated and that the Trust Land Act provides comprehensive procedure for the assessment of compensation, the Endorois *property rights* have been encroached upon, in particular by the expropriation and the effective denial of ownership of their land. It agrees with the Complainants that the Endorois were never given the full title to the land they had in practice before the British colonial administration. Their land was instead made subject to a trust, which gave them beneficial title, but denied them actual title. The African Commission further agrees that though for a decade they were able to exercise their traditional rights without restriction, the trust land system has proved inadequate to protect their rights.

200. The African Commission also notes the views expressed by the Committee on Economic, Social and Cultural Rights which has provided a legal test for forced removal from lands which is traditionally claimed by a group of people as their property. In its ‘General Comment No. 4’ it states that “instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the *most exceptional circumstances*, and in accordance with the relevant principles of international law.”<sup>154</sup> This view has also been reaffirmed by the United Nations Commission on Human Rights which states that forced evictions are a gross violations of human rights, and in particular the right to adequate housing.<sup>155</sup> The African Commission also notes General Comment No. 7 requiring States Parties, prior to carrying out any evictions, to explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force.<sup>156</sup>

201. The African Commission is also inspired by the European Commission of Human Rights. Article 1 of Protocol 1 to the European Convention states:

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<sup>154</sup> Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), para. 18, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

<sup>155</sup> See, Commission on Human Rights resolution 1993/77, UN Doc. E/C.4/RES/1993/77 (1993); Commission on Human Rights Resolution 2004/28, UN Doc. E/C.4/RES/2004/28 (2004).

<sup>156</sup> See Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), para. 14, U.N. Doc. E/1998/22, annex IV at 113 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003).

*Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*<sup>157</sup>

202. The African Commission also refers to *Akdivar and Others v. Turkey*. The European Court held that forced evictions constitute a violation of Article 1 of Protocol 1 to the European Convention. *Akdivar and Others* involved the destruction of housing in the context of the ongoing conflict between the Government of Turkey and Kurdish separatist forces. The petitioners were forcibly evicted from their properties, which were subsequently set on fire and destroyed. It was unclear which party to the conflict was responsible. Nonetheless, the European Court held that the Government of Turkey violated both Article 8 of the European Convention and Article 1 of Protocol 1 to the European Convention because it has a duty to *both respect and protect* the rights enshrined in the European Convention and its Protocols.

203. In the instant case, the Respondent State sets out the conditions when Trust Land is set apart for whatever purpose.<sup>158</sup>

204. The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights. The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.<sup>159</sup>

205. The Inter-American Court jurisprudence also makes it clear that mere access or *de facto* ownership of land is not compatible with principles of international law. Only *de jure* ownership can guarantee indigenous peoples' effective protection.<sup>160</sup>

206. In the *Saramaka* case, the Court held that the State's legal framework merely grants the members of the *Saramaka* people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognised and respected not only in practice but also in law in order to ensure its

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<sup>157</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, 213 U.N.T.S. 262, entered into force 18 May 1954.

<sup>158</sup> See 3.2.0 of the Respondent State Brief on the Merits. See also para 178 of this judgment where the Respondent State argues that the community's rights of access is not extinguished.

<sup>159</sup> See Articles 8(2) (b), 10, 25, 26 and 27 of the UN Declaration on the Rights of Indigenous Peoples.

<sup>160</sup> Para 110 of the *Saramaka* case.

legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighbouring peoples. The situation of the Endorois is not different. The Respondent State simply wants to grant them privileges such as restricted access to ceremonial sites. This, in the opinion of the Commission, falls below internationally recognised norms. The Respondent State must grant title to their territory in order to guarantee its permanent use and enjoyment.

207. The African Commission notes that that Articles 26 and 27 of the UN Declaration on Indigenous Peoples use the term “occupied or otherwise used.” This is to stress that indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds. This was made clear in the judgment of *Awas Tingni v Nicaragua*. In the current leading international case on this issue, *The Mayagna (Sumo) Awas Tingni v Nicaragua*,<sup>161</sup> the IActHR recognised that the Inter-American Convention protected property rights “in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.”<sup>162</sup> It stated that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.<sup>163</sup>

208. The African Commission also notes that in the case of *Sawhoyamaya v Paraguay*, the IActHR, acting within the scope of its adjudicatory jurisdiction, decided on indigenous land possession in three different situations, viz: in the *Case of the Mayagna (Sumo) Awas Tingni Community*, the Court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration;<sup>164</sup> in the *Case of the Moiwana Community*, the Court considered that the members of the N’djuka people were the “legitimate owners of their traditional lands”, although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them, though in this case, the traditional lands were not occupied by third parties.<sup>165</sup> Finally, in the *Case of the Indigenous Community Yakye Axa*, the Court considered that the members of the community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualise those lands and transfer them on a no consideration basis.<sup>166</sup>

209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to

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<sup>161</sup> *The Awas Tingni Case* (2001), paras. 140(b) and 151.

<sup>162</sup> *Ibid*, at para. 148.

<sup>163</sup> *Ibid*, at para. 151.

<sup>164</sup> See case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 184, para. 151.

<sup>165</sup> See case of the Moiwana Community. Judgment of 15 June 2005. Series C No. 124. para. 134.

