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

I. ORGANISATION OF WORK

A. Period covered by the Report

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

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

B. Status of ratification

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

C. Sessions and Agenda

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

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

D. Composition and participation

4. In accordance with Rule 17 of its Rules of Procedure, the African Commission during the 34th Ordinary Session, elected its Bureau to serve for a term of two years. Commissioner Salamata Sawadogo was elected Chairperson and Commissioner Yassir Sid Ahmed El Hassan was elected Vice-Chairperson.

5. The following Members of the African Commission participated in the deliberations of the 34th and 35th Ordinary Sessions -:
   - Commissioner Salimata Sawadogo (Chairperson);
   - Commissioner Yassir Sid Ahmed El Hassan (Vice-Chairperson);
   - Commissioner Mohammed Abdulahi Ould Babana;
   - Commissioner Andrew R Chigovera;
   - Commissioner Vera M Chirwa;
   - Commissioner E.V.O. Dankwa;
   - Commissioner Angela Melo ;
   - Commissioner Jainaba Johm;
   - Commissioner Sanji Mmasenono Monageng;
   - Commissioner Bahame Tom Mukirya Nyanduga;
   - Commissioner M. Kamel Rezag-Bara.

6. During the 34th Ordinary Session the following three new members of the African Commission, elected during the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union held in Maputo, Mozambique in July 2003, took their oath of office-:

- Mrs Sanji Mmasenono Monageng
- Mr. Bahame Tom Mukirya Nyanduga
- Mr. Mohammed Abdulahi Ould Babana

7. Representatives from the following twenty six (26) Member States participated in the deliberations of the 34th Ordinary Session and made statements, namely, -:

   Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Congo, Cote D'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, The Gambia, Guinea, Guinea Bissau, Kenya, Libya, Mali, Rwanda, Senegal Sudan, South Africa, Tunisia and Zimbabwe

8. Representatives from the following twenty six (26) Member States participated in the deliberations of the 35th Ordinary Session and made statements -:

   Algeria, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo, Cote D'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Guinea Bissau, Kenya, Kingdom Lesotho, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Senegal, Republic of South Africa, Sudan, Tanzania, Tunisia and Zimbabwe.

9. Representatives from UN Specialised Agencies, National Human Rights Institutions and Inter-Governmental and Non-Governmental Organisations (NGOs) also participated in the deliberations of the two Ordinary Sessions.

E. Adoption of the Activity Report

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

II. ACTIVITIES OF THE AFRICAN COMMISSION

A. Retreat of Members of the African Commission

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

12. Issues discussed at the Retreat included the consideration of States Reports, the handling of communications, the relationship between the African Commission and the African Union, and the relationship between the African Commission with other bodies of the African Human Rights System and the initiatives of the African Union.

13. At the 34th Ordinary Session held in November 2003 in Banjul, The Gambia, the African Commission discussed the Report of the Retreat and adopted it. At its 35th Ordinary Session held in May to June 2004 in Banjul, The Gambia, Members of the African Commission continued reflecting on how to implement the recommendations suggested in the Report.

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

14. The Executive Council of the African Union in its Decision on the 10th Anniversary of the Rwandan Genocide – Decision 16(II), decided that the Commission of the African Union should

commemorate the 10th Anniversary of the Rwandan Genocide, being 7th April 2004 as a day of remembrance of the victims of the genocide in Rwanda and reaffirmation of Africa's resolve to prevent and fight genocide on the continent.

15. On 7th April 2004, the Secretariat of the African Commission commemorated this event in Banjul, The Gambia at the Kairaba Hotel. Members of the Diplomatic Corps, Representatives from the UN Specialised Agencies based in the Gambia, Civil Society NGOs and the public were invited and participated in this event. A minute of silence was observed in remembrance of the victims of the genocide and a panel discussion held to discuss and reflect on the events that happened 10 years ago in Rwanda with a resolve never to let it happen again.

C. Consideration of Initial/Periodic Reports of State Parties

16. In accordance with the provisions of Article 62 of the African Charter on Human and Peoples' Rights, each State Party undertakes to present every two years from the date of entry into force of the African Charter, a report on legislative and other measures taken with a view to giving effect to the rights and freedoms guaranteed under the African Charter.

17. The status of submission of Initial and Periodic reports by States Parties is contained in **Annex I** of this report.

18. At its 34th Ordinary Session, the African Commission examined the following reports -:
    - Initial Report of the Democratic Republic of Congo (combining all the overdue reports);
    - Periodic Report of the Republic of Senegal (combining all the overdue reports).

19. At its 35th Ordinary Session, the African Commission examined the following reports -:
    - Initial Report of the Republic of Niger (combining all the overdue reports);
    - Periodic Report of the Republic of Sudan;
    - Periodic Report of Burkina Faso.

20. The African Commission expressed its satisfaction with the dialogue that took place between itself and the delegations from the Democratic Republic of Congo, the Republic of Senegal, Republic of Niger, Republic of Sudan and Burkina Faso and encouraged the States Parties to continue their efforts in fulfilling their obligations under the African Charter.

21. The African Commission adopted Concluding Observations on the five (5) State Reports which will be published together with the reports.

22. The African Commission strongly appeals to those States Parties that have not yet submitted their initial reports or have overdue periodic reports to submit them as soon as possible, and where applicable, compile all the overdue reports into one report.

D. Promotional Activities

23. All the Members of the African Commission undertook promotional activities during the inter-sessions. The activities could be classified as follows -:
    - Promotional missions were undertaken to the following Member States, Democratic Republic of Congo, Rwanda, Burundi, Sierra Leone and Mali;
    - Seminars and Workshops;
    - Conferences, Lectures and Training;
    - Sensitisation on the ratification of the Protocols on the African Court and on the Rights on Women Africa;

- Thematic issues such as freedom of expression, prevention and prohibition of torture, situation of refugees and displaced persons, prisons and conditions of detention in Africa, situation of women in Africa and situation of indigenous populations/communities in Africa

24. Inter-session activity reports of the Commissioners can be found on the website of the African Commission.

25. The African Commission at its 34th and 35th Ordinary Sessions adopted the following Mission Reports -:

- *Reports of Promotional Missions undertaken to the following Member States-:*

  Cote D'Ivoire – 2nd to 4th April 2001
  Seychelles – 2nd to 6th July 2001
  Djibouti – 9th to 11th September 2002
  Niger – 10th to 17th March 2002
  Libya – 17th to 23rd March 2002

- *Report of the Fact-finding Mission to -:*

  Zimbabwe – 24th to 28th June 2002

  The Executive Summary of the Report of the Fact-finding Mission is contained in **Annex II** of this Report.

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

  Benin – 24th January to 5th February 2003

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

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

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

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

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

28. Thus during the period under review, the Special Rapporteur, Commissioner Vera Chirwa was constrained in terms of the activities she could undertake because of the poor financial situation of the African Commission. The following are the activities she was able to undertake -:
    - Drew up a strategic plan for the next three years and prioritised activities to be undertaken within the next twelve months;
    - Undertook visits to prisons and places of detention in Ethiopia from 15th to 29th March 2004 and in Lilongwe, Malawi;
    - Followed up on the implementation of the recommendations made during her visit to the prisons in Uganda in March 2002. Uganda indicated the difficulties faced in implementing some of the recommendations and requested the African Commission to assist it in implementing them.

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

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

30. The Special Rapporteur undertook a Mission to Sao Tome and Principe from 15th to 19th March 2004. In addition the Special Rapporteur undertook the following activities -:
    - Mobilised funds, established contacts with potential donors with a view to financing the activities of the Special Rapporteur;
    - Participated in meetings on strategies for the speedy ratification of the Protocol on the Rights of Women in Africa;

31. The Special Rapporteur carried out the following activities geared towards its speedy ratification by Member States following its adoption by the Assembly of Heads of State and Government in July 2003 and sent letters to -:
    - The Chairperson of the Committee of Permanent Representatives in Addis Ababa to sensitise her and her colleagues with a view to seeking the speedy ratification of the Protocol in their respective countries;
    - The Current Chairperson of the African Union (AU), H.E. Mr. Joaquim Chissano requesting him to encourage Member States of the AU to ratify the Protocol;
    - The Parliament, the Special Commission in charge of Social Affairs, the Commission on Legality and Human Rights, the Minister of Women's Affairs and Social Welfare of Mozambique and the Ministry of Foreign Affairs of Mozambique requesting them to start of the process of ratifying the Protocol;
    - All Members of the African Commission requesting them to encourage their governments to ratify the Protocol;
    - Headquarters of organisations and regional economic communities such as COMESA, UEMOA, IGAD and SADC requesting them to encourage their Member States to ratify the Protocol.

(c) Special Mechanisms of the African Commission

Focal Persons of the African Commission

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

33. The Bureau of the African Commission considered the Report submitted by Commissioner Pityana on the review of the mechanism of the Special Rapporteur and drafted Guidelines for its

review. At its 35th Ordinary Session, the African Commission considered the Guidelines drafted by the Bureau of the African Commission and adopted them.

34. The African Commission nominated the following Members of the African Commission as Special Rapporteurs -:
    - Commissioner Bahame Tom Mukirya Nyanduga - Special Rapporteur on Refugees and Internally Displaced Persons in Africa;
    - Commissioner Jainaba Johm – Special Rapporteur on Human Rights Defenders in Africa.

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

(d) Seminars and Conferences held

NGO Forum

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

All Africa Conference on Freedom of Expression

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

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

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

American Commission on Human Rights and international and African human rights organisations.

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

39. In keeping with its decision made at the 33rd Ordinary Session, the African Commission in collaboration with the Association for the Prevention of Torture (APT) decided to launch and publicise the Robben Island Guidelines in a parallel event during the African Union Assembly of Heads of State and Government in July 2003 in Maputo, Mozambique. The launch of the Robben Island Guidelines took place on 11th July 2003 in Maputo, Mozambique.

40. Following the nomination of Commissioner Sanji Mmasenono Monageng as the Focal Person for the implementation of the Robben Island Guidelines, the African Commission in collaboration with APT held a Consultative Meeting on the implementation of the Robben Island Guidelines. At the invitation of the government of Burkina Faso, the Consultative Meeting took place in Ouagadougou, Burkina Faso, from 8th to 9th December 2003.

Indigenous Populations/Communities in Africa

41. At the 34th Ordinary Session of the African Commission, the Working Group of Experts on Indigenous Populations/Communities in Africa presented its report to the African Commission in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' that was adopted by the African Commission at its 28th Ordinary Session held in Cotonou, Benin, in October 2000.

42. The Report of the Working Group was adopted by a resolution which further established a Working Group of Experts for an initial term of 2 years with the mandate to promote and protect the rights of indigenous populations/communities in Africa.

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

43. At its 34th Ordinary Session, the African Commission discussed and adopted the Modalities for the Operationalisation of the Memorandum of Understanding (MOU) between the African Commission and the UNHCR **(See Annex IV)**.

44. Following his appointment as the Focal Person charged with the responsibility to ensure the implementation of the MoU, Commissioner Bahame Tom Mukirya Nyanduga met with officials from UNHCR Regional Liaison Office in Addis Ababa, Ethiopia from 17th to 18th May 2004. The Meeting developed a more detailed plan of future activities to be undertaken based on the areas of interaction laid out in the modalities of operationalisation of the MoU.

Seminars and Conferences to be organised

45. In accordance with its Strategic Plan of 2003 to 2006 the African Commission resolved to organise a number of Seminars and Conferences as part of its promotional activities[1].

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

46. The Seminar on *Economic, Social and Cultural Rights* scheduled to take place from 20th to 24th September 2003 in Cairo, Egypt did not take place due to lack of funding. Funding for the Seminar has been secured and arrangements are underway to hold the Seminar **in September 2004**.

47. On the whole, the African Commission has been unable to organise all the Seminars that were planned and hereby seeks the support of Member States, International Organisations and NGOs in undertaking this activity.

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

48. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government on 11th July 2003 in Maputo, Mozambique.

49. While twenty nine (29) Member States have signed the Protocol, only one (1) Member State – Comoros, has ratified the Protocol and deposited its instruments of ratification with the Commission of the African Union. The African Commission urges Member States to ratify the said Protocol and calls upon human rights organisations to encourage States Parties to quickly ratify this important instrument in order for it to come into force.

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

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

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

G. Adoption of Resolutions

52. At its 34th Ordinary Session, the African Commission adopted the following Resolutions -:
    - Resolution on the adoption of the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities;
    - Resolution on the Renewal of the Term of the Special Rapporteur on the Rights of Women in Africa;
    - Resolution on the Adoption of the "Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa".

53. At its 35th Ordinary Session, the African Commission adopted the following Resolutions -:
    - Resolution on the Protection of Human Rights Defenders in Africa;
    - Resolution on the situation of human rights in Cote D'Ivoire;
    - Resolution on the situation of human rights in Darfur, Sudan;
    - Resolution on the situation of human rights in Nigeria;
    - Resolution on the Situation of Women and Children in Africa.

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

54. At its 34th Ordinary Session, the African Commission adopted the following documents[2] -:
    - The Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa;
    - The Ouagadougou Plan of Action and Declaration on Accelerating Penal Reform in Africa.

H. Relations with observers

55. At its 34th and 35th Ordinary Sessions the African Commission deliberated further on its co-operation with National Human Rights Institutions and NGOs. The matter remains on the Agenda of the African Commission.

56. At its 35th Ordinary Session, the African Commission granted Affiliate Status to three (3) National Human Rights Institutions[3]. This brings the number of National Human Rights Institutions to which the African Commission has granted affiliate status to fifteen (15).

57. The African Commission reiterated its appeal to States Parties to create National Human Rights Institutions and strengthen the capacities of those already in existence.

58. At its 34th and 35th Ordinary Sessions, the African Commission granted Observer Status to thirteen (13) NGOs[4].

I. Protection Activities

59. At its 34th Ordinary Session, the African Commission considered thirty two (32) communications and was seized of eleven (11) new communications. It delivered decisions on the merits on three (3) communications, declared two (2) communications inadmissible and deferred further consideration on twenty seven (27) communications to the 35th Ordinary Session.

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

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

J. Administrative and Financial Matters

a) Administrative Matters

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

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

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

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

b) Financial matters

A.U Budget

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

Extra-Budgetary Funds

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

a) The Danish Institute for Human Rights (DIHR)

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

b) Swedish International Development Agency (SIDA)

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

c) The Government of The Netherlands

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

d) Droits et Démocratie

67. Droits et Démocratie has given the African Commission a grant of fifty two thousand, five hundred and twenty one Canadian dollars and fifty cents (52,521.50) for specific activities, namely -:
    - The campaign to ratify the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights;
    - The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and
    - The Meeting on democracy and elections in Africa.

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

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

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

LIST OF ANNEXES

Annex I

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

Annex II

Executive Summary of the Report of the Fact-finding Mission to Zimbabwe[5] *24th to 28th June 2002*

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

INTRODUCTION

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

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

FINDINGS

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

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

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

RECOMMENDATIONS

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

On National Dialogue and Reconciliation

Further to the observations about the breakdown in trust between government and some civil society organisations especially those engaged in human rights advocacy, and noting the fact that Zimbabwe is a divided society, and noting further, however, that there is insignificant fundamental policy difference in relation to issues like land and national identity, Zimbabwe needs assistance to withdraw from the precipice. The country is in need of mediators and reconcilers who are dedicated to promoting dialogue

and better understanding. Religious organisations are best placed to serve this function and the media needs to be freed from the shackles of control to voice opinions and reflect societal beliefs freely.

Creating an Environment Conducive to Democracy and Human Rights

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

Independent National Institutions

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

The Independence of the Judiciary

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

A Professional Police Service

Every effort must be made to avoid any further politicisation of the police service. The police service must attract all Zimbabweans from whatever political persuasion or none to give service to the country with pride. The police should never be at the service of any political party but must at all times seek to abide by the values of the Constitution and enforce the law without any fear or favour. Recruitment to the service, conditions of service and in-service training must ensure the highest standards of professionalism in the service. Equally, there should be an independent mechanism for receiving complaints about police conduct. Activities of units within the ZRP like the law and order unit which seems to operate under political instructions and without accountability to the ZRP command structures should be disbanded. There were also reports that elements of the CIO were engaged in activities contrary to international practice of intelligence organisations. These should be brought under control. The activities of the youth militia trained in the youth camps have been brought to our attention. Reports suggest that these youth serve as party militia engaged in political violence. The African Commission proposes that these youth camps be closed down and training centres be established under the ordinary education and employment system of the country. The African Commission commends for study and implementation the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (otherwise known as The Robben Island Guidelines) adopted by the African Commission at its 32nd Ordinary Session held in Banjul, The Gambia in October 2002.

The Media

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

Reporting Obligations to the African Commission

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

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

Introduction

1.0 The Government of Zimbabwe is a member of the AfricanrUnion and is a State Party to the African Charter *on* Human and People's Rights in terms of which the African Commission *on* Human and Peoples Rights (the Commission) is constituted. The Government of Zimbabwe is committed to the implementation of its obligations under the African Charter *on* Human and Peoples Rights. It fully recognizes, respects and supports the mandate of the Commission to promote and protect the enjoyment of human rights by the people of Africa. The Government of Zimbabwe therefore commends the African Commission for sending its Fact Finding Mission to Zimbabwe as this showed concern over the situation in our country and commitment to discharge its mandate.

2.0 Backe:round to the mission's visit

2.1 Since the year 2000, up to the present, allegations of violations of human rights by the Government of Zimbabwe are being peddled in various ways, including print and electronic media and at various international, regional and domestic fora. The level and magnitude of the Reports of the alleged violations however intensified during the period between February 2000 and June 2002. During this period the referendum *on* the draft Constitution took place, followed by the Parliamentary elections of June 2000 and the Presid~ntial elections of March 2002. More importantly, the land reform programme was in progress and had reached its peak around the same time.

2.2 The request to send a Fact Finding Mission was premised *on* allegations of violations of human rights received by the Commission. The violations were said to be widespread, and committed at a time when, according to the Report of the Fact Finding Mission, "passions were inflamed"[1]. In light of these Reports, the Commission approached the Government through the Ministries of Foreign Affairs and Justice and was granted approval to send a fact-finding mission to Zimbabwe.

2.3 It must be noted that prior to the request to send a fact finding mission, no communication had been formally made by the Commission to the Government of Zimbabwe regarding the alleged human rights situation, and no specific information regarding the nature of the violations were made before the Mission's arrival in the country. In this situation, the Government of Zimbabwe was confronted with two problems, namely that there had been nondisclosure on the part of the Commission as regards the source of the allegations and secondly there were no specific details regarding the nature of the violations allegedly perpetrated directly, or indirectly, by the Government of Zimbabwe. Notwithstanding the lack of such information, the Government of Zimbabwe, in a spirit of openness and oneness with the Commission, conceded to the Commission's request, as this would enable the Commission to assess the situation on the ground for itself.

2.4 The Government of Zimbabwe believes that the Non governmental organisation community operating in Zimbabwe, in collaboration with their counterparts outside the borders of the country, made the allegations. This presumption was confirmed by the identities of the persons and organizations the Fact Finding Mission specifically requested to meet during the 4 days the Mission met stakeholders, and also those whom the mission made its own arrangements to meet outside of the official programme.

2.5 It should be stated that the Government of Zimbabwe did express disquiet to the Mission over the limitation of their visit to Harare only as this was not representative enough of the situation and the population of Zimbabwe. Further, the Mission only had 4 days to search for the truth in Zimbabwe. Given the nature, seriousness and adverse implications of the allegations, four days for the Fact Finding Mission to conduct the necessary investigations were not adequate.

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

3.0 Time frame of mission's visit

3.1 The fact finding mission came to investigate allegations that had been highly publicized internationally. Considering the international image of Zimbabwe, one would have hoped that more time would have been dedicated to unraveling the human rights situation in the country. However, the mission only spent four working days conducting its investigations which were only confined to Harare. It should be stated that the Government of Zimbabwe did express disquiet to the Mission over the limitation of their visit to Harare only as this was not representative enough of the situation and the population of Zimbabwe. Further, the Mission only had 4 days to search for the truth in Zimbabwe. Given the nature, seriousness and adverse implications of the allegations, four days for the Fact Finding Mission to conduct the necessary investigations were not adequate.

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

4.0 The Mission's Prog!ramme

4.1 The Government of Zimbabwe had anticipated a nationwide investigative mission, in which a wide cross section of Zimbabwe's population, both rural and urban, would be met as the allegations were said to be widespread. In light of this anticipation, the Government of Zimbabwe had prepared a draft itinerary that included visits to rural areas, to farming areas as well as meeting the people of Harare. As indicated in the Fact Finding Mission's Report the Government of Zimbabwe, following requests from the public for audience with the fact finding mission, and in consultation with the Secretariat of the Commission, drew up the Mission's final itinerary. At the end of the day, however, the final programme belonged to the Commission, and the Government's role was merely being facilitatory. In fact, the Commission at times met stakeholders not included in the itinerary. As desired by the Mission, the visit was eventually confined to Harare.

4.2 The Fact Finding Mission met His Excellency the President of the Republic of Zimbabwe, (together with the Minister of Foreign Affairs), the Vice President of Zimbabwe, the Chief Justice of Zimbabwe (together with the Judge President), the Speaker of Parliament, the Commissioner of Police, the Commissioner of Prisons, the Ombudsman, the Attorney-General (for less than 15 minutes and the visit appeared to have been a courtesy call as the Mission kept on making reference to their next appointment), the Minister of State Information And Publicity, the Deputy Minister of Justice, Legal and Parliamentary Affairs, the Minister of Home Affairs together with the Minister of State Security. Even though there were allegations against the youth militia, the Fact Finding Mission declined our request that they meet the Minister responsible for the national youth training programme. The only Minister on the programme who was unable to meet the Fact Finding Mission due to prior commitment is the Minister of Land, Agriculture and Rural Resettlement. The Mission met a total of 16 non-governmental organisations and 8 human rights activists/defenders. It, in short, met 23 civic organizations compared to 15 government institutions. The Fact Finding Mission also met some of the non governmental organizations and human rights defenders outside the programme. However, the generality of the Zimbabwe population, the key persons whose rights were allegedly violated, were not seen and spoken to. The Mission, therefore, did not meet the wide spectrum of stakeholders to justify their visit and Report.

