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Annex II

**24TH ACTIVITY REPORT OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

AFRICAN UNION

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UNION AFRICAINE

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*African Commission on Human &
Peoples' Rights*

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

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ANNEX II

**24TH ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN
AND PEOPLES' RIGHTS**

INTRODUCTION

1. This is the Twenty-fourth Activity Report of the African Commission on Human and Peoples' Rights (the "African Commission", the "Commission," the "ACHPR").
2. The Report is based on the 43rd Ordinary Session of the Commission that was held from 7-22 May 2008, in Ezulwini, in the Kingdom of Swaziland.
3. The Report covers the period November 2007-May 2008, and has two (2) Annexures; the Agenda of the 43rd Ordinary Session, and two of the Communications that were finalised during the Session

Attendance at the Session

4. The following members of the African Commission attended the 43rd Ordinary Session, upon which this Report draws:
 - Commissioner **Sanji Mmasenono Monageng**, Chairperson
 - Commissioner **Angela Melo**, Vice-Chairperson;
 - Commissioner **Catherine Dupe Atoki**;
 - Commissioner **Musa Ngary Bitaye**;
 - Commissioner **Reine Alapini-Gansou**;
 - Commissioner **Zainabo Sylvie Kayitesi**.
 - Commissioner **Soyata Maiga**;
 - Commissioner **Mumba Malila**;
 - Commissioner **Bahame Tom Mukirya Nyanduga**;
 - Commissioner **Pansy Tlakula**; and
 - Commissioner **Yeung Kam John Yeung Sik Yuen**.

Events on the margins of the Session

5. At the beginning of the Session, the Chairperson of the Commission, Commissioner Sanji Monageng participated in the Extraordinary Session of the Executive Council of the African Union from 6 – 8 May, 2008 in Arusha, Tanzania, organised by the African Union Commission (AUC).
6. The Session was preceded by a series of activities, which the Commission organised and/or participated in. These activities include the following:

- i. NGO Forum: 3 – 5 May, 2008, organised by the African Centre for Democracy and Human Rights Studies(ACDHRS);
 - ii. Meeting of the Working Group on the Death Penalty: 4 – 5 May, 2008, organised by the African Commission;
 - iii. Preparatory Committee Meeting for the Seminar on Indigenous Populations/Communities in Africa: 4 – 5 May, 2008, organised by the African Commission;
 - iv. In-house meeting: 6 May, 2008, organised by the African Commission;
 - v. Centre for Good Governance Meeting: 6 May, 2008, organised by the Centre for Good Governance;
 - vi. Human Rights AU/UN Cluster Strategy Meeting: 6 May, 2008, organised by the ACDHRS, in collaboration with the United Nation (UN).
7. The objectives of these events were, inter alia, to advocate for, and disseminate information on human rights, and enhance the promotion and protection of human and peoples' rights in Swaziland in particular and the continent as a whole.

Adoption of the agenda

8. The Agenda of the Session was adopted and is attached to this report as **Annex I.**

The opening ceremony

9. The Vice-Chairperson, Commissioner Angela Melo, presided over the Opening Ceremony, on behalf of the Chairperson, Commissioner Sanji Monageng, who was attending the 11th Extra-Ordinary Session of the Executive Council of the AU in Arusha, Tanzania from 6-7 May 2008.
10. The number of participants that attended the Session totalled four hundred and forty-nine (449), including three (3) National Human Rights Institutions, five (5) International and Intergovernmental Organisations, One Hundred(100) African and International NGOs, and twenty-seven(27) States Parties.
11. At the opening ceremony, speeches were delivered by: Dr. Angela Melo, Vice-Chairperson of the African Commission; the representative of African Union(AU) Member States, Honourable Mathias Chikawe, Minister for Justice and Constitutional Affairs of the United Republic of Tanzania; Mr. Gilbert Sebihogo, the Executive Director of the Network of African National Human Rights Institutions (NHRIs) ; the representative of NGOs, Mrs. Hannah Foster, Director of the African Centre for Democracy and Human Rights Studies; and H.E. Mr. Absolom Themba Dlamini, Right Honourable Prime Minister of the Kingdom of Swaziland, delivered the

opening speech.

Speech of the Vice Chairperson of the African Commission, Dr. Angela Melo

12. In her welcoming address, Dr. Angela Melo, on behalf of the Members and Staff of the Commission and on her own behalf, thanked His Excellency Absolom Themba Dlamini, the Right Honourable Prime Minister of the Kingdom of Swaziland for opening the Session, despite his very busy schedule. The Vice-Chairperson congratulated His Majesty, Royal Highness, **King Mswati III** on the occasion of his 40th birthday and the 40th Independence Anniversary of the Kingdom of Swaziland. She also thanked the people of Swaziland for their hospitality, and the participants for honouring the invitation of the Commission to attend the Session.
13. She stated that the last decade of the 20th century was characterised by unprecedented expansion of democracy and major socio-economic reforms in Africa.
14. She also recounted the efforts and the achievements of the African Commission in the promotion and the protection of human rights on the continent, but implored Governments across Africa to take seriously the synergy between democracy, peace, security, development and human rights if Africa is to achieve.
15. She further stated that observance of human rights is the cornerstone of every democratic system, and recognition of the right of the AU to intervene under certain circumstances, including genocide, war crimes, and crimes against humanity is significant.
16. She emphasised the fact that, the right of the AU to intervene in States Parties under the above circumstances was further upheld by the “Ezulwini Consensus” that was adopted at the 7th Extra-Ordinary Session of the Executive Council, from 7-8 March, 2005 in Addis Ababa, and the Resolution to Protect, adopted during the 42nd Ordinary Session of the Commission in November 2007.
17. Dr. Melo also commended the intensification of collaboration and dialogue between the AU Commission, African Commission, and States Parties.
18. She further indicated that, as part of this dialogue, in January 2008, the Commission was allowed to prepare and present its own budget, which led to a significant increase in the human and financial resources allocated to the Commission. She called on States Parties to fulfil their obligations under the Charter, and to react promptly and positively to requests for promotional and protection missions by the Commission.
19. Dr. Melo also mentioned the main developments which have occurred in

Africa since the last Session of the Commission. She deplored the recent events in Kenya and Zimbabwe. She also stated that the celebration of the World Press Freedom Day, just a few days before the opening of this Session, is a reminder that freedom of Expression and Press Freedom are fundamental cornerstones of democracy. In addition, she deplored other factors hindering the enjoyment of human rights in Africa, including food crisis.