<sup>166</sup> See case of the Indigenous Community Yakye Axa, *supra* note 1, paras. 124-131.

demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.

210. That such encroachment has taken place could be seen by the Endorois' inability, after being evicted from their ancestral land, to have free access to religious sites and their traditional land to graze their cattle. The African Commission is aware that access roads, gates, game lodges and a hotel have all been built on the ancestral land of the Endorois community around Lake Bogoria and imminent mining operations also threatens to cause irreparable damage to the land. The African Commission has also been notified that the Respondent State is engaged in the demarcation and sale of parts of Endorois historic lands to third parties.

211. The African Commission is aware that encroachment in itself is not a violation of Article 14 of the Charter, as long as it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted - 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'. The African Commission will now assess whether an encroachment 'in the interest of public need' is indeed proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands. The African Commission agrees with the Complainants that the test laid out in Article 14 of the Charter is *conjunctive*, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out in accordance with appropriate laws.

212. The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was stressed by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who published the following statement:

*Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.<sup>167</sup>*

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<sup>167</sup> Nazila Ghanea and Alexandra Xanthaki (2005) (eds). 'Indigenous Peoples' Right to Land and Natural Resources' in Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers.

213. Limitations on rights, such as the limitation allowed in Article 14, must be reviewed under the principle of proportionality. The Commission notes its own conclusions that “... the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.”<sup>168</sup> The African Commission also notes the decisive case of *Handyside v. United Kingdom*, where the ECHR stated that any condition or restriction imposed upon a right must be “proportionate to the legitimate aim pursued.”<sup>169</sup>

214. The African Commission is of the view that any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present Communication, the African Commission holds the view that in the pursuit of creating a Game Reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.

215. It is also of the view that even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. From the evidence submitted both orally and in writing, it is clear that the community was willing to work with the Government in a way that respected their property rights, even if a Game Reserve was being created. In that regard, the African Commission notes its own conclusion in the *Constitutional Rights Project Case*, where it says that “a limitation may not erode a right such that the right itself becomes *illusory*.”<sup>170</sup> At the point where such a right becomes illusory, the limitation cannot be considered proportionate – the limitation becomes a violation of the right. The African Commission agrees that the Respondent State has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to “the general interest of the community” or a “public need.”

216. The African Commission notes that the link to the right to life, in paragraph 219 above, is particularly notable, as it is a non-derogable right under international law. Incorporating the right to life into the threshold of the ‘public interest test’ is further confirmed by jurisprudence of the IActHR. In *Yakye Axa v Paraguay* the Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity.

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<sup>168</sup>*Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999), para. 42 (hereinafter *The Constitutional Rights Project Case 1999*).

<sup>169</sup> *Handyside v. United Kingdom*, No. 5493/72, Series A.24 (7 December 1976), para. 49.

<sup>170</sup> *The Constitutional Rights Project Case*, para. 42.

217. The IActHR held that one of the obligations that the State must inescapably undertake as guarantor to protect and ensure the right to life is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

218. The African Commission also notes that the 'disproportionate' nature of an encroachment on indigenous lands – therefore falling short of the test set out by the provisions of Article 14 of the African Charter – is to be considered an even greater violation of Article 14, when the displacement at hand was undertaken by force. Forced evictions, by their very definition, cannot be deemed to satisfy Article 14 of the Charter's test of being done 'in accordance with the law'. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected. The grave nature of forced evictions could amount to a gross violation of human rights. Indeed, the United Nations Commission on Human Rights, in Resolutions 1993/77 and 2004/28, has reaffirmed that forced evictions amount to a gross violations of human rights and in particular the right to adequate housing."<sup>171</sup> Where such removal was forced, this would in itself suggest that the 'proportionality' test has not been satisfied.

219. With respect to the 'in accordance with the law' test, the Respondent State should also be able to show that the removal of the Endorois was not only in the public interest, but their removal satisfied both Kenyan and international law. If it is settled that there was a trust in favour of the Endorois, was it legally extinguished? If it was, how was it satisfied? Was the community adequately compensated? Also, did the relevant legislation creating the Game Reserve, expressly required the removal of the Endorois from their land?

220. The African Commission notes that the Respondent State does not contest the claim that the traditional lands of the Endorois people are classified as Trust Land. In fact S. 115 of the Kenyan Constitution gives effect to that claim. In the opinion of the African Commission it created a beneficial right for the Endorois over their ancestral land. This should have meant that the County Council should give effect to such rights, interest or other benefits in respect of the land.

221. The Complainants argue that the Respondent State created the Lake Hannington Game Reserve, including the Endorois indigenous lands, on 9 November 1973. The name was changed to Lake Bogoria Game Reserve in a second notice in 1974.<sup>172</sup> The 1974 notice was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA).<sup>173</sup> The Complainants argue that WAPA applied to Trust Land as it

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<sup>171</sup> See United Nations Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/1993/RES/77 and United Nations Commission on Human Rights resolution 2004/28, UN Doc. E/CN.4/2004/RES/28. Both resolutions reaffirm that the practice of forced eviction is a gross violations of human rights and in particular the right to adequate housing.