4.3 The Mission, due to limitations expressed in its Report, gave audience to representatives of persons against whom the violations were allegedly committed and these were mainly representatives of Non governmental organisations that made the initial Reports to the Commission. The Mission should have conducted a verification exercise and hence met the allegedly affected persons. Getting first hand information from them about what happened was critical. Meeting the representatives of the same institutions who made the report casts doubt on the integrity of the mission.

4.4 The Fact Finding Mission states in its Report that they saw persons who had been abused and these people were brought to them by members of the non governmental organisation community. However, according to their list of persons and organizations they interviewed annexed to the report they only saw one alleged victim of torture brought by Amani Trus!. It is actually on record that the mission only saw the ordinary citizen, Ephraim Chapwanya cited as a victim of torture whose interview is referred to in the Report and whose name is cited in the Annexure as having been brought by Amani Trust, a non governmental organisation.

4.5 The fact finding mission claims that it received documentary evidence of the alleged violations. However, the Mission did not have an opportunity to verify the authenticity of the video tapes that they received and the credibility of the witnesses who brought the video tapes and the other documentary evidence. It is an undisputed fact that videos can be stage managed and manipulated and the Mission should, therefore, have been concerned with seeing and hearing the persons' accounts of their ordeal so as to buttress the video tapes. This was not done.

5.0 Procedural irregularities

5.1 Zimbabwe is concerned with the procedure which the Commission adopted in conducting the fact finding mission and in the adoption of the report.

5.2 The Mission did not physically verify what they were told. Some of the statements which non governmental organisations made did not only lack substance but they were never brought to the attention of the Government of Zimbabwe for comment. There was no proper verification of the accuracy, or otherwise, of the evidence upon which the Fact Finding Mission based its report because the bulk of the people or organizations that the Mission met are the very persons or organizations that made the allegations in the first place.

5.3 In addition to oral statements that were made to the Commission in the absence of the Government of Zimbabwe, the report alleges that the Mission was furnished with documentary evidence of the violations. The report does not state what is precisely on the said documents. The report itself is a summary of what the Mission was told. The Government of Zimbabwe regards such information, being the basis of the Commission's Report, to be pertinent and, therefore, ought to have been made part of the Report. This position is founded on the internationally accepted rules of fact finding missions which prescribe that the State should have all information submitted for its comments. The Government of Zimbabwe states that to date the vital source of information and the documentary evidence received by the Fact Finding Mission2 have not been presented to the Government of Zimbabwe to enable it to comment on the veracity of the evidence. .

5.4 According to Rule 79 of the Rules of Procedure of the African Commission on Human and Peoples' Rights as provided in the African Charter on Human and Peoples' Rights, the report should only have been released to the public after the Assembly of Heads of State and Government had considered it. Until such time, the report remains a private document. However, the report on Zimbabwe was released to members of the non governmental organisations community in 2003. These organisations held discussions over the report in South Africa in or about October 2003, and there were press reports in the independent media in Zimbabwe over the same which the Government of Zimbabwe brought to the attention of the Commission. No remedial action was taken. Instead, the report was again released through the electronic media before the June 2004 Summit of Heads of States. It is immaterial how the report got out but it is the responsibility of the Commission to ensure that there are no leaks in its rank and file, and that the highest level of security for documents is maintained.

5.4 Further, we note that the Commission adopted the Fact Finding Mission at its 34th Ordinary Session and sought Zimbabwe's response after the adoption. The Fact Finding Mission saw the Head of State and Government representatives first before seeing other stakeholders. The Mission was able to seek comments from the stakeholders on the representations made by the Government. In light of this, the Mission should, therefore, have sought the Government's response before even adopting the Fact Finding Mission's Report. We are of the view that the rules of natural justice require that the Commission should have sought the comments of the Government of Zimbabwe before its adoption of the report. The adoption of the report before seeking the comments of the government of Zimbabwe means that the Commission was convinced on the contents thereof. Seeking the comments of the government of Zimbabwe after the adoption was therefore a mere formality and these comments are irrelevant to the Commission.

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

6.0 Land Question in Zimbabwe

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

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

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

6.2 Writing to the Prime Minister of Australia, Rt. Honourable Mr. J. Howard, President Obasanjo of Nigeria - a member of the *troika* had this to say on the matter of Land:
"In many of our previous meetings it has been admitted that the issue of land is at the core of the current crisis in Zimbabwe and that an appropriate solution to this problem would go a long way in bringing to early conclusion other associated issues. "

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

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

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

6.3 The land and the land reform programme in Zimbabwe is a socioeconomic and political imperative. It is an undisputed fact that the land issue was actually one of the primary reasons for the protracted war of liberation and that up to 1999, the unequal distribution of land had remained a serious concern, whose implications had a potential to de stabilize the post colonial Zimbabwe. Zimbabwe's economy is agriculturally based and, out of a total land area of 39 million hectares, 33.3 million is suitable for agriculture. Half of this land was, up to 1999 occupied by 6 000 white commercial farmers while 840 000 communal farmers (blacks) occupied the other half. The uneven distribution of land between the large scale commercial sector and the communal areas also extended to the suitability of land for agricultural purposes. The commercial farms were largely located in the high rainfall areas, found in regions I, 11 and III while the communal lands are concentrated in regions IV and V which are characterized by very poor soils and low rainfall patterns. Out of the land in the fertile regions, I, 11 and Ill, some belonged to absentee landlords and was either not being put to use at all or was being managed from abroad, some was under-utilised, and other prime agricultural land had been converted to safari hunting while the majority of the black people either had no land or were overcrowded on over-utilised and often barren rural land.

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

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

6.6 It is not correct that the issue of land redistribution is a problem today due primarily to the absence of good governance. The observations by the executive director of SAHRITS are, to all intents and purposes, factually incorrect.[4] It should be pointed out that, during the first ten years of independence, the Government of Zimbabwe was not able to acquire land enmasse to settle the people as the constitutional and legislative framework inhibited the quick acquisition of land for resettlement. The first inhibition was the provision in the Lancaster House Constitution of 1979. The Commission should be reminded that the Lancaster House negotiation nearly collapsed because of the land issue, with the liberation groups insisting on immediate resettlement of its people and the whites opting for protection of land rights. The Lancaster House negotiations were concluded with an agreement that the privileged land rights of the white population would be protected for 10 years and, during this period, Britain and the USA would provide funds for the acquisition of land by the incoming Government from the white farmers on a willing buyer willing seller basis. The programmes that were put in place during the period that extends from 1990 to 1999 were equally not able to place adequate land at the disposal of Government.
This was due particularly to lack of resources, as well as lack of suitable available land for acquisition as white farmers were offering land they had exhausted and had, therefore, become infertile and Britain, on the other hand, was unwilling to fund the exercise.

6.7 Accordingly, following unfulfilled promises by Britain and her allies to fund the acquisition of land for resettlement purposes, Zimbabwe embarked on the land reform programme in 2000. The cause for such a programme was not a desire on the part of ZANU (PF) to hold onto power.[5] The cause was, and remains, the correction of colonial imbalances in the ownership of land, and the advancement of economic rights to the people of Zimbabwe as a whole. This was done following demonstrations by both the land hungry rural peasants and war veterans who spontaneously occupied commercial farms throughout the country as far back as 1999. Such actions caused hue and cry both within and beyond our borders. These developments necessitated the amendment of our Constitution to provide for the compulsory acquisition of land, without compensation except for improvements. It is unfortunate that these provisions were found by some to be offensive.[6] Of concern is the fact that the Mission also considered the amendment to be offensive.[7] This constitutional provision was enacted in the Land Acquisition Amendment Act. We hasten to state that the constitutional amendment, and the accompanying legislation was not put in place to pave way for Government's acquisition of the white farmer's land, but to provide the legal environment within which Government equitably carried out land reform while at the same time obligating Britain to honour her previous undertakings. The amendment was also in conformity with Article 14 of the Charter regarding the allowable encroachments on the right to property. The acquisition was in the interest of the public and due and fair compensation was, and is, still being paid for improvements made on the land.

[3] Page 3 of Report paragraphs 4 to end.

6.8 Government acknowledges the role played by some few members of the white commercial farming community who supported the land reform programme and, in the process, showed willingness as well as commitment to working with Government for the betterment of the black Zimbabweans. However, the overall pursuit of this land reform programme was resisted by many quarters in and outside Zimbabwe, more particularly by the opposition MDC party, the majority of the members of the white commercial farmers, Non governmental organisations, the British Government, and their allies. They carried out a well-orchestrated campaign to disrupt the programme. They did everything in their power to demonise the Government of Zimbabwe.

Some of the British nobility in Britain and whites who migrated to such countries as Australia, New Zealand and South Africa were owners of some of the land acquired under the land reform programme. Some farmers pretended to collaborate with Government by offering for resettlement land that had already been acquired, others gave land that has always belonged to the State and which they illegally annexed to their farmland, while another category gave land that was not suitable for resettlement purposes. There were scuffles and acts of violence at the farms, there were evictions of settlers and counter evictions of the commercial farmers, disruption of production, destruction of property, there was loss of lives and injury to persons. This went on, notwithstanding Government's calls for peaceful coexistence. The enactment in 2001 of the Rural Land Occupiers (Protection from Eviction) Act, and the deployment of police to maintain peace, law and order at the farms were measures which Government took to keep the situation under control.

6.9 The land issue has put Zimbabwe on the international scene since the year 2000 and has had other adverse consequences against the Government of Zimbabwe, which include its suspension from the Commonwealth, from which it eventually pulled out, of smart sanctions and the imposition of travel bans against its leadership. The enactment of the Zimbabwe Democracy and Economic Recovery Bill by the United States Government is a direct response to the land reform programme. All these are pressures intended to bear on Zimbabwe, to bring about political and socio-economic instability and to force Zimbabwe to reverse the land reform programme. However, the approach has since changed and momentum has increased with the introduction of alleged human rights violations in order to bring about a regime change. Indeed, Mr. Blair of Britain has, as recently as this year, told the whole world that his Government was working with the MDC to effect regime change in Zimbabwe. When this statement is viewed in its proper context, it is not hard to see that:

[4] Fact Finding Mission's Report page 5 paragraph 2. It should be noted that throughout the Report the statements of the executive director of SAHRITS are used as the yardstick of assessing the situation in Zimbabwe, and constitute in many respects the mission's findings.

- Britain and her allies in the Western World withdrew the financial support which they were, in the past, giving to Government
- encouraged non-patriotic Zimbabweans to form themselves into Non Governmental Organisations particularly those dealing with human rights issues
- channeled all the funds to the mentioned organisations, and
- used them to demonise the Government of Zimbabwe both from within and from outside the country's borders - all in the name of regime change.

Statement of Law Society of Zimbabwe page 5 of Mission's
6 Report. Report page 3 para.3
7 ibid

7.0 Zimbabwe's General comments on the Report

7.1 We reiterate that four days of searching for the truth was totally inadequate and the Mission confined itself to Harare which was not representation of the views of the entire Zimbabwean population and therefore, not at all reflective of the prevailing situation in the country.

7.2 We reiterate further that the Mission's statement that they did not have sufficient resources to cover a wider spectrum of the people Zimbabwe than they did is not a justifiable excuse as Zimbabwe would have provided additional resources for the Commission's work.

7.3 The Fact Finding Mission's Report is in many respects lacking in specific detail and it is, therefore, not possible for the Government of Zimbabwe to comment on some of the issues that were raised. The Government of Zimbabwe concedes that there were problems in Zimbabwe, especially during the period 1999, to 2002. The Government of Zimbabwe regrets the loss of lives, the injury to persons and destruction of property that took place during this period. While some of the activities were spontaneous, some were manipulated and others were pre-arranged in order to give weight to the allegations of abuse. For instance in Chinhoyi, farm workers were manipulated by their employer to act as war veterans and made to loot their employers' property while aerial photographs were taken as they made away with the property. The events were reported by the British Broadcasting Corporation well before it was even known in Harare that such acts had taken place. The fact that when the alleged war veterans were "looting" the farms the British. Broadcasting Corporation was on the scene taking aerial photographs in a helicopter or small plane should not be regarded as a mere coincidence. When the farm workers were arrested, the white farmers whose property had been 'stolen', and who had made the reports paid bail for the employees. Their conduct in paying bail for "war veterans" who looted their property was contradictory, and raised eyebrows, and supports indications that the whole thing had been stage managed in order to discredit the land reform exercise and the Government of Zimbabwe.

7.4 The Government of Zimbabwe acknowledges the rights of the people to elect a government of their choice. The fact that ZANU (PF) has been the ruling party since the time that Zimbabwe attained her independence does not necessarily mean that with the emergence of the MDC there should have been a change of government. Change is achieved through an expression of will by the majority of the electorate. There was no such expression in favour of the MDC party by the Zimbabwean majority. Rather, the majority of the electorate showed that they wanted no change by voting for, and retaining a ZANU (PF) government. 8 Opposition political parties are formed with the object of forming a new government. However, such a government cannot be imposed on the people. It is the wish of every opposition leader to bring forth a new government, and always undoubtedly put blame on the winner of any election for his or her own misfortune. This has become the trend in Africa where elections won by the ruling party are invariably challenged by the opposition yet when the opposition wins the elections any allegations of manipulation of the elections fall away. However, it is not correct that opposition parties in Zimbabwe have been suffering harassment at the hands of the government since independence. The only party that can claim to have been exposed to, and taken part in, violence is the MDC. For this reason, the statement of the Democratic Party, alleging harassment, and intolerance by Government is materially incorrect.[9]

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

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

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

8 Fact Finding Mission Report page 10 para. 2
9 Supra page 15 para 5 and 6
10 Fact Finding Mission Report page 5 para. 4
11 (**********input from Lands And Agriculture on among other information, success of the programme on production, statistics on the fact that the white farmers had moved from grain production to met the food requirements of Zimbabwe and moved to tobacco, wildlife management, safari operations, horticulture and forestry from which they earned foreign currency and externalized. Considering the development in those sectors in the past 3-4 years and the foreign exchange realized in those activities it is surprising that Zimbabwe could have run out of foreign exchange. Their maize was for their cattle feed and the communal farmers were producing 60% of the food requirements and only 40% from the commercial and small scale farmers. * * * * *)

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

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

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

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

12 Page 29 paragraph. 6
13 Page in Report to be inserted********

- Representatives of chiefs have always been members of parliament since time immemorial yet the impression created is that this was resorted to in order to increase the number of members who represent the ruling party in Parliament. This provision dates back to the pre independence era in which chiefs were appointed to the Senate, an upper chamber of Parliament and since we now have a single chamber house, chiefs are nominated by their constituencies to represent them in Parliament. 14

- Both ZANU (PF) and the MDC challenged the results of the 2000 parliamentary elections. Some of the applications have long since been heard, in some instances the election results were confirmed, while in others they were nullified. In some cases there have been appeals to the Supreme Court. We forward herewith to the Commission a list showing what took place in respect of each Petition which the opposition MDC had filed with the court.

- Learnmore Jongwe, a Member of Parliament from the opposition MDC party, died while in remand prison for the brutal murder of his wife. The legislature was not arrested for political reasons. He did not die at the hands of the State. He committed suicide as was revealed by both the State appointed, and independent, pathologist(s).

- Job Sikhala is the only Member of Parliament of the opposition party who is alleged to have been arrested and tortured by the police. His arrest followed the violent demonstrations and stay away which his party organized. He torched a bus. The Report alleges rampant arrest of other opposition supporters as well as journalists without stating who they were, how many arrests were made, and for what reasons the people were arrested. This creates the impression that as long as one professes to be a member of the opposition party, he should not be arrested for any offences committed. Many members of the opposition party made effort to transgress the law and get arrested to give the picture that Government was not tolerant of any opposition.

14

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

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

8.0 The Report's Inaccuracies And Inconsistencies

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

- The Registrar General has been the elections registrar since 198518yet the Report implies that he was made the elections registrar for the 2000 elections. His office does not unilaterally alter or delete a person's name from the voters roll. In fact, before any election takes place, the office of the Registrar - General of elections opens the voters' roll for inspection and any errors that would prejudice a person's right to vote are corrected.
- The limit on the number of observers from non governmental organisations to a maximum of three was enacted in a statutory instrument and was not a mere administrative decision as is inferred in the Report.[19] In the election petition by the MDC leader Morgan Tsvangirai, the Statutory Instrument in question was ruled to be constitutional.

- During both the parliamentary and presidential elections, police officers did not supervise or monitor the electoral process[20]. They provided the required security during the elections.

- During the parliamentary and presidential elections, it is not true that monitors and observers were not allowed to accompany the ballot boxes.[21] The position was, and still is, that the monitors and observers could not fit into the vehicle that was transporting the boxes. The boxes were ferried in open trucks and the monitors and observers were allowed to follow the boxes as they were being transported.

- The security of the ballot box was never lax and the police officers provided round the clock tight security. In fact, as proof of this point no ballot box was ever found to have been tampered with.

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

- There was no legislation providing that the ballot boxes should not be sealed and, in fact, throughout the elections, as is always the practice, ballot boxes were and are sealed at the end of each polling day, and party officials' signatures as well as the signature of the constituency registrar were and are affixed onto the seal itself.[22] Before the commencement of each polling day, the seals were checked and found not to have been tampered with. Further, through the verification exercise, the number of ballot papers in the boxes tallied with the number of ballot scripts that had been used for each polling station.

- The amendment of the Citizenship Act[23] was intended to prevent dual citizenship, which is prohibited by the Constitution of Zimbabwe. Zimbabwe, like any other sovereign State has the right to decide whether to allow dual citizenship or not and, in our case, we allowed persons of SADC parentage special procedures for the renunciation of their foreign citizenship. The procedures are less cumbersome to enable them to renounce with ease the citizenship of their country of origin.

- The MDC was founded from the ranks of the Zimbabwe Congress of Trade Unions. In fact at the formation of the party, the party president, and his deputy were within the leadership of the labour movement[24] and they used the position they had gained as trade unionists to gamer support for the MDC.

- Incidences of sexual violence and rape[25] allegedly perpetrated by war veterans and graduates of the national youth training service programme were never reported to the authorities. The practice in Zimbabwe, as in all other criminal jurisdictions, is that the victim or other concerned person can report the matter so that it can be dealt with according to law. The Mission itself did not receive, or hear any testimony from persons who claimed to have been raped.

22 ibid
23 ibid and page 12 of the fact finding Report paragraph 1 further comment on paragraph 2 page 12 required.
24 Page 12 paragraph 5 & 6
25 Page 13 last paragraph page 14 paragraph 4, page 25 paragraph 2. NB role in elections requires comment

- Reference is made to the so called hate speeches[26] made against the opposition MDC. It is not clear which of the President of the Republic of Zimbabwe's speeches falls within the internationally accepted definition of hate speech. During the fact finding mission's visit to Zimbabwe, the government of Zimbabwe showed the Mission video tapes of the MDC president Mr. Tsvangirai agitating for the violent removal of the President of the Republic of Zimbabwe from office if he did not heed Tsvangirai's call to vacate office. This constitutes hate speech within the internationally accepted definition, yet there is no reference to it whatsoever in the Mission's report. Among other video clips shown to the Mission was also one of Mr. Tsvangirai campaigning for sanctions to be imposed on Zimbabwe to force the President out of office, Mr. Mhashu's promise during an interview on the BBC Hard Talk programme which he made to his white community forks in Britain promising to return land to them in the event that an MDC government came to power, Morgan Tsvangirai's plea to South African to impose sanctions on Zimbabwe, cut the supply of electric power and/or fuel from Zimbabwe. There is no reference whatsoever to this material in the Mission's Report thereby giving the impression that anything that came from the Government was unacceptable as long as it destroyed the credibility of the non governmental organisations and opposition political parties' position. One of the clips showed Mr. Tsvangirai with a group of white farmers who were writing cheques and placing huge sums of money into some container whereupon one of the white farmers stated that he supported MDC as, according to him, it was that party which would return his land which Government had acquired to him. Given that farmer's statement, it remains evident that the Mission missed the point when it stated, as it did, that:

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

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

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

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

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

9.1 As stated above, and as acknowledged by the Fact Finding Mission, during the five days that the Commissioners were in Zimbabwe, the team was confined to Harare and contrary to their statement, the Mission did not meet a wide cross section of the Zimbabwean community, or even anyone critical for the visit to be a success.27 Further, the mission, as stated above, largely met the same organisations or representatives of those who had made the initial complaints and hence their findings are a rhetoric of what they were told.

9.2 The team probed on the situation in Zimbabwe during the period 1999 to June 2002. It should be noted that at the time the Mission came to Zimbabwe, the people of Zimbabwe were living peacefully. During that time, there were no reports of political clashes, or politically motivated crimes which the Mission witnessed, or even heard of, a fact which is not acknowledged anywhere in the Report. In fact, law and order was well in place and in those instances where wrongs had been committed against the people, necessary measures had been taken to ensure a remedy for the wrongs.