20. She recalled the role of NGOs in the African human rights system, and the close collaboration that the Commission enjoys with them. She recognised the increasing participation of other partners, including intergovernmental organisations and NHRIS in the activities of the African Commission.
21. She also indicated that three States Parties; Sudan, Tanzania, and Democratic Republic of Congo(DRC), would present their Periodic Reports during the Session, and urged States Parties to comply with their reporting obligation under Article 62 of the Charter.
22. She commended members of the Commission and the staff of the Secretariat for their dedication and announced that the African Commission is planning to celebrate Africa Day this year in Swaziland.

Speech of the Representative of AU Member States

23. Speaking on behalf of AU Member States, Honourable Mathias Chikawe, Minister for Justice and Constitutional Affairs of the United Republic of Tanzania expressed his profound gratitude to the King and people of Swaziland for their warm welcome and hospitality. He indicated that, the Sessions of the African Commission could be seen as a mirror through which Africa sees itself and its achievements and challenges in the promotion and protection of human rights over the past 21 years.
24. He noted that the Agenda for the Session included many pertinent human rights issues on the continent, debates about human rights situation in Africa, which will give the stakeholders the opportunity to exchange views in a frank and open manner.
25. The representative also acknowledged the role of NHRIs in the promotion and protection of human rights and declared that there was a NHRI in Tanzania charged with promoting and protecting human rights since its establishment. He asserted that, the cooperation between the Commission and NHRIs will enhance the enjoyment of human rights by the people of Africa.
26. He further acknowledged the role of NGOs and Civil Society Organisations (CSO) in the African human rights system, especially their collaboration with the Commission. He stated that the AU has recognised the role of NGOs on

the continent by associating them to its work through the establishment of the Economic, Social and Cultural Council.

27. He also mentioned the importance of communications/complaints brought before the African Commission. He stated that, apart from being a process aimed at providing remedies, it also helps States to be involved and assume responsibility for human rights violations.
28. The representative also noted that State Reports submitted under Article 62 of the Charter enables states to engage in dialogue on human rights issues. He urged States parties to fulfil their obligations under Article 62 of the African Charter.
29. He commended the efforts made by the Commission to achieve its mandate, especially the exemplary commitment of the staff of the secretariat despite the material and human resource constraints impacting negatively on the work of the Commission.
30. He further noted the ongoing revision of the Rules of Procedure of the Commission, especially in view of the establishment of the African Court, and hoped that, the complementary nature of the Court will enhance the work of the Commission.
31. On the **Draft Single Legal Instrument** on the Merger of the African Court on Human and Peoples' Rights with the African Court of Justice, Honourable Chikawe noted that there will be two different sections within the new merged Court, a General Affairs Section and a Human Rights Section.
32. He informed the African Commission that the Protocol relating to the Merger was adopted on 18 April 2008, and that the Draft Single Legal Instrument will be presented to the Policy Organs of the AU at the forthcoming AU Summit in June - July 2008.
33. He stated that, in the light of these developments, he feels that the mission of the Commission is gaining grounds and that Member States should help the Commission to achieve its mandate.

Speech of the Representative of National Human Rights Institutions

34. The Representative of the National Human Rights Institutions, Mr. Gilbert Sebihogo, Executive Director of the Network of African National Human Rights Institutions, declared that the Network, which was established seven months before the 43rd Session, will become a privileged and strategic partner of the African Commission in the promotion and the protection of human rights in Africa.
35. He stated that NHRIs play an important role in the execution of the mandate

of the African Commission, and encouraged the African Commission to continue granting Affiliate Status to NHRIs. He said that the Network will do its best to hold NHRIs' forums prior to Ordinary Sessions of the African Commission.

36. He also asserted that the Session is being held at a time when many challenges are facing Africa in its progress towards good governance, the rule of law and respect for human rights and that NHRIs are not only conscious of these challenges, but also play a role in addressing them. He also articulated the fact that democracy can only be realised through transparency, good governance, peace and human rights.
37. He also mentioned the problems facing NHRIs in Africa, most of which are still nascent and need the confidence of those they work for and the governments that established them.
38. He underlined the importance of NHRIs for an efficient protection of human rights. He stated that the objective of the Network is to promote cooperation and facilitate coordination of the activities of African NHRIs, encourage and advise governments on the establishment of new NHRIs in accordance with the Paris Principles, support governments towards democracy, good governance and the rule of law, enhance visibility and strengthen collaboration with regional and sub regional organisations so that they can do more and participate more actively in helping the Commission to achieve its mandate.
39. Finally, the representative of the African NHRIs stated that, the future of Africa depends on the quality of the work of all human rights stakeholders, and specifically through the reinforcement of the collaboration between national, regional and international mechanisms for the promotion and protection of human rights.

Speech of the Representative of Non-Governmental Organisations

40. The Representative of NGOs, Mrs. Hannah Foster, Director of the African Centre for Human Rights and Democracy Studies, reviewed the human rights situation in Africa since the last Ordinary Session of the Commission, characterised by ongoing human rights violations. She expressed a particular concern regarding the escalating human rights violations in Zimbabwe in the aftermath of the March 2008 elections, and called on the Commission to undertake a fact-finding mission to Zimbabwe.
41. She also expressed concerns regarding the human rights situation of journalists in Africa, especially the situation of Moussa Kaka who has been in custody for the last seven months in Niger.
42. The NGO representative further urged the African Commission, in view of the situation on the continent, to establish new special mechanisms,

including on poverty eradication and on minority rights.