<sup>172</sup> Pursuant to Kenyan law, the authorities published notice 239/1973 in the Kenya Reserve to declare the creation of "Lake Hannington Game Reserve." Gazette notice 270/1974 was published to revoke the earlier notice and change the name of the Game Reserve on 12 October 1974: "the area set forth in the schedule hereto to be a Game Reserve known as Lake Bogoria Game Reserve."

did to any other land, and did not require that the land be taken out of the Trust before a Game Reserve could be declared over that land.

222. They further argue that the relevant legislation did not give authority for the removal of any individual or group occupying the land in a Game Reserve. Instead, WAPA merely prohibited the hunting, killing or capturing of animals within the Game Reserve.<sup>174</sup> The Complainants argue that despite no clear legal order asking them to relocate to another land, the Endorois community was informed from 1973 onwards that they would have to leave their ancestral lands.

223. In rebuttal, the Respondent State argues that the Constitution of Kenya provides that Trust Land may be alienated. It also states that the “Government offered adequate and prompt compensation to the affected people...”<sup>175</sup> As regards the Complainants’ claim that the Respondent State prevented the Endorois community from accessing their other ancestral lands, Muchongoi forest, the Respondent State argues that the land in question was gazetted in 1941 by the name of Ol Arabel Forest with the implication that the land ceased being communal by virtue of the gazettelement.

224. The African Commission agrees that WAPA merely prohibited the hunting, killing or capturing of animals within the Game Reserve.<sup>176</sup> Additionally, the Respondent State has not been able to prove without doubt that the eviction of the Endorois community satisfied both Kenyan and international law. The African Commission is not convinced that the whole process of removing the Endorois from their ancestral land satisfied the very stringent international law provisions. Furthermore, the mere gazetting of Trust Land is not sufficient to legally extinguish the trust. WAPA should have required that the land be taken out of the Trust before a Game Reserve could be declared over that land. This means that the declaration of the Lake Bogoria Game Reserve by way of the 1974 notice did not affect the status of the Endorois land as Trust Land. The obligation of Baringo and Koibatek County Councils to give effect to the rights and interests of the Endorois people continued. That also has to be read in conjunction with the concept of adequate compensation. The African Commission is in agreement with the Complainants that the only way under Kenyan law in which Endorois benefit under the trust could have been dissolved is if the County Council or the President of Kenya had “set apart” the land. However, the Trust Land Act required that to be legal, such setting apart of the land must be published in the Kenyan Gazette.<sup>177</sup>

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<sup>173</sup> See section 3(2) for relevant parts of WAPA. Section 3(2) was subsequently revoked on 13 February 1976 by S.68 of the Wildlife Conservation and Management Act.

<sup>174</sup> See section 3(20) of WAPA, which did not allow the Kenyan Minister for Tourism and Wildlife to remove the present occupiers.

<sup>175</sup> See para 3.3.3 of the Respondent State’s Merits brief.

<sup>176</sup> See note 125.

<sup>177</sup> The mechanics of such a ‘setting apart’ of Trust Land under S.117 or S.118 of the Constitution are laid down by the Kenyan Trust Land Act. Publication is required by S.13(3) and (4) of the Trust Land Act in respect of S.117 Constitution, and by s.7(1) and (4) of the Trust land Act in respect of S.118 Constitution.



225. Two further elements of the 'in accordance with the law' test relate to the requirements of **consultation** and **compensation**.

226. In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that *consent* be accorded. Failure to observe the obligations to consult and to seek consent - or to compensate - ultimately results in a violation of the right to property.

227. In the Saramaka case, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory do not amount to a denial of their survival as a tribal people, the Court stated that the State must abide by the following three safeguards: first, ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory; second, guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; third, ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

228. In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a *prior* environment and social impact assessment was not carried out. The absence of these three elements of the 'test' is tantamount to a violation of Article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.

229. On the issue of compensation, the Respondent State in rebutting the Complainants' allegations that inadequate compensation was paid, argues that the Complainants do not contest that a form of compensation was done, but that they have only pleaded that about 170 families were compensated. It further argues that, if at all the compensations paid was not adequate, the Trust Land Act provides for a procedure for appeal, for the amount and the people who feel that they are denied compensation over their interest.

230. The Respondent State does not deny the Complainants' allegations that in 1986, of the 170 families evicted in late 1973, from their homes within the Lake Bogoria Game Reserve, each receiving around 3,150 Kshs (at the time, this was equivalent to approximately £30). Such payment was made some 13 years after the first eviction. It does not also deny the allegation that £30 did not represent the market value of the land gazetted as Lake Bogoria Game Reserve. It also does not deny that the Kenyan authorities have themselves recognised that the payment of 3,150 Kshs per family amounted only to 'relocation assistance', and does not constitute full compensation for loss of land.

231. The African Commission is of the view that the Respondent State did not pay the prompt, full compensation as required by the Constitution. It is of the view that Kenyan law has not been complied with and that though some members of the Endorois community accepted limited monetary compensation that did not mean that they accepted it as full compensation, or indeed that they accepted the loss of their land.

232. The African Commission notes the observations of the United Nations Declaration on the Rights of Indigenous Peoples, which, amongst other provisions for restitutions and compensations, states:

*Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.*<sup>178</sup>

233. In the case of *Yakye Axa v Paraguay* the Court established that any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations.<sup>179</sup> To this end, Article 63(1) of the American Convention establishes that:

*[i]f the Court finds that there has been a violation of a right or freedom protected by th[e] Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*

234. The Court said that once it has been proved that land restitution rights are still current, the State must take the necessary actions to return them to the members of the indigenous people claiming them. However, as the Court has pointed out, when a State is unable, **on objective and reasonable grounds**, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.<sup>180</sup> This was not the case in respect of the Endorois. The land given them is not of equal quality.