9.3 It has never been categorically denied that there was violence in Zimbabwe, but at the time the mission visited Zimbabwe, the Government was thoroughly in charge of her people's affairs. There was, in fact, peace, law, order and tranquility in the country at the time of the Mission's visit to Zimbabwe. Government makes the following comments to the Mission's findings:

27 Page 3 paragraph 2

~ **Polarization of the Society**

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

~ **Militarized society**

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

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

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

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

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

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

~ **Politicisation of land**

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

~ **The Press**

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

~ **Prevalence of torture and political violence**

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

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

~ **Breakdown of the rule of law**

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

~ **Monitoring of police actions**

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

~ **Conditions in prison**

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

10.0 Comments on the Commission's Recommendations

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

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

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

~ **National dialogue and reconciliation**

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

> **Independent national institutions**

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

> **The independence of the judiciary**

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

> **A professional police force**

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

~ **The media**

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

~ **Repeal of POSA and AIPP A**

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

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

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

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

~ **Reporting obligations under the African Charter**

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

Although this is not justification for the delays in submitting the outstanding reports, the Commission is very much aware that there are other State Parties who have not submitted any report since they ratified the Charter in the early 1980s.

Statement that has been deleted from paragraph 7.1 bullet No. 10 relating to hate speeches

Annex III

Distribution of State Parties among Members of the African Commission

DISTRIBUTION OF COUNTRIES AMONG COMMISSIONERS FOR THEIR PROMOTION ACTIVITIES

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

Annex IV

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

MODALITIES FOR THE OPERATIONALISATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

1. Joint mechanism for implementation:

- Establish a focal person in each institution:
  - One Member of the African Commission to be appointed as focal person.
  - If possible, have a Committee composed of 2 additional Commissioners with the focal Commissioner designated as Chair, and with the assistance of a Legal Officer
  - Focal persons to be designated within UNHCR (Africa Bureau and RLO Addis)

- The African Commission should request the Commission of the African Union to invite it to become a Member of the Coordinating Committee on Assistance to Refugees.
- In carrying out these activities, the African Commission and UNHCR should involve as much as possible the Division of Humanitarian Affairs, Refugees and Displaced Persons of the Commission of the African Union.

2. Areas of interaction:

2.1 Submission of Communications to ACHPR

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

2.2. Missions

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

2.3. Periodic Reports of States Parties

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

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

2.4. Sessions of the African Commission

- An agenda item on refugees to be a standing item on the agenda of each ordinary session of the African Commission;

- UNHCR to provide the African Commission with information on areas of concern to better inform the discussion of this agenda item;

- Annual activity report of the Commission to the Assembly of Heads of State and Government to include report on the status of implementation of refugee rights in Africa;

2.5 Monitoring Implementation

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

Annex IV

Resolutions Adopted During The 34th and 35th Ordinary Sessions

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

RESOLUTION ON THE ADOPTION OF THE "REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP ON INDIGENOUS POPULATIONS/COMMUNITIES"

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

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

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

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

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

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

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

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

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

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

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

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

Decides **to:**
Adopt the "*Report of the African Commission's Working Group on Indigenous Populations/Communities*", including its recommendations

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

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

Establish a Working Group of Experts for an initial term of 2 years comprising of -:
1. Commissioner Andrew Ranganayi Chigovera (Chair)
2. Commissioner Kamel Rezag Bara,
3. Marianne Jensen (Independent Expert)
4. Naomi Kipuri
5. Mohammed Khattali
6. Zephyrin Kalimba

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

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

Done in Banjul, The Gambia, 20th November 2003

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

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

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

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

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

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

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

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

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

Done in Banjul, The Gambia, 20th November 2003

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

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

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

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

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

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

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

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

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

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

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

Done in Banjul, The Gambia, 20th November 2003

RESOLUTION ON THE PROTECTION OF HUMAN RIGHTS DEFENDERS IN AFRICA

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

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

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

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

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

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

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

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

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

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

1. ***Now decides to appoint*** a Special Rapporteur on Human Rights Defenders in Africa for a period of two years with the following mandate -:

    a. To seek, receive, examine and to act upon information on the situation of human rights defenders in Africa;
    b. To submit reports at every ordinary session of the African Commission on the situation of human rights defenders in Africa;
    c. To cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders and other stake holders;

d. To develop and recommend effective strategies to better protect human rights defenders and to follow up on his/her recommendations;
e. To raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa

2. ***Further decides*** to nominate Commissioner Jainaba Johm as Special Rapporteur on Human Rights Defenders in Africa for the current duration of her mandate within the African Commission;

3. ***Reiterates*** its support for the work carried out by human rights defenders in Africa;

4. ***Calls upon*** Member States to promote and give full effect to the UN Declaration on Human Rights Defenders, to take all necessary measures to ensure the protection of human rights defenders and to include information on measures taken to protect human rights defenders in their periodic reports;

5. ***Invites*** its members to mainstream the issue of human rights defenders in their activities;

6. ***Urges*** Member States to co-operate with and assist the Special Rapporteur in the performance of his/her tasks and to provide all necessary information for the fulfilment of his/her mandate;

7. ***Requests*** the African Union to provide adequate resources, assistance and support in the implementation of this Resolution.

Done in Banjul, The Gambia, 4th June 2004

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

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

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

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

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

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

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

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

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

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

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

1. ***Deplores*** the grave and rampant human rights violations committed against the civilian populations, such as summary and arbitrary executions, torture and arbitrary detention and disappearances;

2. ***Requests*** the President of the Republic of Cote d'Ivoire, National Reconciliation Government and all Ivorian political parties to implement the Linas-Marcoussis agreement;

3. ***Urges*** the Ivorian authorities to spare no efforts in ensuring that the perpetrators of the violation of human rights during the period of 24th to 26th March 2004 and any other violations perpetrated are brought to justice and the victims and their families appropriately compensated;

4. ***Calls upon*** the Ivorian Government to ensure full compliance with the provisions of the African Charter on Human & Peoples' Rights and other international human rights instruments.

5. ***Undertakes*** to send a fact-finding mission to investigate human rights violations committed in Cote d'Ivoire since the beginning of the crisis.

Done in Banjul, The Gambia, 4th June 2004

RESOLUTION ON THE SITUATION OF HUMAN RIGHTS IN DARFUR, SUDAN

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

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

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

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

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

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

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

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

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

1. ***Deplores*** the ongoing gross human rights violations in the Darfur region of Sudan;

2. ***Calls upon*** all parties to the armed conflict to immediately cease using military force to interfere with the delivery of humanitarian assistance to the civilian population and to allow such assistance to be delivered unhindered;

3. ***Welcomes*** the announcement by the Sudanese authorities of their decision to allow and facilitate access of humanitarian agencies and organizations and the deployment of observers from the African Union and the international community to Darfur, as well as to facilitate the return of IDPs and refugees;

4. ***Further welcomes*** the announcement by the Sudanese Government of their decision to allow and facilitate access of a fact-finding mission of the African Commission;

5. ***Accepts*** to send a fact-finding mission to Darfur to investigate reports on human rights violations in Darfur and to report back to it.

Done in Banjul, The Gambia, 4th June 2004

RESOLUTION ON THE SITUATION OF HUMAN RIGHTS IN NIGERIA

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

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

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

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

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

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

1. ***Deplores*** the grave and rampant human rights violations committed against the civilian populations in the Northern part of Nigeria

2. ***Urges*** the Nigerian Government to bring the perpetrators of any human rights violation to justice, and to compensate victims and their families;

3. ***Calls upon*** the Nigerian Government to ensure full compliance with the provisions of the African Charter on Human and Peoples Rights and other international human rights instruments;

4. ***Decides*** to send a fact-finding mission to investigate all human rights violations committed in the northern part of Nigeria.

Done in Banjul, The Gambia, 4th June 2004

RESOLUTION ON THE SITUATION OF WOMEN AND CHILDREN IN AFRICA

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

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

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

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

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

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

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

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

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

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

1. **Urges** member states of the African Union to ratify the Protocol to the African Charter on the Rights of Women in Africa in order to facilitate its entry into force;

2. **Urges** all AU member states to ratify the United Nations Convention against All Forms of Discrimination against Women, and member states that have ratified it with reservations to withdraw them;

3. **Launches** an appeal to Member States to incorporate the above-mentioned international instrument into their national laws;

4. **Urges** member states to set up a special protection mechanism for women and children in war zones;

5. **Appeals** to member states to disarm and demobilize child soldiers, and put in place a system for their social reintegration;

6. **Appeals** to Member States to implement programmes to fight against HIV/AIDS;

7. **Appeals** to Member States to devise a system to help women benefit from social security.

Done in Banjul, The Gambia, 4th June 2004

Annex VII

Decisions On Communications Brought Before The African Commission

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

Decisions on the Merits

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

Communications declared inadmissible

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

Communication withdrawn by the Complainant

1. Communication 283/2003 – B/Kenya

DECISIONS ON THE MERITS

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

Rapporteur:

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

Summary of Facts:

1. The communication was submitted by the *Association Pour la Sauvegarde de la Paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi), a non-governmental organisation based in Belgium. The communication pertains to the embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire (now Democratic Republic of Congo), Ethiopia, and Zambia following the overthrow of the democratically elected government of Burundi and the installation of a government led by retired military ruler, Major Pierre Buyoya with the support of the military.

2. The Respondent states cited in the communication are all in the Great Lakes region, neighbouring Burundi and therefore have an interest in peace and stability in their region. At the Summit of the Great Lakes summit held in Arusha, Tanzania on 31 July 1996 following the unconstitutional change of government in Burundi, a resolution was adopted imposing an embargo on Burundi. The resolution was later supported by the United Nations Security Council and by the OAU. All except the Federal Republic of Ethiopia were, at the time of the submission of the communication, state parties to the African Charter on Human and Peoples' Rights. Ethiopia acceded to the African Charter on 17 June 1998.

The Complaint:

3. The Complainant claims that the embargo violates -:
   - Article 4 of the African Charter, because it prevented the importation of essential goods such as fuel required for purification of water and the preservation of drugs; and prevented the exportation of tea and coffee, which are the country's only sources of revenue;
   - Article 17 (1) of the African Charter, because the embargo prevented the importation of school materials;
   - Article 22 of the African Charter, because the embargo prevented Burundians from having access to means of transportation by air and sea;

- Article 23(2) (b) of the African Charter, because Tanzania, Zaire and Kenya sheltered and supported terrorist militia.

4. The communication also alleges violation of Articles 3(1), (2) and (3) of the OAU Charter, because the embargo constitutes interference in the internal affairs of Burundi.

Procedure:

5. The communication is dated 18th September 1996 and was received at the Secretariat on 30th September 1996.

6. At its 20th session, held in October 1996 in Grand Bay, Mauritius, the Commission decided to be seized of the communication.

7. On 10th December 1996, the Secretariat sent copies of the communication to the Ugandan, Kenyan, Tanzanian, Zambian, Zairian and Rwandan governments.

8. On 12th December 1996, a letter was sent to the Complainant indicating that the admissibility of the communication would be considered at the 21st session.

9. At its 21st session, held in April 1997, the Commission decided to be seized of the communication and deferred consideration of its admissibility to the following session. It also requested the Respondent States Parties to send in their comments within the stipulated deadline.

10. At its 22nd session, the Commission declared the communication admissible and asked the Secretariat to obtain clarification on the terms of the embargo imposed on Burundi from the Secretary General of the OAU. The Respondent States Parties were also, once again, requested to provide the Commission with their reactions, as well as their comments and arguments as regards the decision on merit.

11. On 18th November 1997, letters were addressed to the parties to inform them of the Commission's decision.

12. On 24th February 1998, the Secretariat of the Commission wrote to the OAU Secretary General requesting clarification on the terms of the embargo imposed on Burundi.

13. On 19th May 1998, the Secretariat received the Zambian government's reaction to the allegations made against it by the plaintiff. It claims that the sanctions imposed on Burundi ensued from a decision taken by Great Lakes countries in reaction to the coup d'état of 25 July 1996, which brought Major Pierre Buyoya to power, ousting the democratically elected government of President Ntibantuganya.

14. According to Zambia, the said sanctions were aimed at putting pressure on the regime of Major Buyoya with a view to causing it to restore constitutional legality, reinstate Parliament, which is the symbol of democracy, and lift the ban on political parties. It was also aimed at causing the regime to immediately and unconditionally initiate negotiations with all Burundian groups so as to re-establish peace and stability in the country, in accordance with the decisions of the Arusha regional Summit of 31 July 1996.

15. Regarding the allegation that Zambia violated resolution 2625(XXV), adopted on 24th October 1970 by the General Assembly of the United Nations, the Zambian government claims that the United Nations Security Council, in resolution n° 1072(1996), upheld the decision of the Arusha regional Summit to impose sanctions on Burundi.

16. Furthermore, Zambia states that it has derived no benefit of any sort from the embargo imposed on Burundi. On the contrary – the embargo had affected not only the inhabitants of Burundi, but also those of the States that imposed it. In Zambia for example, it continues, many workers at the Mpulungu port were sent on unpaid leave because there was no work, as a result of the embargo. The Zambian State thereby lost many billion Kwacha in revenue. This, according to the Zambian government, is the cost Zambia accepted to pay to contribute to the international effort to promote democracy, justice and the rule of law.

17. Regarding the allegation of violation by Zambia of Article 3(1), (2) and 3 of the Charter of the Organisation of African Unity on non-interference in the internal affairs of member States, the Zambian government recalls that the Organisation of African Unity, through its Secretariat, has held many meetings on the situation in Burundi. It concludes, therefrom that the decisions of the Arusha Regional Summit were endorsed by the Organisation of African Unity. Moreover, it points out that the sanctions imposed on Burundi were decided in consultation with the United Nations Organisation and the Organisation of African Unity.

18. As regards the allegation of violation by Zambia of the provisions of article 4 of the African Charter on Human and Peoples' Rights on the right to life and physical and moral integrity, Zambia points out that the sanctions monitoring committee had authorised the importation into Burundi, through United Nations agencies, of essential items such as infants' food, medical and pharmaceutical products for emergency treatment, among others. It concludes therefore that the embargo is far from being a total blockade.

19. To the allegation of violation of article 17 of the African Charter on Human and Peoples' Rights on the right to education, Zambia responds with the same arguments indicated above.

20. Zambia stresses that it is a democratic State. This, it states, is enshrined in article 1.1 of its Constitution, which states that the country "…is a sovereign, unitary, indivisible, multiparty democratic State". It thereby justifies what it refers to as its support for the ongoing democratisation process in Africa and claims to abhor regimes led by ethnic minorities. The Great Lakes countries in general and Zambia in particular, it continues, were right in imposing sanctions on Burundi to bring about the restoration of democracy and discourage coups d'état in Africa.

21. On 8th September 1998, the Secretariat received the reaction of the Tanzanian government on the communication under consideration. The latter rejected the allegations made against its country and ended with a plea for inadmissibility of the communication on the grounds among others that it contains several contradictions which were only aimed at defending the aggrieved state's interests. This country proceeded to argue its case as follows -:

22. "There is great confusion in the facts as presented by the Complainant; there are also many lies contained therein, particularly the accusation that Tanzania was preparing to send its army to Burundi at the request of the International Monetary Fund and the World Bank which had promised to fund the operation. The undeniable truth, and ASP-Burundi knows it well, is that the essential reason why Tanzania and the other countries in the region decided to impose sanctions is to bring about the negotiation of a lasting peace among all Burundian parties. The sanctions are used as a means of pressure, and the results are palpable, as in the restoration of the National Assembly, the lifting of the ban on political parties and the initiation of unconditional negotiations among all parties to the conflict. The discrete contacts with Mr. Léonard Nyangoma of CNDD are a step in the right direction envisaged in the imposition of the sanctions".

23. Regarding the allegation that Tanzania violated article 4 of the African Charter, citing the article, it stresses, "it is rather surprising to see ASP-Burundi using this article to support an allegation of human rights violations resulting from the sanctions. This association forgets or pretends to be unaware that the security situation in Burundi took a turn for the worse before and after the coup d'état and that it can be said emphatically that this provision of the Charter had been violated in a shameless way during this period. In June 1996, President S. Ntibantuganya and the then Prime Minister, Mr. Nduwayo, came to Arusha to solicit sub-regional assistance in the form of troops". Tanzania then goes on to enumerate some cases of violation of human rights by the Burundian government. It emphasises, inter alia, "that the war being waged against the Hutu militia by the Burundian army is conducted with ever increasing vigour, the massacre by the Burundian army of 126 refugees on their way back to their country from Tanzania, the establishment of concentration camps in Karugi, Mwamanya and Kayanza, camps that are populated by Hutus who are denied food even to the point of death, the detention of the Speaker of the National Assembly, Mr. Léons Ngandakumana…etc.".

24. Reacting to the allegation of violation of article 17(1) of the Charter, Tanzania points out that "education and educational institutions were not the targets of the embargo; however, due to its multiplier effect, they were affected. In view of this, at the meeting held in Arusha on 6 April 1997, the leaders of the countries that had imposed the embargo decided to exclude educational materials on the list of items that are not subject to the embargo. This was with a view to alleviating the suffering of ordinary citizens".

25. Responding to the allegation of violation of article 22 of the Charter, Tanzania argues that it is "difficult to conceive that it is possible to enjoy economic and socio-cultural rights without enjoying the fundamental rights, which are the political rights that condition the others. The most fundamental and important rights, which deserve to be recognised and which are currently being trampled upon by the regime in power are political rights. The Great Lakes countries, other African countries and the international community at large would like to see an end to the cycle of violence in Burundi. This can only be achieved by way of a political settlement negotiated among the various Burundian factions".

26. Tanzania argues "the enjoyment of economic, cultural and social rights cannot be effective in the morass that Burundi has fallen into. Constitutional legality has first to be restored. That is the reinstatement of a democratically elected Parliament, the lifting

of the ban on political parties, and the beginning of political talks involving all parties to the conflict…". In reaction to the allegation of violation of article 23,2 of the Charter, Tanzania states "it has never granted shelter to terrorists fighting against Burundi. However, Tanzania admits that it has always welcomed in its territory streams of refugees from Rwanda and Burundi each time trouble fares up in those two countries. Tanzania has always refused to serve as a rear base or staging post for any armed movement against its neighbours. Leaders of political parties and factions are welcomed in Tanzania just like other refugees are. But they are not allowed to carry out military activity against Burundi from Tanzanian territory".

27. In response to the accusation that it violated the provisions of article III paragraphs 1,2 and 3 of the OAU Charter, Tanzania states that "it has not violated any of the principles enshrined in those texts". It emphasises that "despite its [small] size, Burundi remains a sovereign State like any other African State. The sanctions imposed on it by its neighbouring countries do not undermine its sovereignty or its territorial integrity, nor much less its inalienable right to its own existence". On the contrary, continues Tanzania, "the sanctions could play an important role in reminding the Burundian authorities of the content of the preamble to the OAU Charter, which states that all members of the OAU are conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. Another provision states that in order to create conditions for human progress, peace and security must be established and maintained. Peace and security are lacking in Burundi and the sanctions imposed on it could be one of the means of achieving them through dialogue".

28. As regards the allegation of violation of article III paragraph 4 de of the OAU Charter, Tanzania comments "ASP-Burundi deliberately ignores one very important provision of the OAU Charter which states that OAU members solemnly affirm their adherence to the principle of the peaceful resolution of disputes by negotiation, mediation, conciliation and arbitration. The idea behind the imposition of the sanctions is precisely that of causing the application of this principle which a view to achieving lasting peace in Burundi. Contrary to ASP-Burundi's contention that a dangerous precedent had been set, Tanzania believes that the countries of the Great Lakes region had set a favourable precedent. In the pursuit of the goals and objectives of the OAU, article II paragraph 2(2) states "to these ends, the member States shall cooperate and harmonise their general policies in the political and diplomatic fields" Tanzania concludes its exposition with a response to ASP-Burundi's accusation that it had violated certain texts adopted by the United Nations, including some provisions of the Organisation's Charter. It emphasises in particular that "the concept of regional arrangement adopted by the Great Lakes countries is straight out of chapter VIII of the United Nations Charter: "article 52 of the said Charter stipulates that regional arrangements may be used for keeping international peace and security, with the proviso that such actions shall be consistent with the goals and principles of the United Nations. This provision allows for regional arrangements to be used for peaceful settlements before having recourse to the Security Council. And indeed, the Council encourages regional arrangements".

29. "Tanzania does not believe that the imposition of sanctions is an interference in the internal affairs of Burundi. Tanzania is more concerned about the potential consequences of the instability currently prevailing in Burundi. All neighbouring countries share the same concern, since it is true that the instability in Burundi signifies

for them inflow of refugees, instability in their own territory as a consequence of that prevailing in Burundi and which could transform into a generalised conflagration in the entire region. The imposition of sanctions should be seen as a preventive means of self defence aimed at avoiding seeing the region plunge into instability and chaos".

30. Tanzania further emphasises that "in fact, all the sanctions that were adversely affecting the ordinary Burundian citizen were softened when the leaders of the Great Lakes countries met in Arusha on 16 April 1997. This included the lifting of the sanctions on food products, school materials, construction materials, as well as all medical items, and agricultural products and inputs".

31. "The sixth Summit of the Great Lakes countries held in Kampala on 21 February 1998, unanimously decided to maintain the sanctions against the Burundian military regime. In this vein, the enforcement of the sanctions shall be scrupulously monitored by the organ established for this purpose; this is with a view to ensuring the implementation of the decisions taken by the countries of the region. It is important to note that the sanctions were declared by the countries of the region and not unilaterally by Tanzania. Hence, if ASP-Burundi has a just cause to defend, it should do so against the region and not against Tanzania".

32. At its 24th session held in Banjul, The Gambia, after hearing the Rwandan Ambassador, who presented his government's position on this affair, and considering the responses of Zambia and Tanzania, the Commission decided to address a recommendation to the Chairman in Office of the Organisation of African Unity (OAU), with a copy to the Secretary General, requesting the States involved in the affair to find means of reducing the effects of the embargo. It was however stressed that this should be without any prejudice to the decision that the Commission would take on the merit of the communication.