Opening speech by H.E. Mr. Absalom Themba Dlamini, Right Honourable Prime Minister of the Kingdom of Swaziland

43. The Prime Minister of the Kingdom of Swaziland, H.E. Absalom Themba Dlamini, welcomed, on behalf of His Majesty King Mswati III, the Queen Mother, the Government and People of Swaziland, the participants to the 43rd Ordinary Session of the African Commission.
44. He mentioned that since the transformation of the OAU into the AU, Africa experienced tremendous changes in the area of democracy, good governance and human rights. He stated that the number of NGOs collaborating with the African Commission has increased and that Swaziland has recognised this intricate relationship and is trying to ensure that its citizens enjoy their human rights.
45. He added, however, that there is still room for improvement, as democratic institutions are still weak, and in some cases non-existent, and in certain parts of the continent, respect for human rights and free and fair elections are not yet a reality.
46. He further reiterated the commitment of the Kingdom of Swaziland to collaborate with and support the activities of the African Commission in the promotion and protection of human rights, because there is no peace and development without respect for human rights.
47. The Prime Minister asserted that, in Swaziland, measures have been taken to ensure the enjoyment of human rights by the population, and that the level of independence in Swaziland is evidenced by the peace that prevails in the Kingdom.
48. He also affirmed that the Constitution of Swaziland, adopted after a participatory and inclusive process from civil society, contains a Bill of Rights guaranteeing the human rights for all citizens. He stated that logistical measures are being taken for the establishment of a National Human Rights Commission and that the government is finalising its initial report to the Commission in accordance with Article 62 of the African Charter.
49. He further recollected that the African Commission conducted a promotional mission to Swaziland two years ago, the report of which was sent to the government. He acknowledged the fact that, the fruitful dialogue which emanated from this mission was an indication of the government's commitment to human rights. He also informed the Commission that the Government will be submitting its comments to the report shortly.
50. The Prime Minister emphasised the need for respecting human rights in Africa, and commended the African Commission for the important issues put

on the agenda of the Session, which is a reflection of the main human rights issues and challenges in the continent.

51. He declared that the success or failure of the Commission depends on the level of support from States Parties. This can be done, not only financially, but also morally and politically, through extending invitations to the African Commission for promotional missions, timely submission of state reports, participation in sessions, and implementation of the Commission's recommendations.
52. He also stated that in deciding on its activities, the African Commission should give priority to challenges that affect the whole of Africa, such as poverty, HIV/AIDS, climate change, inadequate shelter, food shortages, abuse of power, neglect of children, rampant corruption, hypocrisy, double standards etc.
53. He stated that States Parties need to observe to the letter the rule of law, and have an independent judiciary. He also stated that there is a need for citizens to practice good governance which is everybody's responsibility.
54. The Prime Minister finally wished all the participants fruitful deliberations and declared the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights officially open.

Cooperation and Relationship with National Human Rights Institutions and NGOs

55. Commissioner Musa Ngary Bitaye opened discussions under this item, recognising the role of NGOs in the work of the African Commission, through the granting of Observer Status. He stated that NGOs with Observer Status have obligations vis-à-vis the African Commission, which includes among others, submitting a report of their activities every two years to the Commission. He also noted that, out of the 375 NGOs with Observer status, less than 200 have submitted their reports to the African Commission.
56. Commissioner Bitaye further stated that, NGO reports should include measures taken to promote and protect the rights enshrined in the Charter, urging them to comply with their obligations under the Resolution on granting Observer Status. He added that there is need to structure the statements made by NGOs during the public Sessions of the African Commission.
57. The African Commission considered the applications of six (6) NGOs seeking Observer Status before it. In accordance with its Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental

Organizations Working in the field of Human and Peoples' Rights, ACHPR /Res.33 (XXV) 99, adopted in 1999, the African Commission granted Observer Status to the following NGOs:

- i. Legal Resources Centre, South Africa;
- ii. Socio-Economic Rights and Accountability Project (SERAP), Nigeria
- iii. Communautés des Potiers du Rwanda (COPORWA ASBL), Rwanda
- iv. Norwegian Refugee Council (NRC), Norway
- v. Associacao Maos Livres, Angola

58. **Save the Children Sweden** was granted Observer Status on the condition that it submitted proof within two months to the African Commission that it operates in Africa.
59. This brings the number of NGOs with Observer Status before the African Commission to **three hundred and eighty (380)**.
60. The African Commission did not receive application to grant Affiliate Status from any NHRI during the 43rd Session. Thus, the number of NHRIs with Affiliate Status with the African Commission still remains at 21.
61. A recommendation was made by the South African Human Rights Commission to establish a NHRI Unit within the African Commission and the development of guidelines on Cooperation between the Commission and NHRIs.

ACTIVITIES OF MEMBERS OF THE COMMISSION DURING THE INTER-SESSION

62. The Chairperson and the members of the African Commission presented reports on the activities they undertook in their capacities as members of the Commission and as Special Rapporteurs, or members of Special Mechanisms as follows:

Commissioner Sanji Mmasenono Monageng-Chairperson

Report on activities as Chairperson of the Commission

63. Commissioner Monageng sent a letter of appeal to the Government of Kenya after the December 2007 elections, urging the ruling party and the opposition ODM to solve their political differences amicably. She also urged the Government of Kenya to discharge its obligations under the African Charter and ensure the respect of the rights of its citizens during the painful period.
64. In the same light, she appealed to the Government of the Republic of Zimbabwe to release the results of the March elections.
65. While appreciating the fact that the situation in Kenya has been resolved, Commissioner Monageng appealed to the representatives of Kenya to follow up on the request by the African Commission to undertake a fact finding mission to Kenya. The Commissioner finally reminded the Government of Somalia about the Commission's request to undertake a fact finding mission to Somalia, while underlining the urgency of this mission.
66. The Chairperson accompanied the Secretary to the African Commission and the Finance and Administration Officer (FAO) from 6-11 January 2008 to Addis Ababa, where they presented the budget of the Commission to the Permanent Representative Committee (PRC), sub committee on Advisory and Financial matters. The budget was approved with amendments and a recommendation was made to the PRC.
67. Following the adoption of the budget, she also accompanied the Secretary to the Commission to Addis Ababa, where on 23 January 2008, the budget was presented and approved by the PRC. There was also a meeting of the Executive Council and the Assembly of Heads of State and Government in which the latter approved the final budget during its ordinary summit on 2 February 2008.
68. Commissioner Monageng attended the 4th Extra-Ordinary Session of the Commission in Banjul, The Gambia, from 17-23 February 2008.
69. From 25-29 February 2008, she attended and offered training during a seminar for Magistrates organised by the Ministry of Justice, of Malawi, in collaboration with the Human Rights Unit of the Commonwealth. The meeting was held in Mangochi, Malawi, and she was accompanied by Dr. Eno, a Senior Legal Officer at the Secretariat of the Commission. The training was basically to promote the domestic application of international

human rights treaties and other instruments by national courts.