235. The reasons of the Government in the instant Communication are questionable for several reasons including: (a) the contested land is the site of a conservation area, and the Endorois – as the ancestral guardians of that land – are best equipped to maintain its delicate ecosystems; (b) the Endorois are prepared to continue the conservation work

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<sup>178</sup> Declaration on the Rights of Indigenous Peoples, preambular para. 5, E/CN.4/Sub.2/1994/2/Add.1 (1994).

<sup>179</sup> See *Case of Huilca Tecse*. Judgment of 3 March 2005. Series C No. 121, para. 86, and *Case of the Serrano Cruz Sisters*, para. 133.

<sup>180</sup> See case of the Indigenous Community *Yakye Axa*, para. 149.

begun by the Government; (c) no other community have settled on the land in question, and even if that is the case, the Respondent State is obliged to rectify that situation,<sup>181</sup> (d) the land has not been spoliated and is thus inhabitable; (e) continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois' way of life, a consequence which clearly tips the proportionality argument on the side of indigenous peoples under international law.

236. It seems also to the African Commission that the amount of £30 as compensation for one's ancestral home land flies in the face of common sense and fairness.

237. The African Commission notes the detailed recommendations regarding compensation payable to displaced or evicted persons developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>182</sup> These recommendations, which have been considered and applied by the European Court of Human Rights,<sup>183</sup> set out the following principles for compensation on loss of land: Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them. These recommendations could be followed if the Respondent State is interested in giving a fair compensation to the Endorois.

238. *Taking all the submissions of both parties, the African Commission agrees with the Complainants that the Property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law. Accordingly, the African Commission finds for the Complainants that the Endorois as a distinct people have suffered a violation of Article 14 of the Charter.*

### **Alleged Violation of Article 17 (2) and (3)**

239. The Complainants allege that the Endorois' cultural rights have been violated on two counts: first, the community has faced systematic restrictions on access to cultural sites

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<sup>181</sup> Indeed, at para 140 of the *Sawhoyamaxa Indigenous Community v. Paraguay* case, the Inter-American Court stresses that: "Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a "public purpose or interest", which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.

<sup>182</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Guidelines on International Events and Forced Evictions* (Forty-seventh session, 1995), UN Doc. E/CN.4/Sub.2/1995/13. 17 July 1995, para. 16(b) and (e)

<sup>183</sup> *Doğan v. Turkey* (2004), para. 154.

and, second, that the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.

240. The Respondent State denies the allegation claiming that access to the forest areas was always permitted, subject to administrative procedures. The Respondent State also submits that in some instances some communities have allowed political issues to be disguised as cultural practices and in the process they endanger the peaceful coexistence with other communities. The Respondent State does not substantiate who these “communities” or what these “political issues to be disguised as cultural practices” are.

241. The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. Both the Complainants and the Respondent State seem to agree on that. It notes that Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group’s religion, language, and other defining characteristics.<sup>184</sup>

242. The African Commission notes that the preamble of the African Charter acknowledges that “civil and political rights cannot be dissociated from economic, social and cultural rights ... social, cultural rights are a guarantee for the enjoyment of civil and political rights”, ideas which influenced the 1976 African Cultural Charter which in its preamble highlights “the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas.<sup>185</sup> Article 3 of the same Charter states that culture is a source of mutual enrichment for various communities.<sup>186</sup>

243. This Commission also notes the views of the Human Rights Committee with regard to the exercise of the cultural rights protected under Article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Committee observes that “culture manifests itself in many forms, including a particular way of life associated with the use of *land resources*, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require

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<sup>184</sup> Rachel Murray and Steven Wheatley (2003) ‘Groups and the African Charter on Human and Peoples’ Rights’, *Human Rights Quarterly*, 25, p. 224.

<sup>185</sup> African Cultural Charter (1976), para 6 of the Preamble.

<sup>186</sup> Ibid. Article 3.

positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>187</sup>

244. The African Commission notes that a common theme that usually runs through the debate about culture and its violation is the association with one’s ancestral land. It notes that its own Working Group on Indigenous Populations/Communities has observed that dispossession of land and its resources is “a major human rights problem for indigenous peoples.”<sup>188</sup> It further notes that a Report from the Working Group has also emphasised that dispossession “threatens the economic, social and *cultural survival* of indigenous pastoralist and hunter-gatherer communities.”<sup>189</sup>

245. In the case of indigenous communities in Kenya, the African Commission notes the critical ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in Kenya’ that “their *livelihoods and cultures have been traditionally discriminated against* and their lack of legal recognition and empowerment reflects their social, political and economic marginalization.”<sup>190</sup> He also said that the principal human rights issues they face “relate to the loss and environmental degradation of their land, traditional forests and natural resources, as a result of dispossession in colonial times and in the post-independence period. In recent decades, inappropriate development and conservationist policies have aggravated the violation of their economic, social and *cultural rights*.”<sup>191</sup>

246. The African Commission is of the view that in its interpretation of the African Charter, it has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group. It has thus interpreted Article 17(2) as requiring governments to take measures “aimed at the conservation, development and diffusion of culture,” such as promoting “cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; . . . promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population.”<sup>192</sup>

247. The African Commission’s WGIP has further highlighted the importance of creating spaces for dominant and indigenous cultures to co-exist. The WGIP notes with concern that:

*Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale*

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<sup>187</sup> Human Rights Committee, General Comment 23 (Fiftieth Session, 1994), U.N. Doc. CCPR/C/21Rev.1/Add5, (1994). Para. 7.