33. The Secretariat wrote to the parties informing them of the Commission's decision.

34. On 26th March 1999, the Secretariat received the reaction of the author of the communication to the Tanzanian and Zambian memoranda. In its view, Tanzania's argument that it did not violate art. 4 of the African Charter is baseless. It argues that "after the coup d'état security in the country improved considerably. On the contrary, the embargo deprived the Burundian people of their basic needs, especially as regards health care and nutrition, claiming many victims".

35. It continues: "Tanzania claims not to have violated art. 17 of the Charter with the argument that the embargo was relaxed in April 1997. This shows a *contrario* that before the relaxation, which had no effect in reality, the said provision had been violated; that is from 31/07/96 to April 1997".

36. According to the plaintiff, "Tanzania also claims not to have violated art. 22 of the Charter with the argument that of all human rights, it is what it refers to as the "political right" that matters most". It continues by saying that Tanzania's argument is unfounded since "…the right to life for example is more important than any "political right". The choice is clear between someone who takes your life and someone who denies you your right to elect your head of State".

37. According to the plaintiff, "all groups that are attacking Burundi – PALIPEHUTU, FROLINA, CNDD... etc. – operate from that country".

38. The Complainant avers, "Tanzania claims not to have violated art. 3 items 1, 2, 3 of the OAU Charter. But imposing on Burundi a manner whereby it can "resolve" its internal problems, under the pressure of an embargo, undoubtedly constitutes interference in the internal affairs of Burundi".

39. The Complainant continues: "it is evident that Tanzania violated international law by imposing an embargo on Burundi. ASP-Burundi hereby calls on the African Commission on Human and Peoples' Rights to declare that country guilty and condemn it to pay damages". As regards the memorandum submitted by Zambia, the plaintiff states that:

40. "Zambia claims not to have violated resolution 2625 of the United Nations with the argument that the UN had approved the decision to impose the embargo. Whether the UN approved the measure or not changes nothing, for the initiative should have come from the United Nations and not the other way around! Hence, the decision to impose the embargo had no legal basis".

41. It continues: "along the same line of thought, Zambia claims that it did not violate Art. 3(1), (2), and (3) of the OAU Charter for the reason that the OAU had approved the embargo. Once again, the approval came after the fact. It was not the OAU that mandated these countries to impose the embargo".

42. According to the petitioner, "Zambia claims [...] that it did not violate art. 4 of the African Charter on Human and Peoples' Rights with the argument that in April 1997, some alleviation measures were introduced. ASP-Burundi points out that this provision was violated from the time of the imposition of the embargo (August 96) to the date those measures were introduced (April 97), and the measures did not even bear any effect in reality".

From the foregoing, the Complainant draws the following conclusion:

43. "It is abundantly clear that Zambia, as well as Tanzania, have violated international law and that this violation caused very serious injury to the Burundian people. ASP - Burundi therefore urges the African Commission on Human and Peoples' Rights to declare Zambia guilty of this and to constrain it to pay the relevant damages".

44. On 24 March 2000, the Secretariat received a Note Verbale from the Kenyan Ministry of Foreign Affairs requesting a copy of the communication submitted by ASP-Burundi. The request was met, and a reaction is still being awaited.

45. At its 27th ordinary session held in Algeria, the Commission examined the case and deferred its further consideration to the next session.

46. The Commission's decision was communicated to the parties on 20 July 2000.

47. On 17th August 2000, the Secretariat of the Commission received a Note Verbale from the Ministry of Foreign Affairs of the Republic of Uganda claiming that it had never been notified of the existence of this communication.

48. On 21st August 2000, the Secretariat of the Commission replied the said Ministry stating among other things that such notification had long been served the competent authorities of the Republic of Uganda, in 1996, as soon as the case was filed. A copy of the communication was however forwarded to the Ministry.

49. During the 28th ordinary session held in Cotonou, Benin, from 26 October to 6 November 2000, the Commission considered the communication and noted that although Ethiopia was a party to the case, it had never received notification of the communication.

50. The Commission therefore asked the Secretariat to check whether Ethiopia had ratified the African Charter at the time the decision on the embargo was taken.

51. If it had, the Secretariat should then send it notification of the communication opposing that embargo and ask for its comments and observations on the issue.

52. Given that Ethiopia ratified the African Charter two years after the decision to impose the embargo on Burundi was taken, the Secretariat of the Commission did not send a copy of the case file to Ethiopia for notification.

53. The Secretariat acted in this manner in accordance with the decision taken by the 28th ordinary session of the Commission.

54. Moreover, this decision of the Commission is in line with the principle of non-retroactivity of the effects of agreements, which is contained in Article 28 of the Vienna Convention on Treaties.

55. The Secretariat informed the concerned parties about the decision of the 30th session, and the Tanzanian and Zambian Embassies in Addis Ababa reacted by saying that their respective Governments were never informed of this case and they requested to be given a copy of the case-file.

56. In reply, the Secretariat conveyed the documents requested to the two Embassies, as well as all necessary information that could help elucidate the progress of the case submitted to the Commission, in respect of which their States had contributed by submitting defence statements.

57. At the 31st session (2-16 May 2002, Pretoria, South Africa), delegates from some of the accused States (DRC, Rwanda, Tanzania, Uganda and Zambia) presented some oral comments on the position of their respective Governments during the Commission's consideration of the communications.

58. The said delegations in turn flatly rejected the allegations levelled against their Governments pointing out in a nutshell, that -:

- The sanctions adopted by the summit of the countries of the Great Lakes region held on 31 July 1996, in Arusha, Tanzania, was not aimed at providing advantages to the countries that made the decisions but, were meant to put pressure on the Government brought about by the military coup d'etat of 25 July 1996 in Burundi, with a view to bringing it to restore constitutional legality, democracy, peace and stability.

- The joint initiative taken by their Governments were part of their contribution to the international efforts aimed at promoting the rule of law, in spite of the sacrifices that this initiative entailed for the people of the countries that initiated the embargo against Burundi, who also suffered from the consequences of the said embargo.

59. After the session, the Secretariat informed the States concerned and the Complainants about the status of the communication by Note Verbale and by letter respectively.
60. At the 32nd Session held from 17th to 23rd October 2002, in Banjul, The Gambia, the Commission was unable to consider the merits of Communication, because of time constraints occasioned by the reduction of this session's duration.

61. The African Commission consequently deferred consideration of the matter to its 33rd Ordinary Session scheduled to take place from 15th to 29th May 2003, in Niamey, Niger.

62. The African Commission considered this communication during the 33rd Ordinary Session and decided to deliver its decision on the merits.

LAW
Admissibility

63. The Commission had to resolve the matter of the *locus standi* of the author of the communication. It would appear that the authors of the communication were in all respects representing the interests of the military regime of Burundi. The question that was raised was whether this communication should not rather be considered as a communication from a state and be examined under the provisions of Articles 47-54 of the African Charter. Given that it has been the practice of the Commission to receive communications from non-governmental organisations, it was resolved to consider this as a calls action. In the interests of the advancement of human rights this matter was not rigorously pursued especially as the Respondent states did not take exception by challenging the *locus standi* of the author of the communication. In the circumstances the matter was examined under Article 56.

64. Under article 56(5) and (6) of the African Charter on Human and People's Rights, communications other than those referred to in Article 55 received by the Commission and relating to human and people's rights shall be considered if they -:
    - (5) "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged";
    - (6) "are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter".

65. These provisions of the African Charter are hardly applicable in this matter inasmuch as the national courts of Burundi have no jurisdiction over the state Respondents herein. This is yet another indication that this communication appropriately falls under *Communications from States* (Articles 47-54).

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

Merits

67. The communication was submitted by the *Association pour la Sauvegarde de la Paix au Burundi* against States of the Great Lakes region (DRC, Kenya, Rwanda, Tanzania, Uganda, Zambia) and Ethiopia, in the wake of an embargo declared by these countries against Burundi on 31 July 1996, following the coup d'etat carried out by the Burundian army on 25 July against the democratically elected government.

68. The communication alleges that by its very existence this embargo violated and continues to violate a number of international obligations to which these States have subscribed, including those emanating from the provisions of the Charter of the Organisation of African Unity (OAU), the African Charter on Human and Peoples' Rights, as well as Resolution 2625 (XXV) of the General Assembly of the United Nations on the principles of international law applicable to friendly relations and cooperation between States on the basis of the United Nations Charter.

69. The States accused in the communication, particularly Zambia and Tanzania which submitted written conclusions on the case, reject the allegations against them, stating among other things, that while it is true that the decision to impose an embargo against Burundi was taken at the Arusha summit of 31 July 1996 at which they participated, (with the exception of Zambia, which only joined the others after the Arusha decision), it is equally true that following this, the decision to impose an embargo against Burundi was endorsed by the Organisation of African Unity and the United Nations Security Council.

70. The decision to impose the embargo against Burundi is thus based, by implication, on the provisions of Chapters VII and VIII of the United Nations Charter, regarding "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" and "Regional Arrangements", in the sense that the military coup which deposed the democratically elected government constituted a threat to, indeed a breach of, the peace in Burundi and the region.

71. The Respondent States took collective action as a sub-regional consortium to address a matter within the region that could constitute a threat to peace, stability and security. Their action was motivated by the principles enshrined in the Charters of the OAU and of the United Nations. The Charter of the OAU stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples." It goes on to promote international cooperation "to achieve a better life for the peoples of Africa…"

72. The resolution to impose the embargo on Burundi was taken at a duly constituted summit of the states of the Great Lakes Region who had an interest in or were affected by the situation in Burundi. The resolution was subsequently presented to the appropriate organs of the OAU and the Security Council of the United Nations. No breach attaches to the procedure adopted by the states concerned. The embargo was not a mere unilateral action or a naked act of hostility but a carefully considered act of intervention which is sanctioned by international law. The endorsement of the embargo by resolution of the Security Council and of the summit of Heads of State and Government of the OAU does not merit a further enquiry as to how the action was initiated.

73. The United Nations Security Council is vested with authority to take prompt and effective action for the maintenance of international peace and security. In doing so, states agree that the Security Council "acts on their behalf…" This suggests that, once endorsed by resolution of the Security Council, the embargo is no longer the acts of a few neighbouring states but that it imposes obligations on all member states of the United Nations.

74. The Charter of the United Nations allows that member states of the UN may be called upon to apply measures including, "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations…" Economic sanctions and embargoes are legitimate interventions in international law.

75. The critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of. The Human Rights Committee has adopted a General Comment in this regard precisely in order to create boundaries and limits to the imposition of sanctions.

76. We are satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and situation was monitored regularly. As a result of these reports adjustments were made accordingly. The report by the Secretary General of the OAU is indicative of the sensitivity called upon in international law: "…besides their political, economic and psychological impact, they (the sanctions) continue to have a harsh impact on the people. The paradox is that they enrich the rich and impoverish the poor, without effectively producing the desired results… It would, perhaps, be appropriate to review the question of the sanctions, in such a way as to minimise the suffering of the people, maximise and make effective the pressures on the intended target" (CM/2034 (LXVIII), 68th Ordinary Session of the Council of Ministers, Ouagadougou, 1-6 June 1998).

77. We accept the argument that sanctions are not an end in themselves. They are not imposed for the sole purpose of causing suffering. They are imposed in order to bring about a peaceful resolution of a dispute. It is self-evident that Burundians were in dispute among themselves and the neighbouring states had a legitimate interest in a peaceful and speedy resolution of the dispute.

78. With regard to the allegations of interference in the domestic affairs of other sovereign states, the Commission recognises that international law has provided careful procedures where such interference may be legitimate. It is our view that the present matters falls on all fours with the provisions of international law.

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

For these reasons, the African Commission,

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

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

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

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

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

197/97 - Bah Ould Rabah/Mauritania

Rapporteurs:

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

Summary of facts

1. In November 1975, four years after the death of his mother, Mr. Bah Ould Rabah, a Mauritanian national (the plaintiff) and his family were forcefully expelled from their ancestral domicile by the man named Mohamed O. Bah on the grounds that the mother of the plaintiff, the late Aichetou Valle, was his slave and that subsequently, the house bequeathed to her descendants and the whole estate around it became legally the property of Mohamed O. Bah, the alleged "owner" of the deceased.

2. When the plaintiff approached them, the local authorities and the courts decided in favour of his opponent and the Supreme Court upheld this decision. The plaintiff wrote to the highest authorities, including the President of the Republic, to contest this decision which he qualifies as "flagrant support of the Government to the illegal institution of slavery". To date, however, he has received no reply.

Complaint

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

Procedure

4. Communication 197/97 is dated 11th April 1997.

5. The African Commission assumed jurisdiction in the case during its 21st ordinary session held in Nouakchott, Mauritania, in April 1997.

6. On 7th July 1997, a note verbale of notification was sent to the Government concerned urging it to reply to the allegations contained in the Communication.

7. On 7th July 1997, the plaintiff was informed of the decision of seizure.

8. During the 22nd ordinary session, the Commission deferred any decision on this Communication pending the reception of the comments from the Government of Mauritania on the report of the mission undertaken to that country.

9. The African Commission continued the process of exchanging information between the parties.

10. The African Commission considered this communication at its 35th Ordinary Session held in Banjul, The Gambia and decided to deliver its decision on the merits.

LAW
Admissibility

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

12. In the case under consideration, the plaintiff filed court decisions attesting that he used and exhausted the remedies before the competent national courts with a view to obtaining compensation for the alleged violation of his rights.

13. The Complainant furnished the African Commission with the judgement of the Boutilimitt District Court of 26th December 1998, the decision of the Rosso Regional Court if 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott of 11th November 1990.

14. The African Commission contacted the Respondent State demanding for information with respect to exhaustion of local remedies and the Respondent State responded by stating that local remedies had been exhausted.

15. It is therefore unquestionable that the Complainant had met the provisions of Article 56(5) of the African Charter.

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

Merits

17. The Complainant alleges a violation of the following Articles of the African Charter:
    a) *Article 2: right to enjoyment of the rights and freedoms recognized and guaranteed in the Charter, such as the right to property, without any distinction;*
    b) *Article 3: right to equality and to equal protection of the law;*
    c) *Article 4: inviolability of the human being, the right to physical and moral integrity;*
    d) *Article 5: right to human dignity, recognition of his legal status, prohibition of all forms of exploitation and degradation, particularly slavery;*
    e) *Article 6: right to liberty and security;*

f) *Article 7: right to have his cause heard (particularly paragraph 1(d), impartiality of the courts);*
g) *Article 8: freedom of conscience;*
h) *Article 9: right to information, freedom of opinion;*
i) *Article 11: right to assemble freely with others.*

18. The Complainant states that in particular that his sisters, brothers and himself have been deprived of the inheritance of their parents, 4 years after the death of his mother, by Mr. Bah Ould Mohamed, on the grounds that their late mother was his slave.

19. In order to get round the ban on slavery in force in Mauritania, Mohamed Moustapha made mention of a donation supposedly given to him by the late mother of the plaintiff.

20. In a letter of 7th April 1990 addressed to the Head of State by Bah Ould Rabah (the Complainant) and copied to the case file, it is stated that to support his claims on the property of his late mother, Mohamed Moustapha (his opponent) had produced the certificate of occupancy No. 453 dated 24th November 1972.

21. This permit produced by Mohamed Moustapha had been prepared by the Cadi on the basis of evidence relating to the donation made by the late mother of the plaintiff to Mohamed Moustapha, his opponent.

22. The donation to Mohamed Moustapha was supposedly meant to render freedom to Lady Merien, daughter of the plaintiff's mother, his slave, but Mohamed Moustapha's submissions show no tangible evidence of the reason for his being the beneficiary of this donation.

23. The Complainant alleges that some of the witnesses who supported the argument of donation to his opponent later retracted, and he made mention of names such as Imam Mohamed Hamed and others in the letter addressed to the Head of State.

24. The Complainant further alleges, in the same letter, that in opposition to the certificate of occupancy produced by opponent, he had produced a certificate occupancy No. 66 of 24th April 1971, issued in the name of his mother a few months before her death; that the said document dates before that produced by his opponent.

25. The Complainant also pointed out serious procedural irregularities in the processing of the case in that he had requested the competent legal Authorities in vain, to order an investigation which would have proved Mohamed Moustapha's allegations baseless and proved as a result, the pertinence of the said violations of Article 14 of the African Charter relating to the guarantee of his and his family's right to property.

26. The Government of the Islamic Republic of Mauritania provided an explanation, through the statement made by its delegation at the 29th Ordinary Session of the African Commission; this statement was confirmed and supplemented by a

document dated 19th June 2001 filed in court. From these documents it would appear that where the Respondent State is concerned -:

a) The Communication 197/97 introduced against the State of Mauritania by Mr. Bah Ould Rabah is based on a dispute relating to the ownership of a real estate which opposes two Mauritania citizens, Mr. Bah Ould Rabah (the Complainant) and Mr. Mohamed Moustapha Ould Bah;
b) This case is simply a classical dispute about real estate property between members of the same family in which the intervention of the Cadi is in keeping with the existing law and practice in Mauritania;
c) It was on the request of Mr. Bah Ould Rabah that the Mauritian Courts, had, within a reasonable period, passed judgement through the District Court of Boutilimitt on the 26th December 1998, the decision of the Regional Court of Rosso on the 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott on 11th November 1990;
d) It would appear from his own submission that the plaintiff recognized that the Courts seized had arrived at a final decision on the basis of facts derived from the documents presented by himself and his opponent (namely the certificates of occupancy), which is in conformity with the rules within their competence and thereby indicates that the dispute relates to the right to ownership of property and that the conflicting parties have enjoyed the conditions of a fair trial, with the participation of their lawyers in the proceedings and in the hearings;
e) His allegations relative to slavery and the violation of his rights were baseless;
f) The Government of Mauritania admits that undoubtedly the consequences of slavery, against which it continues to fight, still linger on in the country. But this is not sufficient to justify the allegations of Rabah Ould Bah (the Complainant) relative to the issue of slavery raised by Mohamed Bah (his opponent) before the Mauritanian Courts, in violation of the African Charter and its provisions as mentioned above;
g) Accordingly, Bah Ould Rabah (the Complainant) should have all his claims dismissed.

27. The African Commission has noted that no document exists in the case file which clearly delineates the reason for the donation made to Mohamed Moustapha by the late mother of the Complainant and also that there is no opposing statement to the effect that the witnesses named by the plaintiff had retracted their statements after having given evidence before the Cadi in support of Mohamed Moustapha.

28. The African Commission realises that Mr. Bah Ould Rabah had enjoyed all the conditions of a fair trial and had thus exhausted all the local remedies. The fact that he had lost the case after exhausting the procedures he had initiated was due to a weak judicial system and not on the basis of the practice of slavery or slave like practices. In fact, slavery had been abolished (order No. 81.234 of 9th June 1981 and 1991 Constitution).

29. The African Commission further noted that from the information in its possession (report of the mission to Mauritania, statements made by NGOs and the delegates from Mauritania during the various Sessions of the African Commission as well as from diverse documents from the Government of the

Republic of Mauritania), that the consequences of slavery still persist in Mauritania and that, for people to act as Mohamed Moustapha Ould Bah has done has become common practice in the country.

30. Furthermore in the African Commission's view, to accept that someone, and a mother for that matter, can deprive her own children of their inheritance for the benefit of a third party, with no specific reason as in this case, is not in conformity with the protection of the right to property (Article 14 of the African Charter).

31. The African Commission thus calls upon all the public institutions in the Islamic Republic of Mauritania to persevere in their efforts so as to control and eliminate all the offshoots of slavery.

For these reasons;

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

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

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

1. This is a dissenting opinion from the one that was adopted by a simple majority[6] of the members of the Commission on communication 197/1997 during the 35th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21st May to 4th June 2004. The present dissenting opinion is based on facts and arguments derived from the original documents[7] contained in the communication file.

2. Furthermore, most of the documents submitted by the parties to the communication were originally in Arabic and were never translated into English or French, the languages of the Commissioner, who was the first rapporteur or the legal officer working on the file at the Secretariat of the Commission. These documents contained the ruling of different local courts of the respondent state.

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

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

So the Commissioners made a decision relying only on the short and inaccurate summary of file that was given to them.

3. The essence of facts of this communication as extracted from the file shows that it was a normal civil litigation between two members of the same family over a plot of land. The complainant, a banker born in 1949, filed in 1986, a lawsuit in local courts in which he claimed the full title over this real estate.

4. The complainant originally argued before courts that the disputed land belongs to his father, and that his mother has no separate title to dispose of the land. The respondent[8] claimed that the mother of the complainant has a separate property and transferred to himself and his sisters by the way of donation, this plot of land which constitutes part of her property. He further claimed that he was de facto in peaceful, continuous and uninterrupted possession of that land for 27 years consecutive before the claim of the complainant, which was brought before the courts only in 1986.

5. A decision of the District Court of Boutilimitt, the Court of Rosso, dated 26/12/1988, a decision of the Court of Appeal of Nouakchott dated 11/3/1990, and a decision of the Supreme Court dated 5/11/1990, ruled all in favour of the respondent on the grounds that the failure of the complainant to refute the strong evidence composes of antiquity of deeds and testimonies of reliable and credible witnesses as well as de facto possession of the disputed land. The Final ruling from the Supreme Court was delivered on 5/11/1990.

6. On April 11, 1997, the complainant filed this communication 97/1997 against the Islamic Republic of Mauritania.

7. The complainant claimed before the commission that in November 1975, that is four years after the death of his mother, he himself and his family were forcefully expelled from their ancestral home by Mohamed Ould Bah (his opponent) on the grounds that the complainant's mother, Aichetou Valle had been his slave and that, the house and the surrounding land therefore rightfully belonged to him.