70. From 20-21 March 2008, she attended a conference on post-conflict situations in Africa, organised by the African Union in Bujumbura, Burundi. The objective of the conference was to share experiences and suggest a way forward to curb conflict in the continent. During the conference, she gave a presentation on the mandate of the Commission and stated that the vast expertise that exists in the Commission could be exploited in conflict situations, especially in terms of women and children.
71. Commissioner Monageng also attended the opening ceremony of the NGO Forum in Mbabane, Kingdom of Swaziland on 3 May 2008.
72. She attended the 11th Extra -Ordinary Session of the Executive Council of the AU, in Arusha, Tanzania from 6-7 May 2008, where she made a presentation on behalf of the African Commission. The objective of this Session was to discuss the report of the High Level Panel which was set up by the Assembly of Heads of States and Government of the AU, to undertake an audit of the status of the AU and its organs so as to improve and strengthen service delivery.

Commissioner Angela Melo-Vice Chairperson

Report of activities as Commissioner

73. Commissioner Melo attended the 16th Annual Board Meeting of the International Penal Reform from 1-2 December, 2007 which was aimed at designing strategies to implement its strategic plan of action.
74. She also attended a Conference co-organised by UNESCO and Egyptian National Human Rights Council, on Democracy and Human Rights in Africa from 3-4 December 2007 in Cairo, Arab Republic of Egypt. The objectives of the Conference among others, was to discuss strategies to encourage ratification of the African Charter on Democracy, Elections and Governance adopted by the AU in January 2007. She recommended that the Secretariat of the Commission includes ratification of this Charter in the terms of reference of Commissioners' promotional missions. The role of NHRIs in was also discussed and Commissioner Melo presented the Commission's recommendations in this regard.
75. From 17-23 February 2008, Commissioner Melo attended the 4th Extra-Ordinary Session of the Commission held in Banjul, The Gambia, to consider the Rules of Procedure of the Commission.
76. Commissioner Melo attended a meeting on Minority Rights from 10-12

March 2008, in Pretoria, South Africa. She was invited by Minority Rights Group International and the African Centre for Democracy and Human Rights Studies, in collaboration with the Centre for Human Rights, University of Pretoria, South Africa. The meeting discussed concepts of minority rights and the way forward. It was suggested that a minority rights forum be established.

77. During the Workshop on Minority Rights, she discussed with female parliamentarians from Uganda and Botswana on the ratification of the Protocol on Women by their respective countries. She also made a presentation on the provisions of the Protocol to address the right of abortion which is apparently impeding ratification of the Protocol in Uganda.
78. From 3-4 April, 2008, Commissioner Melo, attended the Second Annual Conference on the Implementation of the Optional Protocol on the Convention Against Torture (OPCAT), organised by the University of Bristol (United Kingdom). This was in collaboration with the African Commission and South African Human Rights Commission. During the conference, she discussed with the OPCAT representative on the possibility of designing strategies targeting Lusophone countries on the ratification of the Convention Against Torture
79. Commissioner Melo also undertook the following activities:
 - i. She had a meeting with the Minister of Interior of Mozambique, in Maputo, where she urged the latter to insert provisions prohibiting violence against women in the revised penal code. During the meeting, she was given the Plan of Action on Gender Equality which she is currently working on with the representative of Ipas and the Mozambican Lawyers Association in Mozambique.
 - ii. She attended a meeting organised by Mozambican Women Forum, in Maputo, Mozambique in March 2008, to examine the National Plan of Action for Advancing of Women in Mozambican Government. She has also planned meetings with the Minister of Women and Social Action, Justice and Labour to discuss the harmonisation of the Protocol on Women in Africa.
 - iii. In the same month, she met with Mozambican Women Forum again to discuss strategies to lobby with Parliamentarians so as to adopt a Draft Law on Violence against women and a Draft Law on conditions for legal abortion.
80. Commissioner Melo took part in the NGO Forum from 4-5 May 2008 in Ezulwini, Kingdom of Swaziland, where she chaired the discussion of the interest group on ECOSOC and delivered a closing speech.

Report of activities as Chairperson of the Working Group on Specific Issues

81. As Chairperson of the Working Group on Specific Issues, Commissioner Melo reported on the activities of the Working Group as required by the Operative Paragraph (OP) 8(a) of **Resolution ACHPR/Res.77 (XXXVII)**.
82. As per its mandate outlined in the aforementioned Resolution, the Working Group reviewed the Rules of Procedure of the African Commission, drawing from numerous comments, criticisms and research done within the context of the African Human Rights System by researchers, scholars and students.
83. Commissioner Melo reported on the various meetings that have been held by the Working Group since its conception in 2005. They include:
 - i. Meeting in Cotonou, Benin, from 4-7 July 2005, where the Working Group set up a timetable to implement its mandate;
 - ii. Meeting in Addis Ababa, October 2005, where the Group consulted with various AU departments and organs;
 - iii. Meeting in South Africa, April 2006 to advance the decision to review the Rules of Procedure of the African Commission, which continued at the margins of the 42nd Session in Brazzaville, Republic of Congo;
 - iv. Meeting in Banjul, The Gambia from 15-17, February 2008 to finalise the revised Rules of Procedure, which could not be concluded due to time constraints.
84. The Chairperson noted that, lack of funding seriously impedes the Group to meet as often as they would like to, and it is hoped that, the adoption of the budget of the Commission would enable the Group to fulfil its mandate under the resolution establishing it.

Activities as Chairperson of the Working Group on ECOSOC Rights in Africa

85. Commissioner Melo, in her capacity as Chairperson of the Working Group on ECOSOC Rights in Africa recalled the mandate of the Working Group, and stated that since the 39th Session, the WG has been closely supervising the revision of the draft directives prepares by the Consultants and trying to secure funding for the finalisation of the document. The Directives and Guidelines of the document include; the Preamble, nature of State obligations, equality and non-discrimination, compensation for violations of ESCR, and specific rights such as right to employment, health, education, housing, social security and the right to property.
86. The Chairperson of the Working Group had informal meetings during the 43rd Ordinary Session, where it reviewed progress made in the drafting of the Directives and Guidelines, as well as the work plan developed for the finalisation of the document.
87. On 8 May 2008, she chaired the meeting on the Working Group on ECOSOC, during which the Plan of Action for the rest of the 2008 Calendar

year and beyond was discussed.

88. She reported that, in order for the Commission to respond to economic, social and cultural rights problems in Africa, the Secretariat of the African Commission has provided the WG with a sum of USD 20,000 to convene a meeting in Pretoria, South Africa in due course.