<sup>188</sup> Report of the African Commission’s Working Group on Indigenous Populations/Committees (2003), p.20.

<sup>189</sup> Ibid. p.20.

<sup>190</sup> Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *supra* n. 47.

<sup>191</sup> Ibid. Italics added for emphasis.

<sup>192</sup> *Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989, ACHPR/RPT/2nd, Annex XII.*

*development initiatives that tend to destroy their lives and cultures rather than improve their situation.*<sup>193</sup>

248. The African Commission is of the opinion that the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois,<sup>194</sup> but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.<sup>195</sup>

249. In its analysis of Article 17 of the African Charter, the African Commission is aware that unlike Articles 8 and 14, Article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. It further notes that even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights. Thus, even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State's failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the Game Reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.

250. It is the opinion of the African Commission that the Respondent State has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects. The Respondent State has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake.

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<sup>193</sup> Report of the African Commission's Working Group on Indigenous Populations/Committees (2005), p. 20. [Emphasis added]

<sup>194</sup> See UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2): States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII, Article 4(e): Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages; International Covenant on Economic, Social and Cultural Rights, Article 15(3).

<sup>195</sup> See statement by Mr. Sha Zukang Under-Secretary General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People to the Third Committee of the General Assembly on the Item "Indigenous Issues" New York, 20 October 2008.

251. *By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and (3) of the Charter.*

### **Alleged Violation of Article 21**

252. The Complainants allege that the Endorois community has been unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve.

253. The Respondent State denies the allegation. It argues that it is of the view that the Complainants have immensely benefited from the tourism and mineral prospecting activities, noting for example:

a) Proceeds from the Game Reserve have been utilised to finance a number of projects in the area, such as schools, health facilities, wells and roads.

b) Since the discovery of ruby minerals in the Weseges area near Lake Bogoria, three companies have been issued with prospecting licences, noting that two out of three companies belong to the community, including the Endorois. In addition, the company which does not consist of the locals, namely Corby Ltd, entered into an agreement with the community, binding itself to deliver some benefits to the latter in terms of supporting community projects. It states that it is evident (from the minutes of a meeting of the community and the company) that the company is ready to undertake a project in the form of an access road to the prospecting site for the community's and prospecting company's use.

c) The Respondent State also argues that the mineral prospecting activities are taking place outside the Lake Bogoria Game Reserve, which means that the land is not the subject matter of the Applicants' complaint.

254. The Respondent State also argue that the community has been holding consultations with Corby Ltd., as evidence by the agreement between them is a clear manifestation of the extent to which the former participants in the decisions touch on the exploitation of the natural resources and the sharing of the benefits emanating therefrom.

255. The African Commission notes that in *The Ogoni case* the right to natural resources contained within their traditional lands is also vested in the indigenous people, making it clear that a people inhabiting a specific region within a state could also claim under Article 21 of the African Charter.<sup>196</sup> The Respondent State does not give enough evidence to substantiate the claim that the Complainants have immensely benefited from the tourism and mineral prospecting activities.

256. The African Commission notes that proceeds from the Game Reserve have been used to finance a lot of useful projects, 'a fact' that the Complainants do not contest. The African

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<sup>196</sup> The Ogoni Case (2001), paras 56-58.

Commission, however, refers to cases in the Inter-American Human Rights system to understand this area of the law. The American Convention does not have an equivalent of the African Charter's Article 21 on the Right to Natural Resources. It therefore reads the right to natural resources into the right to property (Article 21 of the American Convention), and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property. The "test" in both cases makes for a much higher threshold when potential spoliation or development of the land is affecting indigenous land.

257. In the *Saramaka* case and Inter-American case law, an issue that flows from the IActHR assertion that the members of the Saramaka people have a right to use and enjoy their territory in accordance with their traditions and customs is the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources. In the *Saramaka* case both the State and the members of the Saramaka people claim a right to these natural resources. The Saramakas claim that their right to use and enjoy all such natural resources is a necessary condition for the enjoyment of their right to property under Article 21 of the Convention. The State argued that all rights to land, particularly its subsoil natural resources, are vested in the State, which it can freely dispose of these resources through concessions to third parties.

258. The IActHR addressed this complex issue in the following order: first, the right of the members of the Saramaka people to use and enjoy the natural resources that lie on and within their traditionally owned territory; second, the State's grant of concessions for the exploration and extraction of natural resources, including subsoil resources found within Saramaka territory; and finally, the fulfilment of international law guarantees regarding the exploration extraction concessions already issued by the State.