8. The complainant further claimed that the courts of his country, which are State institutions, deprived him from his property and since then he wrote to the highest governmental authorities including the President of the Republic, protesting against this blatant governmental support for the illegal institution of slavery, but has received no reply as of this date.

9. Article 56 paragraph 6 of the African Charter on Human and Peoples' Rights requires that communication should be submitted within a reasonable period from the time when local remedies have been exhausted or from the date the Commission is seized with the matter

10. The complainant resorted to local courts only in 1986 whereas he alleged that he had been forcefully expelled from his home in 1975. And again he took more than six years after the Supreme Court delivered its final decision to submit his

[8] Mohamed bin Mohamed Almustaffa.

communication to the Commission in April 1997. In my view, this can be considered as unreasonable period in term of Article 56 paragraph 6 of the African Charter, and accordingly the Commission ought to declare this communication inadmissible.

11. From the documents in the file, which contains the rulings of the Mauritanian courts at all levels and which were submitted to the Commission by both parties, it was not indicated anywhere that the recipient of the donation had claimed that the complainant's mother had donated the land because she was the slave of the recipient. On the contrary, the recipient indicated clearly that the complainant's mother donated the land to him because of the existence of good ties and relationship between the two of them. The complainant himself stated in his memo to the Court of Appeal of Nouakchott that his family is well-known for its good reputation and generosity.

12. The documents from the communication file also show that the claimant had neither raised these matters before the District Court of Boutilimitt, nor before the Court of Rosso or before the Court of Appeal.

13. The claimant has come up before the Commission with new arguments that he did not advance before the courts in Mauritania in the process of his case. Consequently, by bringing new elements which are neither raised nor disputed before national courts he wanted to use this Commission as a court of first instance. In my view, this is another reason for declaring this communication inadmissible.

14. The inability of the Secretariat of the Commission to work in Arabic whereas the original documents of the communication file are in this language, do inhibited the Commissioners ability to have first hand information. This made the Commission to act only on the translated summary of part of the documents of the communication, which in my view, was not built on facts but on the mere allegations of the complainant. Allegations, which were neither raised before National Courts nor well substantiated before the Commission.

15. The Commission in acting upon the assumption that those allegations are facts, wrongly decided that the Islamic Republic of Mauritania has violated Article 14 of the African Charter on Human and peoples` Rights.

16. The date of claim of donation (by opponent to the complainant) goes back to 1959 - according to complainant - or to 1975 when the complainant claims that the forceful eviction from disputed land took place.

17. One must note that the practice of slavery was legal in 1959 and 1975. Slavery was banned by the Mauritanian authorities in 1980. The recipient could therefore have easily based his claim of property over the disputed land on slavery. However, he did not do that. Instead, he claimed that the land was donated to him because the good relationship he had with the mother of the complainant.

18. The events in question took place by any way before 1986 when Mauritania became a party to the African Charter on Human and Peoples' Rights; the

admissibility of such a communication raises the question of the principle of retroactivity of laws which was not discussed by the commission in this very case.

19. The erection of building permissions No.453 dated 24th November, 1972, and No.66 of 24th April, 1971, (and not certificate of occupancy as mentioned in paragraphs 46 and 50 of the commission ruling) both discussed by Courts and ruled over that the later does not relate to the same plot of land.

20. I do agree with the Commission's conclusion that there is no evidence brought before the Commission that the witnesses retracted from their statements made before the Cadi in support of donation as stated in the last part of paragraph 53 the communication decision. This part of the above-mentioned mentioned paragraph negates the complainant's allegations as stated in paragraph 49 of the same document, and contradicts the final findings of the Commission.

21. Paragraphs 51 of the decision of the Commission states that the plaintiffs (complainant) requested an investigation to prove as a result, the pertinence of the said violations of article 14 of the African Charter on Human and peoples` Rights. This paragraph does not reflect the accuracy that the complainant claimed the violation of Article 14 of the Charter. The lengthy discussions by Commissioners, on whether the Commission could invoke article 14 of the charter that was not mentioned by the complainant prove this. Moreover, paragraphs 3 and 43 of the decision did not mention article 14 of the Charter.

22. The Mauritanian courts cannot restrain the right or freedom of the claimant's mother to dispose part of her property by way of donation to a member of her family without a legal basis, neither do they have the right to compel the claimant's mother to explain the reasons why she donated such property to one of her family members, while she is sane, mature and not restrained from disposing her property by a court order.

23. Had the Mauritanian courts prevented the claimant's mother from disposing of part of her property by donating it to a relative and deprived her son of that portion of property, they would have violated Article 14 of the African Charter on Human and Peoples' Rights, which related to the right to property and also embodies the rights to freely dispose of one's property.

24. The Mauritanian courts, by confirming the right of ownership of the claimant's mother and confirming her right to dispose of part of her property by the way of donation, confirmed that the claimant's mother's freedom to own her property and to dispose of it. By doing so, Mauritanian Courts furthermore, proved that she was neither a slave nor a servant.

25. The Commission, by deciding that the Islamic Republic of Mauritania had contravened Article 14 of the African Charter on Human and Peoples' Rights and recommending that the government should return the property to the claimant, had deprived the recipient from a property that was donated to him. The Commission has also, without a legal basis, restrained, the right and freedom of the claimant's mother to freely dispose of a part of her property in a manner she deemed fit. The Commission wanted to protect what it considered

to be the right of a citizen (the complainant). However, in doing so it advised the government to do what constitutes a violation of the rights of two citizens: the mother of the complainant and the recipient.

26. For all the foregoing reasons, I believe that the Commission had erred in this communication, by deciding that the Islamic Republic of Mauritania had violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights.

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

199/97 Odjouoriby Cossi Paul/Benin

Rapporteur:

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

Summary of facts:

1. The Complainant is a national of Benin who alleges violation of his rights by the judiciary of his country.

2. It is alleged that the Appeal Court of Cotonou refused to restore his rights in a case pending before the said court since 1995 which sets him up against Mr. Akitobi Honoré whom he accuses of having despoiled him of his real estate property with the complicity of some judges.

3. The Complainant considers that the attitude of the Appeal Court constitutes a denial of justice.

Complaint

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

Procedure

5. The Secretariat of the African Commission acknowledged having received the communication on 8th April 1997.

6. The African Commission was seized of the communication at its 22nd ordinary session and deferred its decision on admissibility to its 23rd ordinary session scheduled for April 1998.

7. During its 23rd session held from 20th to 29th 1998 in Banjul, The Gambia, the African Commission declared the communication admissible and deferred consideration of the merits of the case to its 24th ordinary session.

8. On 1st June 1998, a note was sent to the Government of Benin informing them that the communication had been declared admissible by the African Commission, pursuant to Article 56 paragraph 5, and that the Commission would

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

9. During the 28th Ordinary Session, the African Commission heard both parties. Through its representative, the Respondent State asked the African Commission to review its decision on admissibility as the Complainant had not exhausted local remedies.

10. The African Commission, noting that the Complainant had not put his case across logically, advised some NGO's to assist him. To this end, the case was entrusted to Interights and to the Institute for Human Rights and Development in Africa on behalf of the Complainant.

11. In any case, the African Commission took note of the undue delay of the Complainant's case before the courts.

12. From the submissions, it became apparent that in a civil case like this one, the conduct of proceedings is the responsibility of the parties in the case. The appeal filed against the judgment of the court of first instance is dated 19th September 1995 and the Commission was seized of the case on 8th April 1997, that is 20 months after the filing of the appeal. It appears from the practice of the Appeal Court accepted by the Supreme Court that average period ranges between 4 and 5 years.

13. The African Commission upheld its decision on admissibility and deferred its decision on the merits to the 30th Ordinary Session held in Banjul, The Gambia, from 13th to 27th October 2001.

14. The communication was deferred on several occasions because the Complainant was not very familiar with the procedures of the African Commission.

15. The African Commission considered this communication at its 35th Ordinary Session held in Banjul, The Gambia and decided to deliver its decision on the merits.

LAW
Admissibility

16. Article 56 of the Charter provides, among other things, that communications shall be considered by the Commission if they -:
(5) : "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

17. Odjouoriby Cossi Paul (the Complainant) claims that the case opposing him to Mr Akitobi Honore has been pending before the Appeal Court of Cotonou since 19th September 1995 and that up to now the Court has delivered no judgment.

18. And yet, it is obvious that the local proceedings will remain in impasse as long as the Appeal Court has not made any ruling on the appeal pending before it.

19. The African Commission has moreover established the evidence of silence of the State of Benin to all the notifications and other requests for clarification addressed to it through its Secretariat.

20. This situation has led the African Commission to rule on the admissibility of the communication submitted to it on the basis of the facts brought to its attention by the Complainant.

21. In accordance with the provisions of Article 7, paragraph 1(d) of the African Charter and its previous decisions, (cf. in particular [2]communication 39/90, Annette Pagnoulle – on behalf of A. Mazou/Cameroon[9])), the Commission considered that the waiting period before the Appeal Court of Cotonou had been unduly prolonged and on these grounds, it had declared the communication admissible.

22. Details brought later to the case file by Interights and the Institute for Human Rights and Development as well as by the Government of Benin indicate that:
    - Following an appeal lodged by the two parties, the case was the subject of a joinder by interlocutory decision dated 9th March 1996.
    - After several adjournments due mainly to non attendance by one or the other party at the hearings, the court gave judgment by default on 5th August 1999 indicating that non production of the disputed decision and conclusions by the parties causes damage to the smooth administration of justice.
    - Mr. Akitobi Honoré, the opponent of Mr.Odjouoriby, lodged an appeal against this decision and Mr. Yansunnu, counsel of Mr. Odjouoriby, submitted further pleadings in defence before the chamber of the Supreme Court on 27th June 2001.

23. But the African Commission maintains that in any case, the State of Benin remains the guarantor of a good administration of justice on its territory and for the reasons, the African Commission upholds its decision on admissibility.

Merits

24. The African Charter on Human and Peoples' Rights stipulates in Article 7, paragraph 1(d) that « every individual shall have the right to have his cause heard. This comprises...the right to be tried within a reasonable time ».

25. On 19th September 1995, the plaintiff lodged an appeal against judgment No. 75/95 4° CCM delivered on 7th August 1995 by the civil chamber of the court of first instance of Cotonou in its provisions on damages granted to him by the said court.

26. On his part, Mr. Honore Akitobi (the opponent of Mr. Odjouoriby) filed a cross-appeal in reply to the principal appeal and as pointed out earlier, the proceedings pending before the appeal court are unduly prolonged.

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

27. Accordingly, the African Commission observes that the case before the Appeal Court has been unduly prolonged.

28. The African Commission is of the view that this undue prolongation of the case at the level of the Appeal Court is contrary to the spirit and the letter of above-mentioned Article 7(1)(d).

29. Concerning the allegations of the plaintiff of violation of his right to property, the Commission recalls that the right to property is recognized and guaranteed by the African Charter of which Article 14 stipulates that this right may be encroached upon only "in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

30. The African Commission, however, is of the opinion that to the extent that there has been no definitive decision in this case, it cannot substitute itself to the national courts to appreciate violation of the enjoyment of the right to property of the plaintiff.

For these reasons the African Commission,

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

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

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

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

Rapporteur:

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

Summary of Facts:

1. The communication is submitted by Edward Luke II of Luke and Associates, Saul Lehrfreund of Simons Muirhead and Burton (practising advocates based in the United Kingdom and Botswana) and Interights, a human rights NGO based in the United Kingdom on behalf of Mariette Sonjaleen Bosch who is of South African nationality.

2. Mrs. Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30th January 2001.

3. The Complainant alleges that the judge who convicted Mrs. Bosch wrongly directed himself that the burden of proof was on the accused ***"to prove on a balance of probabilities"*** that someone else was responsible for the killing and thereby reversing the presumption of innocence. That the Court of Appeal wrongly upheld the conviction despite recognising the fact that the judge had fundamentally erred by reversing the onus of proof.

4. The Complainant further alleges that her right to life has been violated by the imposition of the death penalty for what was alleged to be a crime of passion, in circumstances where there were clearly extenuating circumstances.

5. It is also alleged that Mrs. Bosch is likely to suffer inhuman treatment and punishment because the execution will be carried out by the cruel method of death by hanging, which exposes the victim to unnecessary suffering, degradation and humiliation.

Complaint

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

Procedure

7. The communication was received at the Secretariat of the Commission 7th March 2001 by fax.

8. On 12th March 2001, the Secretariat of the African Commission wrote to Interights requesting for complete copies of the judgements of the High Court and Court of Appeal of Botswana.

9. On 26th March 2001, the Secretariat of the Commission received by courier the full text of the judgement of the Court of Appeal of Botswana delivered on 30th January 2001 and expert affidavits relating to the manner and speed in which a person executed by hanging would meet their death.

10. On 27th March 2001, the Chairman of the Commission wrote to the President of Botswana appealing for a stay of execution pending consideration of the communication by the Commission.

11. The President of Botswana did not respond to the appeal but information received at the Commission indicates that Mrs. Bosch was executed by hanging on **31st March 2001.**

12. At its 29th ordinary session, the Commission decided to be seized of the Complaint and the parties to the communication were informed of this decision.

13. At its 30th ordinary session held in Banjul, The Gambia, the Commission heard oral submissions from the Complainants and declared the communication admissible.

14. On 9th November 2001, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility and on the merits to the Secretariat.

15. The African Commission continued the process of exchanging information between the parties.

16. At its 34th Ordinary Session, held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

LAW
Admissibility

17. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant for a communication to be declared admissible.

18. The Complainants submit that they have fulfilled all the conditions of Article 56 of the African Charter. They argue that Mrs Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30th January 2001. On 7th March 2001, 35 days after the Court of Appeal of Botswana had handed down its decision dismissing Mrs Bosch's appeal, the Complainant filed this communication with the African Commission. They submit that this matter has not been submitted for examination under any other procedure of international investigation or settlement. The Complainants also state

that all local remedies were exhausted and the complaint was filed with the African Commission within a reasonable time from the time local remedies were exhausted. Therefore the African Commission should declare the communication admissible.

19. In their response, the Respondent State concedes that all local remedies in this matter were exhausted, as the Court of Appeal is the last and final court in Botswana.

20. The Commission notes that the Respondent State and the Complainants agree that all domestic remedies were exhausted and thus declares the communication admissible.

Merits

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

Alleged Violation of the Right to Fair Trial

22. With regard to the alleged violation of the right to fair trial under Article 7 (1)(b) of the African Charter, the issue is whether the misdirection by the trial judge in regard to the onus of proof was so fatal as to negate the right to fair trial in the circumstances of this case. Simply put, does a misdirection per se vitiate the holding of a fair trial in violation of Article 7 of the African Charter and of necessity leads to the quashing of a conviction with capital consequences.

23. In this regard, it was submitted that the placing of the burden of proof on the applicant was a violation of a fundamental right such as would negate the holding of a fair trial and that the court of appeal wrongly held that this did not result in a miscarriage of justice.

24. In dealing with this issue it is important to recognise that there is no general rule or international norm stating that any misdirection per se vitiates a verdict of guilt. As pointed out by the State Party, what is generally accepted in several countries particularly common law countries is the rule that a misdirection will vitiate a verdict of guilt only where such misdirection either on its own or "cumulatively is or are of such a nature as to result in a failure of justice." The legal position is aptly stated in Archbold, Criminal Pleading and Practice [10] as follows".

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

[10] 200 Ed at page 18

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

25. The Court of Appeal thoroughly examined the evidence led at the trial and the effect of the misdirection and came to the conclusion that there was a massive body of evidence against the Applicant which would lead to no other conclusion than that it was the applicant and no one else who murdered the victim and that the quality of the evidence was such that no miscarriage of justice was occasioned.

26. A breach of Article 7 (1) of the African Charter would only arise if the conviction had resulted from such misdirection. As pointed out by the Court of Appeal at page 47 of the judgement, the trial judge "meticulously evaluated the evidence and came to the only conclusion possible on the evidence".
27. A number of decisions have been taken in the European Court of Justice on Article 6 (2) of the European Convention on Human Rights which also provides for the presumption of innocence. In discussing Article 6(2), R. Clayton and H. Tomilson observe[11] that the Article does not prohibit presumption of facts and law and citing Salabiaku v France (1988) 13 EHRR 379 paragraph 28 states that the State must however,

> *"Confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence"*[12].

A more appropriate discussion of Article 6(2) can be found in the Digest of Case-Law Relating to the European Convention on Human Rights (1955-1967)[13] where it is stated that,

> *"If the lower court has not respected the principle of presumption of innocence, but the higher court in its decision has eliminated the consequences of this vice in the previous proceedings, there has been no breach of Article 6 (2)"*[14]

28. As already discussed above, the Court of Appeal 'meticulously evaluated the evidence' between pages 11-20, 62-74 and 77-111 of the judgement and was satisfied that despite the misdirection, there was adequate evidence to convict the Applicant of murder.

29. It should be noted here that it is for the courts of State Parties and not for the Commission to evaluate the facts in a particular case and unless it is shown that the courts' evaluation of the facts were manifestly arbitrary or amounted to a denial of justice, the Commission cannot substitute the decision of the courts with that of its own. It has not been shown that the courts evaluation of the evidence was in any way arbitrary or erroneous as to result in a failure of justice. The Commission therefore finds that there is no basis for finding that the State Party violated its obligations under Articles 4 and 7 (1).

Alleged Violation of Article 5

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[11] Page 114, paragraph 11.238.
[12] See also Hoang v France (1992) 16 EHRR 53.
[13] 1970, UGA Huele, Belgium
[14] Digest of Case-Law Relating to the European Convention on Human Rights 1955-1967 U.G.A Huele, Belgium paragraph 153 on page 140

30. The second issue relates to the allegation that the sentence of death in this case was a disproportionate penalty in the circumstances of this case and hence a violation of Article 5 of the Charter.

31. While it is accepted that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence but also the circumstances of the individual offender, (Inter-American Commission of Human Rights in Downer and Tracey v. Jamaica (41/2000) 14 April 2000), there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed. It should be pointed out here that apart from stating the trend in other jurisdictions and decisions of other Human Rights bodies governed by specific statutes, it has not been established that the courts in this case did not consider the full circumstances before imposing the death penalty. If anything, the courts fully considered all the circumstances in this case (See pages 48 to 55 of the judgement of the Court of Appeal). It is clear that the submission that the imposition of the death penalty was disproportionate to the gravity of the crime in this case is based on an erroneous assumption of what amounts to extenuating circumstances.

32. Extenuating circumstances are facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability. First, the facts or circumstances must be directly related to or connected with the criminal conduct in question. The court is only concerned with facts which lessen the seriousness or culpability of that particular criminal conduct.

33. Second, extenuation relates to moral blameworthiness. It is the state of mind of the offender at the time of the commission of the offence that is a relevant consideration otherwise offenders would use any personal circumstance totally unrelated to the conduct complained of to escape punishment.

34. In considering whether or not extenuating circumstances exist, the inquiry is:

    a) Whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation
    b) Whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what s/he did; and
    c) Whether this influence was of such a nature as to reduce what he did.

35. The claimed capacity for redemption or reformation and or good character is certainly not connected with the commission of the particular murder and therefore not relevant considerations to this finding of extenuating circumstances.

36. In deciding on the proportionality of a sentence one would have to fully weigh the seriousness of the offence against the sentence. It is quite evident from the Court of Appeal records that the murder committed by Mrs Bosch involved considerable effort and careful planning.

37. Thus while the African Commission acknowledges that the seriousness or gruesome nature of an offence does not necessarily exclude the possibility of extenuation, it cannot be disputed that the nature of the offence cannot be disregarded when determining the extenuating circumstances. As such, the African Commission finds

no basis for faulting the findings of both the trial court and Court of Appeal as it relates to this issue.

Issue of reasonable notice

38. It was submitted that failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman and degrading punishment and treatment in breach of Article 5 of the African Charter and that execution under such circumstances violates the protection of law provisions under Article 3 as it deprives an individual the right to consult a lawyer and obtain such relief from the courts as may be open to him or her.

39. It should be noted that this issue was not addressed by the Respondent State in its written submissions primarily because it had not been communicated to it. The issue was not even raised in the Authors' consolidated submissions of the record of their oral submissions on admissibility made at the 30th Session and submitted to the African Commission's Secretariat on 18th March 2002.

40. The issue only surfaced with the Author's written submissions distributed shortly before the hearing of the matter at the 31st Session of the African Commission. It was therefore not surprising that no useful submissions or submissions at all were made on behalf of the Respondent State on the issue. Neither was there any debate on the issue at the instance of the Commissioners, as they had not had an opportunity to consider those submissions.

41. In the circumstances it would be fundamentally unfair to the Respondent State to deal with the substance of this issue save to observe that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to "arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal [15].

Alleged violation of Article 4: Clemency Procedure was unfair

42. This is one of the two issues raised rather belatedly and the approach in issue 3 above applies and the comments made hereunder are for future guidance in matters of this nature it being pointed out that the communication procedure is an attempt to achieve or address failed justice at the domestic level which follows the rules of natural justice and would not permit any springing of surprises.

43. Applicant alleges that in exercising his clemency, the President acts "arbitrarily". The main issue is whether or not the Presidential clemency is what is envisaged in Article 4 of the Charter. Article 4 proscribes the arbitrary deprivation of the right to life. A process is put in all jurisdiction to ensure that due process is had in ensuring that the right to life is not violated. This process includes the holding of a trial so that an accused is given an opportunity to defend his cause. It is that process that can be challenged to be arbitrary. The intervention of the President does not in any way affect the non-arbitrariness of the process. The due process in Botswana was followed with the Applicant's case following the process that has been established to

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

guarantee Applicant's rights. Her matter was heard in both the High Court and the Appeal Court.