Commissioner Catherine Dupe Atoki

Activities as a Commissioner

89. Commissioner Atoki undertook the following activities;
 - i. Represented the ACHPR at a Workshop on Sexuality and Human Rights organised by Action Aid, from 3-4 February 2008, where she chaired;
 - ii. She participated in the 4th Extra-Ordinary Session of the Commission in Banjul, The Gambia from 17-23 February 2008;
 - iii. From 27-29 March 2008, she attended a Workshop organised by Africa legal Aid (AFLA) on Legal Development and Human Rights in Accra, Ghana. During this Workshop, she presented a paper on "Gender Equality in the African Human Rights System;"
 - iv. Commissioner Atoki also attended the NGO Forum in Ezulwini, in the Kingdom of Swaziland from 3-5 May 2008.

Activities as Chairperson of the Follow-up Committee of the Robben Island Guidelines (RIG)

90. Commissioner Atoki, in her capacity as Chairperson of the Follow-up Committee of the RIG attended a meeting in Cape Town Lodge, on 2 April, 2008. The main objective of this meeting was to review progress of the Committee and to draw up an effective Plan of Action or Programme of Activities for the promotion, dissemination and the implementation of the RIG. She stated that, the Committee has identified three States Parties to the African Charter who will serve as pilot countries for the implementation of the RIG.
91. The Chairperson also stated that the Committee has agreed to meet for another meeting in Lagos, in July, 2008, which will be followed by sub-regional workshop on the RIG between the 22-25 July 2008.
92. Commissioner Atoki attended the Second Annual Conference of the Optional Protocol Against Torture (OPCAT) in the African Region in Cape

Town from 3-4 April, 2008 which marks two years since the OPCAT was in force.

Commissioner Musa Ngary Bitaye

Activities as Commissioner

93. Commissioner Bitaye submitted a preliminary study made by NANA KUSI APPEA BUSIA, Jr on the violations of human and peoples' rights in Africa by non-state actors in the context of the African Charter on Human and Peoples' Rights. This study was authorised by the African Commission during its 40th Ordinary Session in Banjul, The Gambia, and distributed to Commissioners, with a parallel study by the Forest People, during the 42nd Ordinary Session in, Brazzaville, Republic of Congo.
94. As a step forward on this important issue, Commissioner Bitaye has prepared a Resolution calling for the appointment of a working group to be presented for consideration and adoption by the African Commission during this 43rd Session in the Kingdom of Swaziland.
95. Commissioner Bitaye is also involved in the:" Know Your Rights Project", aimed at disseminating the rights and freedoms guaranteed under the Charter through major African languages.
96. From 17-23 February 2008, he attended the 4th Extra-Ordinary Session of the African Commission held in Banjul, The Gambia, during which the draft Rules of Procedure were considered and elaborated in part.
97. Chairing the meeting of the Working Group from 4 - 5 May 2008, in Manzini, in the Kingdom of Swaziland, the meeting reviewed its work undertaken since the last Session of the African Commission and planned its activities for the forthcoming intersession. The planned activities include the following:
 - i. Organising a big sensitisation seminar in September 2008 with funding from the AU;
 - ii. Carrying out a country mission to Burkina Faso;
 - iii. Publishing the reports from the research and information visits to Uganda, the Central African Republic and Libya;
 - iv. Continue distribution of all the Working Group's publications;

- v. Continue developing the Working Group's website with new publications and information;
- vi. Continue involvement in the joint research project with the ILO and the University of Pretoria.

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

- 98. In his capacity as chairperson of the Working Group on Indigenous Populations/Communities in Africa, Commissioner Bitaye summarised the developments and activities of the Working Group during the reporting period.
- 99. He stated that, the main activities of the Working Group included;
 - i. Re-printing of the English/French version of the African Commissions' report on the rights of indigenous populations, which has been in very high demand since its publication in 2005, and a total of 7.500 copies have been printed in a combined English/French version. He said that, the report has been re-printed three times and the latest re-print of an extra 2000 copies was done during the intersession;
 - ii. The reports from the country missions to Botswana, Namibia and Niger have been printed in a book format in English and French which form part of the book series of all missions undertaken by the Working Group;
 - iii. Reports of the Research and Information Visits to Uganda and the Central African Republic, were considered during the 43rd Session and adopted by the African Commission with amendments;
 - iv. Finalisation of Research and Information Visit to Gabon, which will be presented at the 44th Ordinary Session of the African Commission;
 - v. Seminars for Journalists on Indigenous Peoples' Rights; one in Tanzania in December 2007 for Tanzanian journalists, and the other in Rwanda in December 2007 for journalists from the Central African region, including Cameroon, DRC, Burundi, Central African Republic, Republic of Congo, Gabon and Rwanda. The media sensitisation seminars engaged journalists on indigenous issues and the African Commission's work in this respect. They provided an opportunity for interaction between journalists and experts on indigenous peoples' human rights, and created a forum for discussion and dialogue. The journalists decided to form a network at each of the meetings;

- vi. Research project being carried out in collaboration with the ILO and the University of Pretoria, aimed at analysing constitutional and legislative protection of indigenous peoples' rights in all African states. The project is expected to be finished by the end of 2008 and it will provide a substantial knowledge pool on the legal protection of indigenous peoples in Africa, which will be made available by means of reports and a comprehensive database;
- vii. Finalisation of DANIDA funded programme, through which the Working Group has promoted the understanding of the African Commission's conceptualisation of indigenous peoples' issues in Africa and the Commission's criteria for identifying indigenous peoples, as well as the specific human rights violations suffered by indigenous peoples, Funding for a new 3 year phase of the programme aimed at enabling the Working Group to continue the implementation of its mandate has been secured from DANIDA. However, the funds cannot be utilised this year due to the AU budget rules;
- viii. In order to prepare for the sensitisation seminar scheduled for September, 2008, the WGIP decided to set up a Technical Steering Committee composed of the following members:
 - Commissioner Musa Ngary Bitaye, Chairperson;
 - Commissioner Soyata Maïga,
 - Mr. Melakou Tegegn,
 - Mrs. Naomi Kipuri,
 - The Secretary to the ACHPR,
 - One Legal Officer from the Secretariat
- ix. The Technical Steering Committee was assigned the mandate to:
 - Suggest dates and venue for the stakeholders' sensitization seminar
 - Identify relevant AU bodies
 - Determine the structures, methodology, format and themes of the seminar
 - Identify resource persons or institutions
 - Liaise with the secretariat on budgetary issues
 - Oversee the progress of the organization of the seminar

Commissioner Reine Alapini Gansou

Activities as Commissioner

- 100. Commissioner Gansou attended a National Seminar on the theme;" Schools and human rights," organised by the UNESCO Office in Cotonou, Benin, for Education councillors, on 1 December, 2007. During the seminar, she presented a paper on the African Charter on Human and Peoples' Rights.