259. First, the IActHR analysed whether and to what extent the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory. The State did not contest that the Saramakas have traditionally used and occupied certain lands for centuries, or that the Saramakas have an "interest" in the territory they have traditionally used in accordance with their customs. The controversy was the nature and scope of the said interest. In accordance with Suriname's legal and constitutional framework, the Saramakas do not have property rights *per se*, but rather merely a privilege or permission to use and occupy the land in question. According to Article 41 of the Constitution of Suriname, and Article 2 of its 1986 Mining Decree, ownership rights of all natural resources are vested in the State. For this reason, the State claimed to have an inalienable right to the exploration and exploitation of those resources. On the other hand, the customary laws of the Saramaka people give them a right over all natural resources within its traditional territory.

260. The IActHR held that the cultural and economic survival of indigenous and tribal peoples and their members depends on their access and use of the natural resources in their territory that are related to their culture and are found therein, and that Article 21 of the Inter-American Convention protects their right to such natural resources. The Court further said that in accordance with their previous jurisprudence as stated in the *Yakye Axa* and *Sawhoyamaya* cases, members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same



reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake;<sup>197</sup> hence, the Court opined, the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. It said that the aim and purpose of special measures required on behalf of members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by states.

261. But the Court further said that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 (of the American Convention) are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.<sup>198</sup>

262. In the *Saramaka* case, the Court had to determine which natural resources found on and within the *Saramaka* people's territory are essential for the survival of their way of life, and are thus protected under Article 21 of the Convention. This has direct relevance to the matter in front of the African Commission, given the ruby mining concessions which were taking place on lands, both ancestral and adjacent to *Endorois* ancestral land, and which the Complainants allege poisoned the only remaining water source to which the *Endorois* had access.

263. The African Commission notes the opinion of the IActHR in the *Saramaka* case as regards the issue of permissible limitations. The State of Suriname had argued that, should the Court recognise a right of the members of the *Saramaka* people to the natural resources found within traditionally owned lands, this right must be limited to those resources traditionally used for their subsistence, cultural and religious activities. According to the State, the alleged land rights of the *Saramakas* would not include any interests on forests or minerals beyond what the tribe traditionally possesses and uses for subsistence (agriculture, hunting, fishing etc), and the religious and cultural needs of its people.

264. The Court opined that while it is true that all exploration and extraction activity in the *Saramaka* territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the *Saramakas*, it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within *Saramaka* territory. The Court observed that this natural resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the *Saramaka* community and, consequently, their members. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the *Saramakas*.

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<sup>197</sup> See case of the *Indigenous Community Yakye Axa, and the Case of the Indigenous Sawhoyamaya Community*.

<sup>198</sup> *Ibid.*

265. Nevertheless, the Court said that protection of the right to property under Article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. The Court also recognised the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival but that these property rights, like many other rights recognised in the Convention, are subject to certain limitations and restrictions. In this sense, Article 21 of the Convention states that the “law may subordinate [the] use and enjoyment [of property] to the interest of society.” *But the Court also said that it had previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.*<sup>199</sup>

266. The Saramaka case is analogous to the instant case with respect to ruby mining. The IActHR analysed whether gold-mining concessions within traditional Saramaka territory have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka community. According to the evidence submitted before the Court, the Saramaka community, traditionally, did not use gold as part of their cultural identity or economic system. Despite possible individual exceptions, the Saramaka community do not identify themselves with gold nor have demonstrated a particular relationship with this natural resource, other than claiming a general right to “own everything, from the very top of the trees to the very deepest place that you could go under the ground.” Nevertheless, the Court stated that, because any gold mining activity within Saramaka territory will necessarily affect other natural resources necessary for the survival of the Saramakas, such as waterways, the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. The same analysis would apply regarding concessions in the instant case of the Endorois.

267. In the instant case of the Endorois, the Respondent State has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community. The African Commission is aware that the Endorois do not have an attachment to ruby. Nevertheless, it is instructive to note that the African Commission decided in *The Ogoni case* that the right to natural resources contained within their traditional lands vested in the indigenous people. This decision made clear that a people inhabiting a specific region within a state can claim the protection of Article 21.<sup>200</sup> Article 14 of the African Charter indicates that the two-pronged test of ‘in the interest

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<sup>199</sup> See case of the Indigenous Yakye Axa Community, paras. 144-145 citing (*mutatis mutandi*) Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 96; Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 127, and Case of Iocher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. para. 155. See also, Case of the Indigenous Sawhoyamaya Community, at para. 137.

<sup>200</sup> The Ogoni Case (2001), paras 56-58.

of public need or in the general interest of the community' and 'in accordance with appropriate laws' should be satisfied.

268. As far as the African Commission is aware, that has not been done by the Respondent State. The African Commission is of the view the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State. Article 21(2) also concerns the obligations of a State Party to the African Charter in cases of a violation by spoliation, through provision for restitution and compensation. *The Endorois have never received adequate compensation or restitution of their land. Accordingly, the Respondent State is found to have violated Article 21 of the Charter.*

### **Alleged Violation of Article 22**

269. The Complainants allege that the Endorois' right to development have been violated as a result of the Respondent State's creation of a Game Reserve and the Respondent State's failure to adequately involve the Endorois in the development process.

270. In rebutting the Complainants' allegations, the Respondent State argues that the task of communities within a participatory democracy is to contribute to the well-being of society at large and not only to care selfishly for one's own community at the risk of others. It argues that the Baringo and Koibatek Country Councils are not only representing the Endorois, but other clans of the Tugen tribe, of which the Endorois are only a clan. However, to avoid the temptation of one community domineering the other, the Kenyan political system embraces the principle of a participatory model of community through regular competitive election for representatives in those councils. It states that elections are by adult suffrage and are free and fair.