44. It should also be noted that the exercise of clemency unlike the process described above, is discretionary in most jurisdictions and are for the most part discretionary; they are given to him to be exercised in his own judgement and discretion[16]. Whilst the Constitution of Botswana provides for the constitution of an Advisory Committee on Prerogative of Mercy, the President is only required to request and get advice from that committee if he so wishes. However, he can only exercise his power of clemency after presentation of a written report of the case from the trial judge together with any other information that he may require.

45. The question then is whether or not the President arbitrarily deprived the Applicant of her right to life. The word "arbitrarily" is defined in Black's Dictionary[17]

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

A similar definition is provided in Stround's Judicial Dictionary[18] and Classen's Dictionary of Legal Words and Phrases[19]

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

47. In any event, the right to be heard does not entail entitlement to the benefit of all the facilities which are allowed to a litigant in a judicial trial. Thus the 'right to be heard' in appropriate circumstances may be confined to the submission of written representations. These are clearly appropriate circumstances for written representations.
48. However, it should be noted that a person must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations (See also Baxter op cit at p 552.)

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

[17] 5th Ed, West Publishing Company, 1979.

[18] 5th Sweet and Maxwell Limited, 1986

[19] Volume 1. Butterworths, 1975.

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

49. The last argument is that Article 1 of the African Charter obliges a State Party to comply with the requests of the African Commission. The Complainants base this argument on the letter written by the Chairperson of the African Commission to the President of Botswana on 27th March 2001 seeking a stay of execution. The letter was communicated by fax.

50. In its oral submissions during the 31st Ordinary Session, the Respondent State argued that the fax was never received by the President. However, in this particular case, the African Commission is not in possession of any proof that the fax was indeed received by the President of Botswana.

51. Article 1 obliges State Parties to observe the rights in the African Charter and to 'adopt legislative or other measures to give effect to them.' The only instance that a State Party can be said to have violated Article 1 is where the State does not enact the necessary legislative enactment[20].

52. However, it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty. This is illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the ICCPR and the general reluctance by those States that have retained capital punishment on their Statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a *"Resolution Urging States to envisage a Moratorium on the Death Penalty[21]"* and therefore encourages all States party to the African Charter on Human and Peoples' Rights to take all measures to refrain from exercising the death penalty.

For the above reasons, the African Commission,
Finds that the Republic of Botswana is not in violation of Articles 1, 4, 5 and 7(1) of the African Charter on Human and Peoples' Rights;[22]
Strongly urges the Republic of Botswana to take all measures to comply with the Resolution urging States to envisage a Moratorium on the Death Penalty;
Requests the Republic of Botswana to report back to the African Commission when it submits its report in terms of Article 62 of the African Charter on measures taken to comply with this recommendation.

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

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

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

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

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

Rapporteur:

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

Summary of facts

1. The complaint was submitted by Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme* (Mauritanian Human Rights Association), on behalf of Mr. Ahmed Ould Daddah, Secretary General of *Union des Forces Démocratiques-Ere nouvelle* (UFD/EN, Union of Democratic Forces-New Era), a Mauritanian political party, which was established on 2 October 1991.

2. The Complainants, mandated by Mr. Ahmed Ould Daddah, allege the following facts. By Decree No. 2000/116.PM/MIPT, dated 28 October 2000, *Union des Forces Démocratiques/Ere nouvelle* (UFD/EN), the main opposition party in Mauritania, led by Mr. Ahmed Ould Daddah was dissolved by the Prime Minister of the Islamic Republic of Mauritania, Mr. Cheick El Avia Mohamed Khouna.

3. This measure, taken pursuant to Mauritanian law, (in particular articles 11 and 18 of the Mauritanian Constitution, and Ordinance No. 91.024 of 25 July 1991 which deals with political parties in articles 4, 25 and 26), was imposed, according to this senior official, following a series of actions and undertakings committed by the leaders of this political organisation, and which:
    - were damaging to the good image and interests of the country;
    - incited Mauritanians to violence and intolerance; and
    - led to demonstrations which compromised public order, peace and security.

4. On account of this, all the movable and immovable assets of the said political organisation were, *ipso jure,* seized.

5. A few weeks after the proscription of UFD/EN, the Mauritanian authorities arrested several leaders of the party who had participated in a demonstration against the measure, which they considered illegal and illegitimate, for breach of public order.

6. The Secretary General of the party, Mr Ould Daddah, on arrival from a journey abroad, was himself arrested on 9 December 2000, at Nouakchott airport, and was only released a few days later.

7. On 25 December 2000, the leaders of UFD/EN filed a motion for the repeal of the government's measure before the Administrative Chamber of the Supreme Court, citing:
    - Lack of a just cause for the dissolution Decree;
    - The unjustified nature of the punishment of a political party due to the alleged machinations of its leaders;

- Lack of competence on the part of the authority by whom the Decree was signed; and
- Absence of any deliberation by the Council of Ministers on the matter of the dissolution, as foreseen by law.

8. On 14 January 2001, the Administrative Chamber of the Supreme Court, ruling as court of original and final jurisdiction, delivered its verdict (No. 01/2001 UFD/EN vs/ Prime Minister and Minister of Interior, Post and Telecommunications of 14 January 2001), throwing out Mr. Ahmed Ould Daddah's appeal, without really giving the grounds, stating that the claim lacked merit.

9. Since then, the principal leaders and activists of UFD/EN, who did not have the recourse of appealing the Supreme Court's judgement before any other Mauritanian court, have been subjected to a veritable witch-hunt, throughout the Mauritanian territory, and have suffered acts of intimidation and harassment by the security services.

10. They have also been excluded from participating, under the banner of their political organisation, in the various elections that have been organised in the country.

Complaint

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

Procedure

12. The communication was submitted on the 25th April 2001, during the 29th Ordinary Session, held in Tripoli from 23 April to 7 May 2001.

13. The Secretariat acknowledged receipt of the communication on 2 May 2001.

14. At the 30th ordinary session, the African Commission considered the communication and decided to be seized of the case. Consideration of its merits was deferred until the next session and the Commission asked that the parties be informed accordingly.

15. The Secretariat informed the Respondent State of the decision of the Commission in its Note Verbale of 15th November 2001 and the Complainant was informed of the same decision in an official letter dated 19th November 2001.

16. On 22nd January 2002, the Secretariat received the observations on the admissibility and merits of the case from the Respondent State. Those observations were forwarded to the Complainant.

17. The following documents in Arabic were attached to the observations of the Respondent State:

- *Petition dated 27/01/2001 of Mr Mohamed Oula Gowj requesting the review of the decision of the supreme court No. 01/2002 of 14/01/2001;*
- *Letter of the Assistant Secretary General of UDF/EN dated 24/01/2001;*
- *Letter of Mr Mohamed O. Gowj cancelling his petition of 27/01/2001;*
- *Statement of no appeal issued by the Registrar of the Supreme Court dated 12/01/2001*
- *Communiqué of UDF/EN to development partners;*
- *Statement of general policy of UDF/EN.*

18. On 25 March 2002, the Complainants, comprising of Interights, *l'Association Mauritanienne des Droits de l'Homme* and *l'Institut pour les Droits Humains et le Développement*, presented the Secretariat of the Commission with their written observations on the admissibility of the complaint, in reply to the arguments on admissibility of the complaint as advanced by the Respondent State.

19. At its 31st Session, held from 2 - 16 May 2002 in Pretoria, South Africa, the African Commission declared the communication admissible and called on both parties to submit their observations on the merits of the case without undue delay.

20. By letter dated 29 May 2002, the Secretariat of the Commission informed both of the concerned parties of the Commission's decision.

21. On 7 August 2002, the Secretariat of the Commission acknowledged receipt of the written observations on the merits of the communication, received on 5 August 2002 from the Complainant. A copy of these observations was forwarded to the Respondent State.

22. At its 33rd ordinary session held in Niamey, Niger, the African Commission listened to the oral remarks of both parties and decided to defer its decision on the merits to the 34th ordinary session. The parties concerned were notified of the decision on 4th July 2003.

23. At its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered this communication and decided to deliver its decision on the merits.

LAW
Admissibility

24. Article 56 of the African Charter on Human and Peoples' Rights sets out seven conditions, which, under normal circumstances, must be fulfilled for a communication to be admissible. Out of the seven conditions, the government raised the issue regarding the exhaustion of local remedies as provided under Article 56(5) of the Charter, which stipulates -:

    "Communications….. to be considered, are sent after exhausting local remedies, if any unless it is obvious this procedure is unduly prolonged".

25. In its submission of 7th January 2002, the Respondent State requested that the African Commission: "…enquire whether the complainants had duly seized the African Commission...". The Respondent State also informed the African Commission that the rulings of the Administrative Chamber of the Supreme Court

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

26. To support its line of reasoning, the respondent state indicated that one the lawyers of UDF/EN, Lawyer Mohamed Ould Gowf made a plea in the same vein on 27/01/2001 but withdrew it the same day. Based on the above facts and on Article 56(5) of the African Charter, the Respondent state requested that the communication be declared inadmissible due to the fact that the local remedies were not exhausted.

27. However, the fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.

28. However, it is a known fact that the revision procedure is an extraordinary legal remedy that exists only if a number of conditions specifically stipulated by the law are fulfilled. In this regard, Articles 197 and 198 CPCCA of the Republic of Mauritania do not allow access to revision unless it is proven that the legal decision taken was wrong or due to the fact that the other party is in possession of decisive evidence.

29. Furthermore, the fact that one of the lawyers of the complainants who was probably not empowered to do so, had indeed applied for a revision and withdrew it the same day, was a clear indication of the complainant's intention not to resort to such a remedy. In fact, this does not affect at all the exceptionally legal nature of such a legal remedy as outlined above.

30. Consequently, it is a fact that the party that seized the African Commission had indeed exhausted, with regard to this particular case, the entire local remedies of common law that exist and can be resorted to before Mauritanian jurisdictions.

31. In view of the above-stated reasons, the African Commission declared the communication admissible.

Merits

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

On the principles governing the right to a fair trial

33. The Complainant contends that the Mauritanian Courts are in violation of the provisions of Article 7 (a) of the African Charter which stipulates:
« Every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force. »

34. The Complainant alleges that the dissolution of the main Mauritanian opposition Party UFD/EN, the seizing of its assets and the conditions in which the measure has been confirmed by the highest Court in the land have violated the relevant provisions of the African Charter and other Conventions to which the country is signatory.

35. The Complainant contends that these violations are both procedural and substantial. Procedural, because the basic rules and principles of a fair hearing were not respected during the hearing. Substantial, because the dissolution of the UFD/EN party violated the right of association and freedom of expression of the members and leaders of this political party and violated the principles of democracy outlined in the African Charter.

36. The Complainant alleges that the procedure before the administrative chamber of the Supreme Court did not respect the principles relative to the right to a fair hearing in particular that which is relative to two-tier proceedings. The Complainant also alleges that from the investigation of the case up to the public hearing which decided the on destiny of the UFD/EN, the principles of inter parties had not been respected and that the final ruling by the Judge did not contain pertinent legal arguments justifying the dissolution of the said party.

37. The Respondent State emphasises that the judicial examples and arguments and all the documentation on the right to a fair hearing raised by the Complainant are only applicable in a penal case. The Respondent State imagines evidently that the accusations levelled against the UFD/EN may well have a penal qualification according to the law governing the activities of Political Parties, but this is not enough to give this case a penal character since no penal lawsuit had been brought against the leaders of the said Party.

38. The Respondent State indicates that concerning the respect for the principle of two-tier proceedings, which consists of bringing the entire dossier of the merits of a case before a differently composed higher legal authority for examination, it is established that it concerns a broad based rule which can be widely applied, notably in penal cases. This principle forms the basis of proper administration of justice and allows the well-intentioned applicant to obtain the guarantee of a correct application of the Law.

39. The fact remains however that, as stipulated by Article 7 (a) of the African Charter, every individual has the right to have his cause heard, which includes: "...The right to appeal to competent national organs…"

40. In this particular case, and in conformity with Article 26 of the Decree 91-024 of the 25th July 1991 governing the activities of political parties, the Respondent State underscores the fact that the competent legal authority to examine the legality and validity of a Decree passed by the Prime Minister of the Islamic Republic of

Mauritania is the Administrative Chamber of the Supreme Court, according to the procedure in force in this country. However, the Supreme Court is the highest authority in the Mauritanian legal system and in the matter of appeal against decisions taken by the administrative authorities; the existing procedure requires that annulment takes place only as a first and last resort.

41. Finally, it means that the Mauritanian legislator, like other similar legislations, has given exclusive authority to the highest legal body in the country due to the legal and Political importance of the matter relative to the dissolution of a Political Party. It is before this high authority that the entire Mauritanian legislative system is built and it is here that the uniform rules for applying the Law in this country, in all fields, are established.

42. Concerning the respect for the principle of judgement after due hearing, the Respondent State maintains that the Complainant never mentioned in his written submissions, any opposition to or complaint against the holding of audiences, or of the quality of the representation and the defense of the political party which was dissolved before the Mauritanian legal authorities.

43. After having studied the comments made by the Complainant and the Respondent State, it is well established that the representatives of the UFD/Ere nouvelle received, in good time, all the notifications of the actions and documents relating to this litigation, and had had access to the entire dossier of the case to study all the points and make the relevant criticisms both in writing and by oral advocacy before the competent legal authority.

44. However, regarding this particular case, the parties before the Mauritanian administrative court are, on the one hand, the Minister of the Interior, representing the government and, on the other hand, the political party UFD/Ere nouvelle. As for the Government Commissioner, he carries out the functions of the representative of the Department of Public Prosecution i.e. representative of the public interest charged to ensure, on behalf of society, the sound application of the laws. In this regard, he can resort to methods of public nature that might not have been resorted to by the parties which might have escaped the vigilance of the reporting judge.

45. Thus, the criticism levelled against the Government Commissioner, who is the representative of the Department of Public Prosecution, before the Administrative Division of the Supreme Court because of its so called "collusion" with the ruling, seemed to lack merit due to the absence of hard facts and concrete material evidence to back such a value judgment.

46. In seeking to know if the decision of the Mauritanian Highest Court had been sufficiently justified or not, the report on the ruling by the Administrative Chamber of the Mauritanian Supreme Court amply covers all the arguments raised by the Complainant's Defense, as much in their written submissions as in their oral address before the audience and provides responses based on the provisions of the Mauritanian Laws. From that moment it is not possible to support this grievance with regard to the aforementioned decision.

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

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

48. Article 9 (2) of the African Charter stipulates: "*every individual shall have the right to express and disseminate his opinions within the law".*
    - Article 10 (1) of the African Charter stipulates: *« every individual shall have the right to free association provided that he abides by the law";* and

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

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

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

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

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

53. The Complainant indicates that the notions of the right of association and of the freedom of expression are complementary in a democratic State, in the sense that the Association or the Political Party is, the means par excellence, for the freedom of expression. It is well known that Political Parties contribute greatly to the political debate of democratic States, notably through elections which are organised periodically to guarantee the freedom of choice of its leaders by the citizens.

54. In paying special attention to the terms used in the Party's declarations, in the statements of its leaders and indeed to the context in which these had been published or delivered, the Complainant voices his surprise to note that the authors of this measure were unaware that the activities for which the UFD/EN was being blamed had taken place in the context of « training and the expression of the political will of its members » and in the context of Mauritanians enjoying their right to be differently informed about the political, economic and social situation of their country.

55. The Complainant alleges that the contentious statements and publications had been made and/or distributed during a time when Mauritania was making pre-campaign preparations for the legislative and local elections for the year 2001. In such a context, each Party was endeavouring, with due respect for democratic rules, to put its opponent in a position of weakness before the voters during the electoral campaign.

56. The Complainant exposes that it is for this reason that the statement of the 17th September 1998 had been drafted following the dissemination, by several reliable sources, of information relating to the discovery of a case of misappropriation of public funds, particularly of the aid received from development partners, of financial chaos and of the mismanagement of public affairs[23].

57. According to the Complainant, the objective of this document was, among other things, to remind Mauritania's partners that the Mauritanian citizen, in view of the total silence of the authorities on this issue « has the right and the duty to ask for explanations and to know what happened to the money obtained in his name and which should be refunded »[24], that a happy outcome of this crisis which is threatening the existence of Mauritania, since more than 57% of the population lived below the poverty threshold, could only be obtained through « responsible, dispassionate and constructive dialogue the only means to realise consensual solutions to the major problems which exist ». The document also insisted on the need for the country to have a pluralist Parliament resulting from transparent elections, an independent judiciary, a really free press, the opening of the public media for opposition debates and to give free access to airtime. And in conclusion, the authors of the statement affirmed that « the UFD/EN, as a political force of major significance, whilst expressing its sincere gratitude to all of Mauritania's development partners for their large contributions to this country, and in expressing the hope to see this assistance

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

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

increased, invites them to avoid, as much as possible, easy solutions and complacent attitudes which is costing Mauritania enormously for the past several years »[25].

58. Concerning the statement of the 30th October 1999 made by the UFD/EN, the Complainant argues that it had been published at the end of the Party's 2nd Ordinary Congress which had brought together some fifteen African Political Parties. The text, a report of the 3-day meeting of the Party, had been divided in two sections, devoted respectively to the political, economic and social situation of the nation and to the Party's internal activities.

59. The Complainant claims that the first part of the document was a presentation of the major facts of life in the nation which had been examined by the participants at the Congress and ideas and solutions, outlined in the resolutions which had been advocated by the Party as definitive solutions. These were obviously problems which the Authorities did not wish and still do not wish to see exposed to the public view, such as: - the threats to national unity brought about by racist, slavelike, tribalistic and regionalistic practices ; the maintenance of repressive texts which legalise the muzzling of the press, the violation of individual and collective freedoms and the regular and shameless rigging of elections ; the economic bankruptcy resulting from the systematic looting of national resources and the diverting of national aid by the ruling clique, giving rise to the aggravation of social inequality, of unemployment, of impoverishment and the abandonment by the State of its essential functions of regulation, health, education and security ; - the diplomatic isolation of Mauritania from its natural arabo-african environment and its most spectacular action which was the elevation of Israel's diplomatic representation to the rank of Ambassador.

60. The Complainant notes that in these two documents, there is no passage that contains an insulting or outrageous word against the Authorities or advocating violence and/or calling on the populations to rise against the leaders of the country. And in the two cases, the Party was acting as an activist in the national political life and playing its natural and important role in drawing public attention to the facts outlined by the information disseminated by independent organisations, and all of this with due respect for the laws and regulations of the country, argues the Complainant.

61. The Complainant party recalls that in a democratic society, « the Authorities should tolerate criticism even where it can be considered as insulting or provocative[26]» and one of the characteristics of democracy is « to allow the proposal and the discussion of diverse political projects even those which challenge the State's current mode of organising, so long as these do not cause prejudice to democracy itself[27] », this is what the Mauritanian Constitution requires in its Article 11.

62. As for the incriminating speech, the Complainant continues, it had been delivered by Mr. Ahmed Ould Daddah in his capacity as Secretary General of the UFD/EN during one of the rare occasions when the Party had obtained approval to hold a rally. The essence of his speech related, that day, to the respect which should be accorded by the Mauritanian Authorities to the main Opposition Party of the country

[25] Cf. Declaration quoted above, page 2.
[26] Cf. Cr.EDH, Arrest of Ozgur Gundem c. Turkey of the 16th March 2000, paragraph 60
[27] Cf. Cr.EDH, Arrest of Ybrahim Askoy c. Turkey of the 10 January 2001, paragraph 78

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

63. The Respondent State alleges that political pluralism in the Islamic Republic of Mauritania has its political bases in Articles 11 and 18 of the 1991 Constitution and its legal basis in Articles 4, 25 and 26 of the Law of 25th July 1991 relative to Political Parties.

64. In this context, Article 11 of the Constitution of the Islamic Republic of Mauritania stipulates: « *Political Parties work towards the formation and the expression of political will. They form and exercise their activities freely on condition that they respect the democratic principles and do not jeopardise, either by object or by action, national sovereignty, territorial integrity and the unity of the nation and of the Republic. The Law fixes the conditions for the creation, operation and dissolution of Political Parties.»*

65. Article 18 of the Constitution of the Islamic Republic of Mauritania puts down all offences committed, which are prejudicial to the security of the State.

66. Article 4 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties reads as follows: *« Political Parties are prohibited all propaganda against the principles of Islam. Islam cannot be the exclusive prerogative of any Political Party. In their Statutes, programmes, in their speeches and in their political activities, Political Parties are prohibited from:*
    - *Any form of incitement to intolerance and to violence;*
    - *Organisation of demonstrations likely to compromise public order, peace and security;*
    - *Any transformation aimed at establishing military or paramilitary organisations or armed militia or combat groups;*
    - *Any propaganda with the objective of causing prejudice to territorial integrity or to the unity of the nation »*

67. Article 25 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties makes it possible for a Political Party to be dissolved if the latter violates the rules, which govern it.

68. The Respondent States argues that it is on the basis of these two texts that the Political Party UFD/Ere nouvelle received its legal sanctioning and was able to carry out its activities normally. These two texts, one of which has a Constitutional value and the other an organic value, fix the framework for the activities of Political Parties as organs for participation in the democratisation of public life and determine the modalities of the sanctions to be imposed in case of transgression of the Constitutional requirements and the legal rules governing the activities of Political Parties in the Islamic Republic of Mauritania.