101. From 13-14 December 2007, she attended a Seminar organised by Franciscan International at the Canoviennes Nuns' Training Centre in the Tove, Lome in Togo on: "leadership for the Franciscan Family in West Africa: Cameroon and Chad." During the seminar, she made presentations on the rights enshrined in the Charter and on the mandate and composition of the Commission.
102. On 25 January, 2008, Commissioner Gansou held discussions with Her Excellency, Gayleatha B. Brown, US Ambassador in Benin. She briefed her on issues related to the promotion and protection of human rights and gave her a brief overview of the mandate of the Commission, and its Special Mechanisms.
103. On January, 2008, Commissioner Gansou also had meetings with Mr. Diallo Souleymane, the Resident Representative of the United Nations Children's Fund (UNICEF), in Benin. Child Protection issues in Benin and victims of the so called 'child witchcraft' phenomenon were discussed, and she looked at the possibility of future cooperation between the ACHPR and UNICEF.
104. At the request of GEPIFED-BENIN, Commissioner Gansou addressed INFOSEC, in Cotonou, Benin on; "The issue of under-representation of women at the decision-making level," on 29 January, 2008. Her intervention was not only prompted by the poor results obtained at the last presidential and legislative elections and the level of representation of women in politics, but also took into consideration the recent communal elections, in which about thirty (30) female candidates contested.
105. From 13-15, February 2008, she also attended a seminar jointly organised by the Interparliamentary Union(IPU), the United Nations High Commission for Human Rights(UNHCHR), in collaboration with the Parliamentary Commission of the National Assembly of Togo for Parliamentarians and other socio-political actors. During this seminar, she gave a presentation on; "African human rights instruments and their mechanisms."
106. A follow up of the abovementioned seminar was organised in Mali from 25-27 February, 2008, where she presented a paper on the general theme; "the role of Malian parliamentarians in the drafting of national reports for treaty organs and in the monitoring of their recommendations."
107. Commissioner Gansou participated in the 4th Extra-Ordinary Session of the Commission from 17-23 February, 2008, held in Banjul, The Gambia.
108. She also attended an Inter University Forum on;" Family and Human Rights in Francophone West Africa", organised by the Danish Institute for Human Rights in collaboration with the Political and Legal Division of the University of Ouagadougou, Burkina Faso, on 25 February 2008. Commissioner

Gansou made a presentation on;" Family, Human Rights and Reform in Francophone West Africa."

109. On 3 March, 2008, Commissioner Gansou had discussions with Professor Theodore Holo, Chairperson of UNESCO in Benin, on human and peoples' rights.
110. She also met with His Excellency, Dr. Albrecht Conze, Ambassador of the Federal Republic of Germany (FRG) and His Excellency Mr. Herve Besancenot, Ambassador of France in Benin on 6 March, 2008. During her discussions with His Excellency, Dr Conze, the human rights situations in Africa in general, and Benin, in particular were emphasised. The Ambassador expressed his deep concern about these situations and recounted his experiences and concerns in some countries in which Commissioner Gansou is responsible for promotional activities.
111. During her discussions with the Ambassador of France, she presented the mandate of the Commission, her mandate as member of the Commission, and as Special Rapporteur on the rights of Human Rights Defenders in Africa.

Activities as Special Rapporteur on Human Rights Defenders in Africa

112. In her capacity as Special Rapporteur on Human Rights Defenders in Africa, Commissioner Gansou undertook promotional and protection activities. Her promotional activities include:
 - i. Together with Commissioner Tlakula, Commissioner Gansou participated in an NGO Forum on the human rights situation in Zimbabwe under the auspices of HURISA, and in collaboration with several NGOs and the South African Human Rights Commission from 5-6 December, 2007. During the Forum, she presented a paper on the Commission and her mandate, and seized the opportunity to consolidate their partnership with some human rights defenders working at the local level.
 - ii. Met with the Minister of Justice of Liberia, on January 10, 2008, where she reiterated her desire to see Liberia participate in the Commission's Sessions. She also reminded the Liberian authorities about their obligation to establish a National Commission on Human Rights in accordance with the Paris Principles.
 - iii. Participated in a capacity building seminar for the Liberian Coalition of Human Rights Defenders from 7-13 January, 2008, in Liberia. The objective of this seminar was to ensure that human rights defenders in Liberia have a better understanding of the legal instruments relating to Universal Human Rights as well as the African Regional Human Rights.

- iv. Met with Madam Aidam Celestine, Minister responsible for Human Rights in Togo on March 11, 2008, where she discussed modalities for her scheduled promotional visit to Togo.
- v. Met with the Minister-Counsellor of the DRC on March, 14, 2008. She mentioned the possibility of undertaking a promotional visit to DRC during their discussions and preparations have been made to this effect.
- vi. Participated in the 7th Session of the Human Rights Council in Geneva, within the framework of the renewal of the UN Special procedures from 10-15 March, 2008. During the Session, working sessions were held with human rights defenders, especially with regards to the follow-up of individual cases of human rights violations.
- vii. Participated in a Conference on Cooperation and Human Rights, jointly organised by ADANE, and the Centre D'études Africaines, under the theme: "Forever Africa, For Africa", which was held in Barcelona, Spain, from 7-20 April, 2008. During the Conference, she made a presentation on;" Women and Human Rights in Africa."

113. Commissioner Gansou's protection activities include:

- i. Discussions with 13 countries, pertaining to different cases of human rights violations notably: Algeria, Egypt, Tunisia, Congo, Nigeria, Kenya, Djibouti, Chad, Cameroon, Rwanda, Senegal, DRC and Zimbabwe.
- ii. Five (5) Communiqués were issued, three of which centred on the confirmed cases of violations of the rights of human rights defenders in Chad, Cameroon and Zimbabwe, and two were related to the good practices noted among States such as Gabon and Egypt.
- iii. Note Verbales were sent to some States to request for promotional missions. Among these states, the Republic of Congo, the DRC, Libya, Mauritania and Togo have responded positively.

114. Commissioner Gansou gave the following recommendations;

- i. That States parties react positively to the Commission's Note Verbales and her communications;
- ii. That the Commission takes the necessary measures to ensure that all Special mechanisms effectively achieve their intended goals in terms of promotion and protection; and
- iii. That the Rules of Procedure created by the Commission become non traditional implementation mechanisms which would result from the combined efforts of the Commission and civil society.