271. The Respondent State also submits it has instituted an ambitious programme for universal free primary education and an agricultural recovery programme which is aimed at increasing the household incomes of the rural poor, including the Endorois; and initiated programmes for the equitable distribution of budgetary resources through the Constituency Development Fund, Constituency Bursary Funds, Constituency Aids Committees and District Roads Board.

272. It adds that for a long time, tourism in Kenya has been on the decline. This, it argues, has been occasioned primarily by the ethnic disturbance in the Coast and the Rift Valley provinces which are the major tourist circuits in Kenya, of which the complainants land falls and therefore it is expected that the Country Councils of Baringo and Koibatek were affected by the economic down turn.

273. Further rebutting the allegations of the Complainants, the Respondent State argues that the Complainants state in paragraph 239 of their Merits brief that due to lack of access to the salts licks and their usual pasture, their cattle died in large numbers, thereby making them unable to pay their taxes and that, consequently, the government took away more cattle in tax; and that they were also unable to pay for primary and secondary education for their children is utterly erroneous as tax is charged on income. According to the Respondent State it argues that if the Endorois were not able to raise income which amounts to the taxable brackets from their animal husbandry, they were obviously not

taxed. The Respondent State adds that this allegation is false and intended to portray the Government in bad light.

274. The Respondent State argues that the Complainants allege that the consultations that took place were not in 'good faith' or with the objective of achieving agreement or consent, and furthermore that the Respondent State failed to honour the promises made to the Endorois community with respect to revenue sharing from the Game Reserve, having a certain percentage of jobs, relocation to fertile land and compensation. The Respondent State accuses the Complainants of attempting to mislead the African Commission because the County Council collects all the revenues in the case of Game Reserves and such revenues are ploughed back to the communities within the jurisdictions of the County Council through development projects carried out by the County Council.

275. Responding to the allegation that the Game Reserve made it particularly difficult for the Endorois to access basic herbal medicine necessary for maintaining a healthy life, the Respondent State argues that the prime purpose of gazetting the National Reserve is conservation. Also responding to the claim that the Respondent State has granted several mining and logging concessions to third parties, and from which the Endorois have not benefited, the Respondent State asserts that the community has been well informed of those prospecting for minerals in the area. It further states that the community's mining committee had entered into an agreement with the Kenyan company prospecting for minerals, implying that the Endorois are fully involved in all community decisions.

276. The Respondent State also argues that the community is represented in the Country Council by its elected councillors, therefore presenting the community the opportunity to always be represented in the forum where decisions are made pertaining to development. The Respondent State argues that all the decisions complained about have had to be decided upon by a full council meeting.

277. The African Commission is of the view that the right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.<sup>201</sup>

278. In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to

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<sup>201</sup>Arjun Sengupta, "Development Cooperation and the Right to Development," Francois-Xavier Bagnoud Centre Working Paper No. 12, (2003), available at [www.hsph.harvard.edu/fxbcenter/working\\_papers.htm](http://www.hsph.harvard.edu/fxbcenter/working_papers.htm). See also U.N. Declaration on the Right to Development, U.N. GAOR, 41<sup>st</sup> Sess., Doc. [A/RES/41/128](http://www.unhcr.org/refugees/ref/4/RES/41/128.html) (1986), Article 2.3, which refers to "active, free and meaningful participation in development."

choose where to live. He states "... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available". Freedom of choice must be present as a part of the right to development.<sup>202</sup>

279. The Endorois believe that they had no choice but to leave the Lake and when some of them tried to reoccupy their former land and houses they were met with violence and forced relocations. The Complainants argue this lack of choice directly contradicts the guarantees of the right to development. The African Commission also notes a Report produced for the UN Working Group on Indigenous Populations requiring that "indigenous peoples are not coerced, pressured or intimidated in their choices of development."<sup>203</sup> Had the Respondent State allowed conditions to facilitate the right to development as in the African Charter, the development of the Game Reserve would have increased the capabilities of the Endorois, as they would have had a possibility to benefit from the Game Reserve. However, the forced evictions eliminated any choice as to where they would live.

280. The African Commission notes the Respondent State's submissions that the community is well represented in the decision making structure, but this is disputed by the Complainants. In paragraph 27 of the Complainants Merits brief, they allege that the Endorois have no say in the management of their ancestral land. The EWC, the representative body of the Endorois community, have been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. The Complainants further allege that the failure to register the EWC has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent 'on behalf' of the community.

281. The African Commission notes that its own standards state that a Government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.<sup>204</sup> The African Commission agrees with the Complainants that the consultations that the Respondent State did undertake with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending

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<sup>202</sup> Arjun Sengupta, "The Right to Development as a Human Right," Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), page 8, available at [http://www.hsph.harvard.edu/fxbcenter/working\\_papers.htm](http://www.hsph.harvard.edu/fxbcenter/working_papers.htm) 2000.

<sup>203</sup> Antoanella-Iulia Motoc and the Tebtebba Foundation, Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), para. 14 (a).

<sup>204</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Twenty-eighth session, 2003). See also ILO Convention 169 which states: "Consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve.