69. Pertaining to the dissolution of the UFD/EN, the Respondent State alleges that the lack of direction and extremism of this Party was such that the dissolution was not

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

70. The Respondent State insists that the UFD/EN, because of its radicalism, constituted a grave threat to public order and seriously threatened the rules of the democratic game. In this context it was quite legitimate for the State, in order to avoid a drifting to unforeseeable consequences, to take all the requisite measures to safeguard the general interest of the country and to preserve the social fabric as well as to maintain public order and security in a democratic society, and this in conformity with the relevant provisions of the Decree for the creation and dissolution of Political Parties.

71. The Authorities clearly defined the legal causes and bases of this measure. On the causes relating to the dissolution, the Respondent State noted as follows:

    (1) The activities carried out both inside and outside the country to discredit and destroy the interests of Mauritania. In this regard, the Respondent State cites the communiqué by the UFD/EN dated 17th September 1998 addressed to Mauritania's development partners with the objective of convincing the donor countries to arrest all economic assistance to Mauritania and the orchestrated disinformation campaign against the country relating to the dumping in the national territory of nuclear waste from Israel;
    (2) The fact that the UFD/EN had advocated violence as an instrument of its political activities. It also mentioned the Party's General Political Statement of the 30th October 1999 certain passages of which, notably those speaking of the marginalisation and ignorance of the rights of black-africans, are seen by the Respondent as trying to re-ignite ethnic and racial upheavals in a pluriethnic country, disturbances against public law and order blamed on this Party and declarations attributed to certain leaders of this Party who are reported to have said that they would no longer organise peaceful demonstrations.

72. With regard to the legality of the measure, the Respondent State affirms that this legality is based in Article 11 of the Constitution which governs the principle of the freedom to set up political parties, on condition that they respect the democratic principles and do not cause prejudice either by objective or by their actions to national sovereignty, to the territorial integrity, to the unity of the Nation of the Republic and Articles 4, 25 and 26 of Decree 91-024 of the 25th July 1991 relative to Political Parties which prohibits any action that may incite intolerance and violence and any effort to organise demonstrations that may compromise public order, peace and security.

73. The Respondent State reiterates that factual evidence existed whereby the UFD/EN was advocating violence, was carrying out subversive activities which were prejudicial to national unity, was training dangerous hooligans who were likely to jeopardise the lives and property of peaceful citizens.

74. This factual evidence, continues the Respondent State, fully justifies the regulatory measure taken against the UFD/EN decided by the Council of Ministers since the threat against order, peace and security was evident.

75. The Respondent State advances several arguments against the authors of the communication to justify the basis of the decision to dissolve the UFD/EN, in particular:
    - The fact that the activities of and positions taken by the leaders of this Party constituted a threat to the fundamental interests and image of the country;
    - The fact that certain actions and declarations by the Party appear to be meant to incite Mauritanians to intolerance and violence;
    - The fact that some of its members were involved in activities geared towards pushing people to disobedience and disorder thereby endangering public peace and security.

76. According to the interpretation given by the African Commission to freedom of expression and to the right of association as defined in the African Charter, States have the right to regulate, through their national legislation, the exercise of these two rights. Articles 9(2), 10(1) and 13(1) of the African Charter all specifically refer to the need to respect the provisions of national legislation in the implementation and enjoyment of such rights. In this particular case, the relevant provisions of Mauritanian laws that had been applied are articles 11 and 18 of the Constitution and articles 4, 25 and 26 of the Decree 91-024 of the 25th July 1991 relative to Political Parties.

77. However these regulations should be compatible with the obligations of States as outlined in the African Charter[28]. In the specific case of the freedom of expression that the African Commission considers as « a fundamental human right, essential for the development of the individual, for his political awareness and his participation in public affairs[29], a recent decision[30] clearly delineated that the right of States to restrain, through national legislation, the expression of opinions did not mean that national legislation could push aside entirely the right to expression and the right to express one's opinion. This, in the Commission's view, would make the protection of this right inoperable. To allow national legislation to take precedence over the Charter would result in wiping out the importance and impact of the rights and freedoms provided for under the Charter. International obligations should always have precedence over national legislation, and any restriction of the rights guaranteed by the Charter should be in conformity with the provisions of the latter.

78. For the African Commission the only legitimate reasons for restricting the rights and freedoms contained in the Charter are those stipulated in Article 27(2), namely that the rights « shall be exercised with due regard to the rights of others, collective security, morality and common interest »[31]. And even in this case the restrictions should « be based on legitimate public interest and the inconvenience caused by these restrictions should be strictly proportional and absolutely necessary for the benefits to be realised »[32].

79. Furthermore, the African Commission requires that for a restriction imposed by the legislators to conform to the provisions of the African Charter, it should be done

[28]Cf. Resolution on the right to freedom of association, paragraph 3
[29] Communication 212/98 Amnesty c/Zambia paragraph 54
[30] Communication 105/93, 128/94, 130/94 and 152/96 Media Rights Agenda and Constitutional Rights Project v/Nigeria paragraph 66
[31] Ibid, paragraph 68
[32] Ibid, paragraph 69

« with respect for the rights of others, collective security and common interest[33] » that it should be based « on a legitimate public interest …and should be strictly proportional and absolutely necessary » to the sought after objective[34]. And more over, the law in question should be in conformity with the obligations to which the State has subscribed in ratifying the African Charter[35] and should not « render the right itself an illusion[36] ».

80. It is worthy of note that the freedom of expression and the right to association are closely linked because the protection of opinions and the right to express them freely constitute one of the objectives of the right of association. And this amalgamation of the two norms is even clearer in the case of political parties, considering their essential role for the maintenance of pluralism and the proper functioning of democracy. A political group should therefore not be hounded for the simple reason of wanting to hold public debates, with due respect for democratic rules, on a certain number of issues of national interest.

81. In this particular case it is obvious that the dissolution of the UFD/EN had the main objective of preventing the Party leaders from continuing to be responsible for actions for declarations or for the adoption of positions which, according to the Mauritanian Government, caused public disorder and seriously threatened the credit, social cohesion and public order in the country.

82. Nonetheless, and without wanting to pre-empt the judgement of the Mauritanian Authorities, it appears to the African Commission that the said Authorities had a whole gamut of sanctions which they could have used without having to resort to the dissolution of this Party. It would appear in fact that that if the Respondent State wished to end the verbal « drifting » of the UFD/EN Party and to avoid the repetition by this same Party of its behaviour prohibited by the law, the Respondent State could have used a large number of measures enabling it, since the first escapade of this Political Party, to contain this « grave threat to public order ».

83. The Decree No. 91-024 had in effect, made provision for other sanctions in order to deal with « slips » of Political Parties. Furthermore, the African Commission finds that the dissolution of UFD/EN was in conformity with the provisions of the Decree relating to the Political Parties.

84. The African Commission observes that the UFD/EN Party transformed itself legally into UFD/EN retaining its recognised representatives on the basis of its political statement and its programmes of action. The African Commission also calls on all the Republican political forces in the Islamic Republic of Mauritania to work, within the framework of the Constitution, towards the reinforcement of healthy pluralist and democratic practice which would preserve social unity and public peace.

85. The African Commission notes that the Respondent State contends rightly that the attitudes or declarations of the leaders of the dissolved Party could indeed have violated the rights of individuals, the collective security of the Mauritanians and the common interest, but the disputed dissolution measure was " not strictly

[33] Cf. Communication 140/94 cited above, paragraph 41
[34] Cf. Communication 140/94 cited above, paragraph 42.
[35] Cf. Communication 147/95 and 149/96 Sir Dawda K. Jawara/The Gambia, paragraph 59.
[36] Cf. communication 140/94 cited above, paragraph 42.

proportional" to the nature of the breaches and offences committed by the UFD/EN.

For these reasons, the African Commission-:

Finds that the dissolution of UFD/Ere nouvelle political party by the Respondent State was not proportional to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of Article 10(1) of the African Charter.

250/2002 – Liesbeth Zegveld and Mussie Ephrem/Eritrea

Rapporteur:

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

Summary of Facts

1. The complaint is filed by Dr. Liesbeth Zegveld, an international lawyer at a Netherlands based firm **- Böhler Franken Koppe De Feijter**, and Mr. Mussie Ephrem, an Eritean living in Sweden.

2. The Complainants allege that 11 (eleven) former Eritrean government officials, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie were illegally arrested in Asmara, Eritrea on 18th and 19th September 2001 in violation of Eritrean laws and the African Charter on Human and Peoples' Rights. They were part of a group of 15 senior officials of the ruling Peoples Front for Democracy and Justice (PFDJ) who had been openly critical of the Eritrean Government policies. In May 2001, they wrote an open letter to ruling party members criticising the government for acting in an "illegal and unconstitutional" manner. Their letter also called upon "all PFDJ members and Eritrean people in general to express their opinion through legal and democratic means and to give their support to the goals and principles they consider just." The government subsequently announced that the 11 individuals mentioned above, on whose behalf the present complaint is being filed, had been detained "because of crimes against the nation's security and sovereignty."

3. The complaint also alleges that the detainees could be prisoners of conscience, detained solely for the peaceful expression of their political opinions. Their whereabouts is currently unknown. The Complainants allege that the detainees may be held in some management building between the capital Asmara and the port of Massawa. They have reportedly not been given access to their families or lawyers. The Complainants fear for the safety of the detainees.

4. The Complainants state that they have made a request for *habeas corpus* to the Minister of Justice of Eritrea. They claim that they could not submit the same to the courts, as the place of detention of the 11 former officials was unknown. They allege that in the *habeas corpus* the Eritrean authorities were asked, among others, to reveal where the 11 detainees were being held, to either charge and bring them to court or promptly release them, to guarantee that none of them would be ill treated and that they have immediate access to lawyers of their choice, their families and adequate medical care. The Complainants allege that no reaction has been received from the Eritrean authorities.

5. Together with their complaint the Complainants submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission.

Complaint

6. The Complainants allege violations of Articles 2, 6, 7(1), and 9(2) of the African Charter on Human and Peoples' Rights.

7. The Complainants pray that should the detainees be tried, the trial should be held in accordance with international human rights standards and without recourse to the death penalty. They claim that such a trial should not be before the Special Court, which they allege fails to meet international standards of fair trial.

Procedure

8. The complaint was dated 9th April 2002 and received at the Secretariat on 9th April 2002 by fax, and on 9th and 11th April 2002 by email.

9. On 19th April 2002, the Secretariat wrote to the Complainants acknowledging receipt of the complaint, and informing them that their request for provisional measures was noted and would be acted upon accordingly.

10. On 3rd May 2002, the African Commission wrote a letter of appeal to His Excellency Issayas Afewerki, President of the State of Eritrea, respectfully urging Him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the Commission.

11. At its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.

12. On 20th May 2002, the Ministry of Foreign Affairs of the State of Eritrea responded to the Commission appeal and confirming to the latter that the alleged victims on whose behalf the complaint was filed had their quarters in appropriate government facilities, had not been ill-treated, have had continued access to medical services and that the government was making every effort to bring them before an appropriate court of law as early as possible.

13. On 28th May 2002, the Secretariat wrote to the Complainants and the Respondent State of the Commission's decision to be seized of the matter and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.

14. The Secretariat of the African Commission forwarded the Ministry's response to the Chairperson of the African Commission on 7th June 2002 and to the Complainants on 18th June 2002.

15. On 25th October 2002, the African Commission wrote, by way of follow up on its urgent appeal in the matter, to the Respondent State reminding it that it was the responsibility of the Member State's General Prosecutor to bring the accused before a competent court of law in accordance with the rules guaranteeing fair trial under relevant national and international instruments.

16. The two parties made submissions on admissibility.

17. At its 33rd Ordinary Session held from 15th to 29th May 2003, in Niamey, Niger, the African Commission heard oral submissions from both parties to the communication and decided to declare the communication admissible.

18. On 10th June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and requested them to forward their submissions on the merits of the communication within 3 months.

19. The Chairperson of the African Commission forwarded a letter dated 10th June 2003 appealing to H.E the President of Eritrea to intervene in this matter and urge the authorities holding the 11 individuals to release them or bring them before the courts in Eritrea.

20. At its 34th Ordinary Session, held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

LAW
Admissibility

21. The admissibility of communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which must generally be fulfilled by a Complainant for a communication to be declared admissible.

22. At issue in the present communication is whether the Complainants have pursued and exhausted the domestic legal remedies of Eritrea, and if not, whether the exception to the exhaustion of domestic remedies rule should apply. This issue of exhaustion of domestic remedies is governed by Article 56(5) of the African Charter and it provides -:

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

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

23. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and is premised on the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

24. In determining whether this communication should be declared admissible or otherwise, the African Commission must have regard to the arguments put forward by the Complainants and the Respondent State.

25. The Complainants submit they have attempted to exhaust local remedies in Eritrea. They state that on 26th November 2001 and on 9th April 2002, they submitted a *habeas corpus* request through the Eritrean Minister of Justice asking the Eritrean Authorities to disclose where the 11 detainees were being held and why. The Complainants also requested that the detainees be brought to court and charged in accordance with the law, however, there was no response to their request. A similar request was made on

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

26. In her oral submissions during the 33rd Ordinary Session of the African Commission, Zegveld stated that in an attempt to access the local courts, they had requested locally based legal practitioners (whom she declined to name) to bring the matter before the local courts. However, the said lawyers later informed her that they would not be able to pursue the detainees' case in the domestic courts for fear of persecution by the authorities and for fear of jeopardising their legal practice.

27. The Complainants further submit that for more than 18 months, the 11 detainees have been held in detention without formal charges and with no access to their lawyers or families thus rendering them unable to seek legal or administrative redress. Furthermore, there has been no response from the government of Eritrea or High Court of Asmara, in relation to the Complainants' requests of 26th November 2001 and 9th April 2002.

28. Under the circumstances presented above, the Complainants aver that the requirement to exhaust local remedies can no longer apply because even where such remedies would have been existent they have been unduly prolonged in this case.

29. The Complainants refer the African Commission to a decision of the European Court of Human Rights in *Ocalan vs Turkey*[37] where the court held that Ocalan's isolation and the fact that the Turkish police obstructed his access to lawyers made it impossible for the applicant to have effective recourse to a domestic remedy under Turkish Law.

30. In its written submissions, the Respondent State argues that the Complainants addressed their *habeas corpus* request to the Minister of Justice who is a member of the Executive branch with no capacity to address and take decisions on this matter either in substance or in procedure. They submit that only the judiciary has the authority to take action on any civil, criminal and other issues of judicial nature including, the matter of *habeas corpus*.

31. During the 33rd Ordinary Session, the Representative of the Respondent State submitted that to date the Complainants have not submitted themselves to the courts in Eritrea. He informed the African Commission that he had personally checked with the High Court of Asmara to establish whether the matter had been brought to the court's attention but there was no case file on this matter.

32. The Representative of the Respondent State argues that the Complainants' assertion that they have not been able to access the domestic courts is speculative. He stated that Zegveld should accredit herself to the courts in Eritrea to enable her bring this matter before the local courts.

33. The Respondent State further submits that they have been unable to bring the 11 detainees before a court of law because of the nature of the criminal justice system in Eritrea. The Representative of the Respondent State informed the African Commission that the criminal justice system in Eritrea was inherited from Ethiopia and is therefore lacking. Within the High Court of Asmara, there is only one chamber

[37] Application No. 46221/99, 12th March 2003

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

34. There are exceptions to the rule of exhaustion of domestic remedies and the Complainants have argued that they could not exhaust the domestic remedies because the domestic legislation of the Eritrea does not afford due process of law for the protection of the rights that have allegedly been violated.

35. At this stage, it should be made clear that, when a person is being held in detention and accused for committing a crime, the African Commission holds that it is the responsibility of the Member State, through its appropriate judicial bodies, to bring this person promptly before a competent court of law in order to enable him/her to be tried in accordance with rules guaranteeing the right to a fair trial in accordance with national and international standards.

36. The Inter-American Court of Human Rights in the ***Velasquez case***[38] while interpreting Article 46 of the American Convention (similar to Article 56(5) of the African Charter) which relates to the issue of exhaustion of domestic remedies, stated that, for the rule of prior exhaustion of domestic remedies to be applicable, the domestic remedies of the State concerned must be available, adequate and effective in order to be exhausted. The Court also opined that where a party raises non-exhaustion of local remedies because of the unavailability of due process in the State, the burden of proof will shift to "the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective."

37. In ***Consolidated communication 147/95 and 149/96***[39], the African Commission also ruled that domestic remedies must be available, effective and sufficient; A domestic remedy is considered available if the petitioner can pursue it without impediment, it is effective if it offers a prospect of success and it is sufficient if it is capable of redressing the complaint.

38. The African Commission notes that by its own admission, the Respondent State has indicated that it has not yet put in place structures that would ensure that cases are handled "within reasonable time". However, the Respondent State goes ahead to assure the African Commission that the detainees will be brought before a court of competent jurisdiction in due course.

39. The State has a constitutional or statutory requirement to provide an accessible, effective and possible remedy whereby alleged victims can seek recognition and restoration of their rights before resorting to the international system for protection of human rights. Such procedures should not be mere formalities that, rather than enable the realisation of those rights, to the contrary, dilute with time any possibility of success with respect to their assertion, recognition or exercise.

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

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

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

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

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

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

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

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

45. Secondly, Rule 118(2) of the African Commission's Rules of Procedure stipulate that:

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

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

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

Merits

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

the present communication therefore, the African Commission is left with no alternative but to proceed and deliver a decision on the merits based on the submissions of the Complainants.[40] Although the African Commission has in this decision referred to the oral submissions made by the Respondent State during the 33rd Ordinary Session, especially as they relate to some issues that touch upon the merits of the communication, the Respondent State's failure to present comprehensive submissions on the merits has been done at its own peril.

47. By Note Verbale dated 20th May 2002, the Respondent State informed the African Commission that the 11 persons had indeed been detained for *"conspiring to overthrow the legal government of the country in violation of relevant OAU resolutions, colluding with hostile foreign powers with a view to compromising the sovereignty of the country, undermining Eritrean National Security and endangering Eritrean society and the general welfare of its people"*. The Respondent State further stated that such detention was in conformity with the criminal code of the country. In their oral submissions made during the 33rd Ordinary Session in May 2003, the Respondent State further admitted that they had not at the time brought the 11 detainees before any court of law.

48. The Complainants aver that the 11 persons who were former Eritrean Government officials, had been openly critical of the Eritrean government policies and as a direct result of their open letter criticising the government of Eritrea for acting in an illegal and unconstitutional manner, they were arrested and detained for committing "crimes against the nation's security and sovereignty."

49. The Complainants state that the 11 detainees have since September 2001 been held incommunicado and have never been brought before any courts of law in violation of Article 17(4) of the Constitution of the State of Eritrea and Article 6 of the African Charter. Article 17 (4) of the Constitution provides that every person who is held in detention must be brought before a court of law within 48 hours of his arrest and no person shall be held in custody beyond such a period without the authority of the court.

50. The Complainants submit that the abovementioned acts by the Respondent State violate Articles 2, 6 and 7(1) of the African Charter.

51. Article 2 of the African Charter provides

> *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, or any other opinion, national or social origin, fortune, birth or other status."*

Article 6 of the African Charter provides

> "*Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"*

Article 7(1) of the African Charter provides

> *Every individual shall have the right to have his cause heard. This comprises*

[40] Communication 74/92 – Commission Nationale des Droits de l'Homme et des Libertes/Chad and 232/99 – John D. Ouko/Kenya

a) *The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;*
b) *The right to be presumed innocent until proved guilty by a competent court or tribunal;*
c) *The right to defence, including the right to be defended by counsel of his choice;*
d) *The right to be tried within a reasonable time by an impartial court or tribunal;*

52. Although Article 6 of the African Charter guarantees the right to liberty and security of the person, this is not an absolute right because the African Charter allows the deprivation of this right through lawful means. The African Charter specifically prohibits arbitrary arrests and detention.

53. Evidence before the African Commission indicates that the 11 persons have been held incommunicado and without charge since they were arrested in September 2001. This fact has not been contested by the Respondent State. They are being held in custody and have been cut off from communication with the outside world, with no access to their lawyers or families. Their whereabouts are unknown putting their fate under the exclusive control of the Respondent State.

54. The African Commission on two occasions wrote letters of Appeal to the President of the State of Eritrea informing him about the communication before the African Commission and requested him to intervene in the matter to ensure that the 11 persons are removed from secret detention and brought before the courts of law in Eritrea. In a Note Verbale dated 20th May 2002, the Ministry of Foreign Affairs of the State of Eritrea informed the African Commission that the 11 persons were being held in appropriate government facilities, that they had not been ill-treated and had access to medical services. The Ministry assured the African Commission that the government was making every effort to bring them before an appropriate court of law as early as possible. The African Commission notes that to date it has not received any information or substantiation from the Respondent State demonstrating that the 11 persons were being held in appropriate detention facilities and that they had been produced before courts of law.

55. Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Of itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment. The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and States must disclose the fact that someone is being detained as well as the place of detention. Furthermore, every detained person must have prompt access to a lawyer and to their families and their rights with regards to physical and mental health must be protected as well as entitlement to proper conditions of detention[41].

56. The African Commission holds the view that the lawfulness and necessity of holding someone in custody must be determined by a court or other appropriate judicial authority. The decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide

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

appropriate justification. Therefore, persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the State should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its ***Resolution on the Right to Recourse and Fair Trial***[42] and elaborated upon in its ***Guidelines on the Right to Fair Trial and Legal Assistance in Africa***[43]

57. In the present communication, the Respondent State did not provide the African Commission with any details regarding the specific laws under which the 11 persons were detained but instead generally states that their detention is in *"consonance with the existing criminal code …and other relevant national and international instruments"*. The 11 persons were detained on account of their political beliefs and are being held in secret detention without any access to the courts, lawyers or family. Regrettably, these persons' rights are continually being violated even today, as the Respondent State is still holding them in secret detention in blatant violation of their rights to liberty and recourse to fair trial[44].