Commissioner Zainabo Sylvie Kayitesi

Activities as Commissioner

115. On, 30 December, 2007, Commissioner Kayitesi attended a Seminar organised by the Ministry of Foreign Affairs and Cooperation of Rwanda, for Senior Civil Servants who are involved in the elaboration of State Reports in collaboration with the National Human Rights Commission in Rwanda. During this seminar, she dilated at the closing ceremony on the drafting of reports for submission to treaty organs, and to the African Commission. The relevant provisions of the African Charter were outlined, especially in terms of Article 62, and the procedures guiding the drafting of State Reports were underscored.
116. In February 2008, the Commissioner was granted an audience by the Minister of Justice and Attorney General of Rwanda, to report on the activities of the ACHPR's 42nd Ordinary Session. The Commissioner used the opportunity to urge the Government to make efforts to implement the recommendations of the Commission as reflected in the Concluding Observations on the Periodic Report of Rwanda presented at the 42nd Ordinary Session of the Commission.
117. In March 2008, she requested the National Human Rights Commission of Rwanda to print and disseminate the African Human Rights Instruments such as; the African Charter, the Convention on the Rights and Welfare of the Child, the Protocol establishing the African Court on Human and Peoples' Rights, and the Women's Protocol in English and French. These would be distributed to teachers who teach human rights in secondary schools all over the country.
118. Commissioner Kayitesi also attended a steering committee meeting of the Forum of NGOs active in the area of human rights and the National Human Rights Commission of Rwanda in January 2008. During this meeting, she emphasised on the need to focus on the African Charter, and in the training and sensitisation programmes on international instruments. Furthermore, she urged NGOs having Observer Status with the African Commission to attend the latter's Sessions.

Activities as Chairperson of the Working Group on the Death Penalty

119. In her capacity as Chairperson of the Working Group on the Death Penalty, Commissioner Kayitesi attended and chaired the meeting of the Working Group from 4-5 May 2008, where the Group revised the draft concept paper on the Death penalty in Africa and drew up a detailed plan for the elaboration of a more substantial document. The Working Group also

examined and adopted the Action Plan for 2008-2009, which included the work plan of the Working Group.

Activities as Member of the Working Group on Specific Issues

120. In her capacity as a member of the Working Group on Specific Issues, Commissioner Kayitesi participated in the activities of the Group from 15-17 February 2008, which focused on the Rules of Procedure of the African Commission.

Commissioner Soyata Maiga

Activities as Commissioner

121. Commissioner Maiga was received by the Honourable Minister of Justice and Attorney General, and Honourable Minister of Foreign Affairs and International Cooperation of Mali on 5 December 2007 and 6 December, 2007, respectively. During both audiences, she gave a brief report on the proceedings of the 42nd Ordinary Session and requested the government to lend its support in terms of disseminating information on the missions of the African Commission. She also underscored the urgency of establishing a Permanent Committee in charge of drafting the periodic reports to be presented by Mali in accordance with Article 62 of the Charter, and requested that the government of Mali should host the Ordinary Session of the Commission in the near future.
122. Commissioner Maiga organised a conference on; "ACHPR: Realities and Prospects' for NGOs", with the support of the Minister of Justice of Mali on 9 February 2008. During the conference she distributed the African Charter to the participants to enable them better understand the African Commission, its mandate and composition.
123. On 13 February, 2008, she organised a press conference in collaboration with the Minister of Justice and the Union of West African Journalists on; "The role of the press in the promotion and protection of human rights," in the Maison de la Presse, Mali.
124. Commissioner Maiga attended a seminar jointly organised by the Interparliamentary Union (IPU) and the United Nations High Commission for Human Rights (UNHCHR) in collaboration with the National Assembly of Mali from 26-28 February, 2008. During this seminar, participants questioned the effectiveness of Parliament's oversight role in monitoring the ratification of international treaties and conventions and the drafting and submission of State reports to the relevant organs of the UN and the AU.

Activities as Special Rapporteur on Women

125. Commissioner Maiga, in her capacity as Special Rapporteur on Women attended the second African Gender Forum jointly organised by the NGO, Femme Africa Solidarité (FAS) and the Dakar-based Pan African Gender, Peace and Development Centre from 10-12 December 2007. During the forum, she presented a paper on the role, and contribution to the promotion of women's rights by the Special Rapporteur on women.
126. From 20-24 January, 2008, she attended a joint mission at the invitation of the Canadian Centre for Law and Democracy in Montreal and Ottawa, Canada with the UN Special Rapporteur on the Causes and Consequences of violence Against Women, Mrs Yahin Erturk. During the mission, they reviewed the findings of a mission on gender violence in DRC conducted by the UN Special Rapporteur in July 2007 and also participated in the launching of the women's campaign against gender violence in the DRC. Furthermore, Commissioner Maiga presented several papers on the role of the Commission in protecting the rights of women to students, the press, and Foreign Affairs Officials.
127. Commissioner Maiga met with NGOs and Women's' Associations in Mali on 9 January, 2008, during a ceremony she organised to display the commitment of Malian women to support her mandate.
128. She participated in a workshop in preparation for the Congress of the Pan African Women's Organisation (PWO) organised by the latter's Regional Bureau in Bamako, Mali from 30-31 January, 2008.
129. On 29 January, 2008, the Special Rapporteur organised a lunch-debate sponsored by the Denmark Ambassador in Mali on the quota of administrative and elected posts in favour of women.
130. Commissioner Maiga had a meeting in Bamako, Mali with Equality Now, on 1 March 2008 about an on-going study on female genital mutilation in the countries that have ratified the Protocol to the African Charter on the Rights of Women in Africa,
131. On 4 March, 2008, she also participated in a meeting with the Danish Human Rights Institute and the National Human Rights Commission in Mali, where prospects for collaboration and consolidation of ties were discussed.
132. Furthermore, from 13-16 March, 2008, Commissioner Maiga participated in the 4th National Campaign for the promotion of Family Planning in Mali on the theme: "Promotion of family Planning: greater commitment of men;" where she moderated a debate on; "Women's Reproductive Health Rights and the Law in Mali."
133. She participated in a workshop on; "Mediation and Leadership" jointly

organised by the French Association, Partenariat Femme France-Afrique and the Malian Association for Progress and the Protection of Women's Rights, on 2 April 2008.