282. Furthermore, the community representatives were in an unequal bargaining position, an accusation not denied or argued by the Respondent State, being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community. It also agrees with the Complainants that the inadequacy of the consultation undertaken by the Respondent State is underscored by Endorois' actions after the creation of the Game Reserve. The Endorois believed, and continued to believe even after their eviction, that the Game Reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry on to their land. In failing to understand their permanent eviction, many families did not leave the location until 1986.

283. The African Commission wishes to draw the attention of the Respondent State that Article 2(3) of the UN Declaration on Development notes that the right to development includes "active, free and meaningful participation in development".<sup>205</sup> The result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan Authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.

284. The case of the Yakye Axa is instructive. The Inter-American Court found that the members of the Yakye Axa community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that were the subject matter of proceedings in front of the Court as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim.

285. The IActHR noted that, according to statements from members of the Yakye Axa community during the public hearing, the members of that community might have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

286. The precariousness of the Endorois' post-dispossession settlement has had similar effects. No collective land of equal value was ever accorded (thus failing the test of 'in accordance with the law', as the law requires adequate compensation). The Endorois were

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<sup>205</sup> U.N. Declaration on the Right to Development, U.N. GAOR, 41<sup>st</sup> Sess., Doc. [A/RES/41/128](#) (1986), Article 2.3. (hereinafter Declaration on Development).

relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area's medicinal salt licks or traditional water sources. Few Endorois got individual titles in the Mochongoi Forest, though the majority live on the arid land on the outskirts of the Reserve.<sup>206</sup>

287. In the case of the Yakye Axa community, the Court established that the State did not guarantee the right of the members of the Yakye Axa community to communal property. The Court deemed that this had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.

288. In the instant Communication in front of the African Commission, video evidence from the Complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.<sup>207</sup> The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects.

289. Closely allied with the right to development is the issue of participation. The IActHR has stated that in ensuring the effective participation of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.

290. In the instant Communication, even though the Respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the Respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The Respondent State did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. The African Commission agrees that the Complainants had a legitimate expectation that even

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<sup>206</sup> See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16. In these documents the arguments is made that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, the Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.

<sup>207</sup> See, for example, the affidavit of Richard Yegon, one of the Elders of the Endorois community.

after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes – the reason, in fact why they are in front of the African Commission.

291. Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

292. From the oral testimony and even the written brief submitted by the Complainants, the African Commission is informed that the Endorois representatives who represented the community in discussions with the Respondent State were illiterates, impairing their ability to understand the documents produced by the Respondent State. The Respondent State did not contest that statement. The African Commission agrees with the Complainants that the Respondent State did not ensure that the Endorois were accurately informed of the nature and consequences of the process, a minimum requirement set out by the Inter-American Commission in the *Dann* case.<sup>208</sup>

293. In this sense, it is important to note that the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People observed that: “[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.”<sup>209</sup> Consequently, the U.N. Special Rapporteur determined that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects.”<sup>210</sup>

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<sup>208</sup> In *Mary and Carrie Dann v. USA*, the IACmHR noted that convening meetings with the Community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation. To have a process of consent that is fully informed “requires at a minimum that *all* of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.” *Mary and Carrie Dann vs. USA* (2002).

<sup>210</sup> The UNCERD has observed that “[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought”. Cf. UNCERD, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty Second Session, 2003)*, U.N. Doc. CERD/C/62/CO/2, 2 June 2003, para. 16.



294. In relation to benefit sharing, the IActHR in the Saramaka case said that benefit sharing is vital both in relation to the right to development and by extension the right to own property. The right to development will be violated when the development in question decreases the well-being of the community. The African Commission similarly notes that the concept of benefit-sharing also serves as an important indicator of compliance for property rights; failure to duly compensate (even if the other criteria of legitimate aim and proportionality are satisfied) result in a violation of the right to property.

295. The African Commission further notes that in the 1990 'African Charter on Popular Participation in Development and Transformation' benefit sharing is key to the development process. In the present context of the Endorois, the right to obtain "just compensation" in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

296. In this sense, the Committee on the Elimination of Racial Discrimination has recommended not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories but also "that the equitable sharing of benefits to be derived from such exploitation be ensured." In the instant case, the Respondent State should ensure mutually acceptable benefit sharing. In this context, pursuant to the spirit of the African Charter benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community.

297. The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained. It is also convinced that they have faced substantive losses - the actual loss in well-being and the denial of benefits accruing from the Game Reserve. Furthermore, the Endorois have faced a significant loss in choice since their eviction from the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the Game Reserve.

298. The African Commission is of the view that the Respondent State bears the burden for creating conditions favourable to a people's development.<sup>211</sup> It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that

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<sup>211</sup> Declaration on the Right to Development, Article 3.

the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. *It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.*

### **Recommendations**

In view of the above, the African Commission finds that the Respondent State is in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter. The African Commission recommends that the Respondent State:

- (a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- (c) Pay adequate compensation to the community for all the loss suffered.
- (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- (e) Grant registration to the Endorois Welfare Committee.
- (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.
- (g) Report on the implementation of these recommendations within three months from the date of notification.

2. The African Commission avails its good offices to assist the parties in the implementation of these recommendations.

**Done in Banjul, The Gambia at the 46<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 11 – 25 November 2009.**