58. The Complainants further allege that the 11 persons were arrested and detained because they expressed opinions that were critical of the Respondent State. The Complainants submit that this amounts to a violation of Article 9 (2) of the African Charter, which provides

"Every individual shall have the right to express and disseminate his opinions within the law"

59. The right to freedom of expression has been recognised by the African Commission as a fundamental individual human right which is also a cornerstone of democracy and a means of ensuring the respect for all human rights and freedoms.[45] Nonetheless, this right carries with it certain duties and responsibilities and it is for this reason that certain restrictions on freedom of expression are allowed. However, Article 9(2) as well as Principle II(2) of the ***Declaration of Principles on Freedom of Expression in Africa*** categorically state that such restrictions have to be *provided for by law.*[46]

60. It is a well settled principle of the African Commission that any laws restricting freedom of expression must conform to international human rights norms and standards relating to freedom of expression[47] and should not jeopardise the right itself. In fact, the African Charter in contrast to other international human rights does not permit derogation from this or any other right on the basis of emergencies or special circumstances.

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

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

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

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

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

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

61. Consequently, if any person expresses or disseminates opinions that are contrary to laws that meet the aforementioned criteria, there should be due process and all affected persons should be allowed to seek redress in a court of law.[48]

62. The facts as presented leave no doubt in the mind of the African Commission that the Respondent State did indeed restrict the 11 persons' right to free expression. No charges have been brought against the 11 persons and neither have they been brought before the courts. Such restrictions not only violate the provisions of the African Charter but are also not in conformity with international human rights standards and norms.

For the above reasons, the African Commission,

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

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

Recommends that the State of Eritrea compensates the abovementioned persons

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

[48] Communication 232/99 – John Ouko/Kenya

COMMUNICATIONS DECLARED INADMISSIBLE

248/2002 Interights and World Organisation Against Torture/Nigeria

Rapporteur:

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

Summary of Facts

1. The complaint is filed by Interights and the World Organisation Against Torture/Organisation Mondiale Contre la Torture on behalf of individuals who requested anonymity as permitted under Article 56(1) of the African Charter.

2. In their complaint, the complainants allege that between May 1999 and March 2002, the Federal Republic of Nigeria has engaged in extra-judicial executions, state-sponsored violence and impunity.

3. The complainants allege that during the said period, the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the extra-judicial execution of cumulatively over ten thousand persons at different locations in Nigeria.

4. They allege that the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the verifiable and forcible internal displacement of over one million persons in Nigeria.

5. They allege that the Federal Republic of Nigeria has systematically and deliberately in all the cases of extra-judicial execution and forcible displacement, denied the victims access to remedies in violation of its obligations under the African Charter. It has, by reason of all these violations over a period of more than two and a half years, committed systematic, serious and massive violations of human and peoples' rights recognised by the African Charter on Human and Peoples' Rights which is domestic law in Nigeria.

6. The authors of the complaint allege that they have independently verified the allegations described in the complaint. They assert that the epidemiology of the violations described in the complaint precluded the requirement to exhaust domestic remedies in Nigeria. They cited the decision of the Commission on admissibility in the Communication 25/89 *Free Legal Group et al v. Zaire* wherein the Commission held that the requirement of exhaustion of local remedies need not be applied literally "in cases where it is impractical or undesirable for the individual complainant to seize domestic courts in the cases of each individual complainant. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the great numbers of people involved, such remedies as might theoretically exist in the domestic courts are, as a practical matter, unavailable or, in the words of the Charter, unduly prolonged."

Complaint

7. The Complainant alleges violation of Articles 1, 2, 3, 4, 5, 7(1), 12 (1), 13(1), 13(2), 14, 15, 16, 17(1), 17(2), 18, 25 and 26 of the African Charter on Human and Peoples' Rights.

8. In their prayers for redress, the complainants request the Commission to:

- undertake an independent investigation and verification of the violations being complained of;
- request, pending its decision on this communication, its Special Rapporteurs on Human Rights of Women, on Summary, Arbitrary and Extra-Judicial Executions, and on Prisons to undertake a joint investigation of violence, extra-judicial executions and related violations in Nigeria and to request the government to accede to the conduct of such an investigation;
- request the government to verify the number and manner of death of all victims of extra-judicial executions during the period covered by the communication;
- request the government to provide adequate and appropriate remedies to the victims of violations alleged in this communication, including, in particular, the prosecution of all persons implicated in the violations;
- request the government to adopt and implement such measures as may be indicated by the Commission to prevent recurrence of the violations complained of in this communication; and
- request the government to report periodically to the Commission on steps taken by it to comply with the finding and remedies indicated by the Commission.

Procedure

9. The Complaint, dated April 2002, was sent on 4th April 2002, and received at the Secretariat on 5th April 2002.

10. At its 31st Ordinary Session held from 2nd – 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.

11. On 28th May 2002, the Secretariat wrote to the complainants and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.

12. At its 32nd, 33rd and 34th Ordinary Sessions, the communication was deferred to enable the parties make submissions on admissibility.

13. At its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered this communication and declared it inadmissible.

LAW
Admissibility

14. Article 56 (5) of the African Charter requires that *"a communication be introduced subsequent to exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure for such recourse is unduly prolonged"*.

15. The Complainants' claim that theirs is a special case in which they assert that, by the jurisprudence of the African Commission, the epidemiology of the violations described precluded the requirement to exhaust domestic remedies. Despite this, however, the African Commission had decided, at its 32nd, 33rd and 34th Ordinary Sessions, that both parties should forward their written submissions on admissibility.

16. Despite several reminders, the Complainants, in particular, have not furnished their written submissions on admissibility. Consequently, the African Commission holds that the Complainants have not shown if they have exhausted local remedies as required by the African Charter.

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

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

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

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

Rapporteur:

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

Summary of Facts

1. The complaint is filed by Mr. Samuel Kofi Woods, II and Mr. Kabineh M Ja'neh on behalf of Hassan Bility, Ansumana Kamara and Mohamed Kamara, all Liberian journalists for the independent Analyst Newspaper in Monrovia.

2. The Complainants allege that in the afternoon of 24 June 2002, plain-cloth state security officers from the National Police Force, National Security Agency, National Bureau of Investigation, Fire Service, Immigration, Ministry of Defence, Anti-Terrorist Unit, Special Security Service, and Ministry of National Security arrested Hassan Bility, Ansumana Kamara and Mohammed Kamara, all journalists working for the independent Analyst Newspaper in Monrovia.

3. The complaint also alleges that the said arrest and detention of the journalists was not disputed as the Minister of Information, Mr. Reginald Goodridge has confirmed the same. To date, there was no charge proffered against them and they continue to languish in detention, which is in contravention of the African Charter, the Constitution of Liberia and the Universal Declaration of Human Rights (UDHR).

4. It is alleged that in consideration of the available constitutional local remedies vis-à-vis the arbitrary arrest and detention of these journalists, and further to the petition filed by an assortment of human rights organisations in Liberia filed a petition at the First Judicial Circuit Court, Criminal Assizes "B" of Montserrado County, the latter issued a Special Writ of Habeas Corpus, which, however, was allegedly not complied with.

5. The Complainants further allege that the subsequent announcement by the Liberian Government of its intention to arraign the detained journalist before a military tribunal would restrain, deprive and deny them of their human rights to liberty, freedom and due process of laws as enshrined in the Liberian Constitution, the African Charter, and the UDHR.

6. Together with their complaint the Complainants submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission.

Complaint

7. The Complainants allege violations of Articles 6, 7(b), and 7(d) of the African Charter on Human and Peoples' Rights.

8. The Complainants pray that in addition to provisionally ordering the immediate release of the detainees in consonance with Rule 111 of the Rules of Procedure of

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

Procedure

9. The Complaint was dated 9th August 2002 and received at the Secretariat on 16th August 2002 by post.

10. At its 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.

11. On 23rd October 2002, the African Commission appealed to His Excellency Charles Taylor, President of the Republic of Liberia, respectfully urging him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the African Commission.

12. On 4th November 2002, the Secretariat wrote to the Complainants and Respondent State to inform them that the African Commission had been seized of the communication and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the Commission.

13. The Secretariat requested the parties on several to submit their arguments on admissibility.

14. At its 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered this communication and declared it inadmissible.

LAW
Admissibility

15. Article 56 (5) of the African Charter requires that *"a communication be introduced subsequent to exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure for such recourse is abnormally prolonged"*.

16. The Complainants have, despite repeated requests, however, not furnished their submissions on admissibility, especially on the question of exhaustion of domestic remedies.

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

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

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

258/2002 - Miss A /Cameroon

Rapporteur

32nd Ordinary Session: Commissioner EVO Dankwa /Angela Melo
33rd Ordinary Session: Commissioner EVO Dankwa/Angela Melo
34th Ordinary Session: Commissioner EVO Dankwa/Angela Melo
35th Ordinary Session Commissioner Angela Melo

Summary of Facts

1. On 21st August 2002, the Secretariat of the African Commission on Human and Peoples' Rights (the African Commission) received from Miss A, a Cameroonian citizen, a communication relative to the provisions of Article 55 of the African Charter on Human and Peoples' Rights (the African Charter). Miss A submitted the communication for and on behalf of her father and co.

2. The communication was submitted against the Republic of Cameroon (a Sate Party[49] to the African Charter) and Miss A alleged in the communication that her father and two colleagues, former workers of the Cameroon P & T were arrested and detained in 1998 by the police, as conspirators of the Minister of P & T, who was also arrested and detained for alleged corruption.

3. The Complainant further alleged that since 1998, when her father and two of his colleagues have been in detention, they have never been formally charged, they have never appeared in court and never had access to a lawyer. The Complainant added that the State did not appear to have any intention to try them in the foreseeable future, whereas the delicate health of her father required constant medical attention.

Complaint

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

Procedure

5. By letter ACHPR/COMM/258/2002 of 23rd August 2002, the Secretariat of the African Commission acknowledged receipt of the communication and informed the sender that it would be tabled for consideration *prima facie* at its 32nd Ordinary Session.

[49] Cameroon ratified the African Charter on 20/06/1989.

6. During its 32nd Session, held from the 17th to 23rd October 2002 in Banjul, The Gambia, the Commission considered the communication and decided to be seized of it.

7. On 22nd October 2002, the Chairman of the Commission sent a letter of requesting the urgent intervention of the President of the Republic of Cameroon, drawing his attention to the situation of the two detainees and in particular on their state of health and urged the Head of State to ensure that appropriate medical care is provided for the detainees. The Chairman of the Commission also requested in his letter that the detainees be charged and given a fair trial or freed in case no charge is made against them.

8. On 28th October 2002, the Secretariat of the Commission sent a Note Verbale to Cameroon informing it of the communication against it and the decision of seizure that the Commission had taken on it. Cameroon was further requested to provide the Commission with its arguments on the admissibility of the case, which the Commission intends to consider at its 33rd Session (5-19 May 2003, Niamey, Niger).

9. On the same date, the Secretariat of the Commission sent a letter to the Complainant informing her of the decision of seizure that the Commission had taken on her case as well as of the letter for urgent intervention that the Chairman of the Commission had sent to the President of the Republic of Cameroon at her request. The Complainant was also requested to furnish the Commission with possible arguments on the admissibility of the case, which the Commission intended to consider at its 33rd Session.

10. Having received no reply from the Respondent State, the Secretariat of the Commission sent it a reminder on 10th February 2003 drawing its attention to the fact that its written submissions on the case should reach the Commission as early as possible to allow the Commission take a decision on admissibility of the case. The Secretariat is yet to receive a reaction from the Respondent State.

11. On 20th October 2002, the Complainant sent a letter to the Commission requesting it to defer consideration of the communication to allow her to acquire more information on the case from the victims' lawyers.

12. On 21st October 2002, the Secretariat of the Commission acknowledged receipt of the Complainant's request for deferment, and informed her that in accordance with her request consideration of the communication would be deferred until the 35th Ordinary Session of the ACHPR.

13. At its 34th Ordinary Session held in November 2003 in Banjul, The Gambia, the African Commission formally decided to defer its decision on the admissibility of the complaint, in accordance with the request of the Complainant.

14. By Note Verbale ACHPR/COMM 2^{2}58/2002 OF THE 15/11/2003, the Secretariat of the African Commission handed to the delegation of Cameroon participating at the 34th Session a copy of the said complaint. The Note Verbale further requested Cameroon to convey its comments with regard to the admissibility of the matter within three months and in any case before end

February 2004, to enable the Commission to make a well informed ruling on the communication at its 35th Ordinary Session.

15. On the 17/02/2004, the Ministry of Foreign Relations of Cameroon sent a letter to the African Commission in which the Respondent State intimated that Mr. Ndeh Ningo had been acquitted and freed in November 2003, "for lack of criminal charges" whilst Mr. Takang Philip had been freed in March 2003 "for non-proven facts".

16. Extracts of the judgement letter indicated the acquittal and liberation of the two individuals as well as the respective arrest warrants which had been attached to the documents mentioned earlier.

17. The Respondent State therefore requested the Commission to declare the communication inadmissible "in view of the presentation of the above mentioned documents, which sufficiently prove that the two cases had been submitted to the legal Authorities of Cameroon and had been dealt with".

18. On the 01/03/2004 the Secretariat of the African Commission, through its Note Verbale ACHPR/COMM 258/02 acknowledged receipt of the Note Verbale from the Respondent State.

19. By letter ACHPR/COMM 258/02/RK of the 1st /03/2003, the Secretariat of the African Commission had conveyed the Note Verbale to the Complainant requesting her reaction on the contents of the letter.

20. On the 14/04/2004, the Complainant wrote to the Secretariat of the African Commission to confirm the liberation of Mr. Ndeh Ningo who had been "judged not guilty and freed on the 23/11/2003 after having spent 4 years in detention".

21. The Complainant indicated in her letter that Mr. Ndeh Ningo would advise the Commission on whether or not he would pursue the matter at the level of the Commission. The Complainant further mentioned the possibility of holding negotiations with the Respondent State to obtain compensation for Mr. Ndeh Ningo. For this reason the Complainant requested the African Commission to kindly defer its decision on the admissibility of the communication until its 36th Ordinary Session and not to declare it inadmissible as per the request of the Respondent State.

22. During its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the Commission considered the communication and declared it inadmissible.

LAW
Admissibility

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

24. In the case under consideration, the African Commission notes that the alleged victims were tried and freed in March and November 2003 respectively. This fact was admitted both by the Complainant and Respondent State.

25. The African Commission took note of the fact that the case was brought to the African Commission at the time that the matter was still before the courts. Furthermore, the fact that the case was tried properly before a court of law shows the availability of local remedies.

26. The African Commission further took note of the fact that the Complainant intends to meet with the Respondent State and start negotiations with a view to claim compensation for and on behalf of the alleged victims.

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

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

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

COMMUNICATION WITHDRAWN BY THE COMPLAINANT

283/2003 – B/Kenya

Rapporteur:
34th Ordinary Session – Commissioner Nyanduga
35th Ordinary Session – Commissioner Nyanduga

Summary of Facts

1. The communication is submitted by a Complainant who requests anonymity and presents the facts of the case as follows -:

2. The Complainant alleges that on 30th September 2003, the Anti-Corruption Committee presented a report on corruption in the judiciary to the Chief Justice of Kenya in the presence of the press. The Report also known as the *Ringera* Report reveals shocking and endemic corruption in the judiciary and further lists the names of the Judges alleged to have been involved in corrupt and unethical practices in the course of performing their duties.

3. On 4th October 2003 during a press conference, the Chief Justice without naming the judges is alleged to have given the said judges a two-week ultimatum to resign or face trial. Two days later, the Constitutional Affairs Assistant Minister is reported to have reiterated the deadline issued by the Chief Justice and warned that judges who ignore the deadline would face tribunals and prosecution for crimes committed.

4. The Complainant states that the Kenya Magistrates and Judges Association was quoted in the press as saying "we urge the judicial administration to inform those affected so that they can decide on their next course of action not forgetting the need for confidentiality". However, the Complainant claims that over the following several days none of the judges named in the report were informed of their presence on the list nor of the allegations leveled against them.

5. The Complainant avers that on 14th October 2003 it was reported through a six o'clock news broadcast that the President had appointed two tribunals to investigate the twenty-three judges whose names were announced during the broadcast as well as their suspension. The Complainant asserts that this is the first time that the judges learnt of their presence on the list and of their immediate suspension. The announcement however did not contain details of the allegations made against each judge. It is however reported in the *Daily Nation Newspaper* on 18th October 2003 that the police would question some of the judges before they appear before the tribunals and it is only during those interrogations they will be informed of the accusations against them and their statements taken.

6. The Complainant alleges that as of 17th October 2003, the judges had still not received details of the allegations made against them despite continued press coverage of the matter. Although maintaining their innocence, some of the named judges tendered their resignations or sought retirement.

7. The Complainant further submits that the Chair of the Law Society of Kenya on

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

8. The Complainant on the whole submits that failure to advise the judges mentioned in the *Ringera* Report of the allegations against them and to give them an opportunity to accept or dispute the allegations coupled with varied threats and warnings amounts to harassment and hounding of judges thereby undermining the principles of security of tenure and the independence of the judiciary.

9. Furthermore, the Complainant claims that the manner in which the whole matter was dealt with violates Articles 7 and 26 of the African Charter as well as other international human rights instruments namely the UN Basic Principles on the Independence of the Judiciary, the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights

Complaint

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

Procedure

11. The communication was faxed and received at the Secretariat of the African Commission on 21st October 2003. The Complainant also requested the African Commission to take Provisional Measures under Rule 111 of the Rules of the African Commission to ensure that the process of removal of judges does not interfere with independence of the judiciary and the right to a fair hearing.

12. The Secretariat of the African Commission on 24th October 2003 forwarded a copy of the communication as well as a draft Appeal Letter to the Chair of the African Commission and requested him to take necessary action.

13. By email dated 28th October 2003, the Chair of the African Commission wrote advising the Secretariat that since the matter would be handled as a communication at the African Commission's forthcoming 34th Session, an Appeal Letter should not be sent to the government of Kenya until after the African Commission had examined the matter and determined what course of action to take.

14. On 31st October 2003, the Secretariat of the African Commission wrote to the Complainant acknowledging receipt of the communication.

15. At its 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission examined the communication and decided to be seized of the matter.

16. On 4th December 2003, the parties to the communication were informed accordingly and requested to forward their written submissions on admissibility of the communication within 3 months.

17. On 15th March 2004, the parties to the communication were reminded to forward their written submissions on admissibility to the Secretariat.

18. By email dated 16th March 2004, the Secretariat received a letter from the Complainant withdrawing the matter as she believed that the matter was now being addressed by the Respondent State.

19. On 25th March 2004, the Secretariat received the Respondent State's submissions on admissibility and acknowledged receipt of the same on 26th March 2004.

20. By letter dated 26th March 2004, the Secretariat acknowledged receipt of the Complainant's letter withdrawing the communication and also forwarded a copy of the Respondent State's submissions on admissibility.

21. At its 35th Ordinary Session held in Banjul, The Gambia, the African Commission considered this communication and decided to close the file.

Respondent State's submissions on admissibility

22. The Respondent State provides a background against which it undertook the judicial reforms which have in part given rise to this communication. They argue that a well functioning judicial system is crucial to improving governance, combating corruption and consolidating the democratic order, thereby fostering economically sustainable development. Therefore, a judicial system with integrity should be free from political and external interference. Furthermore, judicial independence must be balanced by accountability in order to facilitate transparency within the system and control of corruption.

23. It is submitted by the Respondent State that the tendency towards corruption and abuse of power among certain members of the judiciary in Kenya has been lamented over time. As such, one of the key objectives of the Kenyan government has been to undertake judicial reform in order to develop an impartial, independent, accountable and effective judiciary that is able to improve governance and advance development in the country.

24. The Respondent State contends that the communication does not meet the requirements in Article 56(2), (4) and (5) of the African Charter.

25. It is submitted that the communication is substantially based on newspaper reports and is therefore not founded on factual realities of the case contrary to Article 56(4) of the African Charter.

26. The Respondent State further submits that the Complainant did not even attempt to exhaust local remedies in their case as required by Article 56(5) of the African Charter. In this regard, the Respondent State argues that the national legal framework in Kenya is adequate to address the concerns raised by the Complainant and should have therefore been utilised. For instance, the concerns

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

27. The Respondent State reports that the judges are not on trial as understood but that special investigative tribunals were set up to determine issues touching upon the behaviour and ability of the judges implicated to perform the functions of their office. 23 judges from both the Court of Appeal and High Court of Kenya were involved and were investigated within 14 days of the presentation of the *Ringera* Report. The Tribunals started sitting on 9th and 16th February 2004.

28. Confidentiality was assured for the affected judges in the initial stages and at all crucial times. Only broad categories of alleged offences were highlighted in the media. The Respondent State argues that it was therefore possible for a judge to privately and conscientiously place him/herself into any of the categories and make a personal decision to resign or appear before the tribunals. Consequently, majority of the judges mentioned opted for early retirement with full benefits as a result.

29. In any case, the Respondent State argues, that the Judges had the option within the laws to challenge the process before the High Court should they be aggrieved by it but none of the said judges opted for the judicial remedy.

30. The Respondent State maintains that the domestic legislation of Kenya is in consonance with both the letter and spirit of international law including the UN Basic Principles on the Independence of the Judiciary and asks the African Commission to declare the communication inadmissible.

Reasons given by the Complainant for withdrawing the communication

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

32. It is for this reason that the Complainant wishes to withdraw the communication.

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

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