134. The Special Rapporteur also participated in the 3rd General Congress of the Association of Tunisian Mothers (ATM), an NGO striving for the promotion of the rights of women and handicaps in Tunisia, from 21-23 April, 2008.
135. Commissioner Maiga participated in the NGO Forum held in Ezulwini, Swaziland, from 3-5 May 2008, where she articulated on the situation of women and girls' rights in Africa and the Solemn Declaration of the Heads of State and Government and Gender Equality in Africa.
136. The Special Rapporteur also collaborated with States Parties by sending information letters and requests for audiences to all African Embassies accredited to Mali and based in Bamako, as well as to their financial and technical partners who have a stake in Gender issues. The objective of this exercise was to establish a link between the Special Rapporteur on Women's Rights and the departments and institutions responsible for women's rights in their respective countries, through their embassies.
137. From 19-20 March 2008, at the request of the Ministry for Children and Family Affairs in Mali, she participated and moderated over a two-day meeting of Heads of Women's Associations and NGOs and the Chairperson of the Council on the Status of Women in Quebec.
138. From 4-5 April, 2008, Commissioner Maiga attended an international seminar in Addis Ababa, organised by the Commission and the AU in collaboration with the ECA, UNIFEM, UNICA, the Institute for Security Studies and the Swedish Embassy on; "Eradicating violence against women in a conflict situation: lessons learnt from the Rwanda Genocide."
139. From 14-16 April, 2008, she also attended a workshop, organised by the Political Affairs Department of the AU, in collaboration with the Economic Commission for Africa (ECA) on Human Rights Education for West Africa, on; "Enforcing the rights of women through human rights education", held in Banjul, The Gambia. During the workshop, she presented a paper on; "The role of the African Commission on Human and Peoples' Rights and Human Rights Education for Women."
140. Commissioner Maiga stated that, a press communiqué was published on International Day for the Economic Rights of Women on 8 March 2008, where she underscored the specific and urgent concerns of women in the informal sector as well as the needs of rural women, as regards access to land, credit and agricultural input.
141. The Special Rapporteur also sent Note verbales to Mauritania, Ethiopia, Libya, Gabon and Congo Brazzaville authorities, requesting for permission to undertake promotional activities. Note Verbales were also sent to State

parties who have not ratified the Protocol on Women, requesting them to make efforts to ratify the same.

Commissioner Mumba Malila

Activities as Commissioner

142. Commissioner Malila attended meetings with a team of Researchers on HIV/AIDS and Human Rights in Zambia in January 2008, in order to ascertain the human rights aspects of their research proposal. The researchers intend to embark on a research on the prevalence of AIDS amongst men who have sex with men (MSM) with a view to recommend intervention measures.
143. He also attended the 4th Extra-Ordinary Session in Banjul, The Gambia from 17-23 February, 2008.
144. Commissioner Malila, accompanied by Dr. Robert Eno, a Senior Legal Officer from the Secretariat of the African Commission, undertook a promotional mission to Malawi from 7-11 April 2008.

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

145. Commissioner Malila, in his capacity as Special Rapporteur on Prisons and Conditions of Detention in Africa, attended the Robben Island Guidelines (RIG) Implementation Committee meeting which took place in Cape Town, South Africa on 2 April, 2008. The meeting was aimed at strategising the publication of the RIG Guidelines and ensuring implementation by African countries.
146. He also attended a workshop organised by Bristol University Law Faculty, Association for the Prevention of Torture (APT), the South African Human Rights Commission and the African Commission from 3-4 April, 2008 in Cape Town, South Africa. This meeting was a follow up on a meeting in April 2007 in Bristol, UK and was designed to explore issues around prison visits under the Optional Protocol to the CAT.

Commissioner Bahame Tom Mukirya Nyanduga

Activities as Commissioner

147. Commissioner Nyanduga attended a workshop organised by the South African Human Rights Commission, the Nelson Mandela Foundation, and the Regional Office of the UN High Commission in Johannesburg, South Africa on 10 December 2007, where he delivered a keynote address, which

he highlighted the challenges faced by African countries in the realisation of human and peoples' rights.

148. On 14 December 2007, he met the President and some judges of the African Court in Dar es Salaam, Tanzania, and briefed them about the outcome of the 42nd Session. He also informed them on the Commission's intention to meet with the Court in order to deliberate harmonisation of their respective Rules of Procedures.
149. Commissioner Nyanduga received a member of the US delegation visiting Tanzania, on 14 February, 2008, and briefed her on the mandate of the Commission, in particular, his role as Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa.
150. Commissioner Nyanduga attended the 4th Extra-Ordinary Session of the Commission in Banjul, The Gambia from 17-23 February, 2008.
151. On March 1 2008, he attended a workshop organised by Franciscan International in Jinja, Uganda, for faith based CBOs from Uganda, Kenya, and Tanzania, to sensitise them on the rights of refugees, women and children.
152. Commissioner Nyanduga also participated in a conference organised by the Institute for Security Studies, (ISS) of South Africa at Gordon's' Bay, Cape Town from 19-20 March 2008. The aim of this conference was to discuss the role of the International Criminal Law regime in the fight against impunity in Africa.
153. From 1-2 April 2008, he participated in a roundtable organised by the Coalition for an Effective African Human Rights Court in Arusha, Tanzania on strategies to promote human rights through Regional Human Rights Systems, where he presented a paper on the potential role of sub-regional courts during the roundtable discussions.
154. He made a presentation to the LLM students at the Centre for Human Rights, University of Pretoria on 9 April 2008, on the Special Mechanisms of the African Commission, especially the role of the Special Rapporteur on refugees, Asylum Seekers, IDPs and Migrants in Africa.
155. On 21 April, 2008, Commissioner Nyanduga also made a presentation to the members of the Tanzania Commission for Human Rights and Good Governance and officials of the Union and the Zanzibar governments responsible for children affairs, on the UN Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child in Zanzibar.
156. Commissioner Nyanduga participated in an; "African Women's Rights Strategy Meeting," on 26 April 2008 in Dar es Salaam, Tanzania. This meeting was organised by Interights, in collaboration with the Tanzania

Women Lawyers Association, to strategise on litigating women's rights at the domestic and regional level under the Protocol on the Rights of Women in Africa. He presented a paper on the African Commission, the African Court in light of the adoption of the Merger Protocol. During the meeting, he highlighted the fact that the restricted access by individuals and NGOs to the Human Rights Section of the Court has been retained in the merged Protocol.

157. On 28 April, 2008, Commissioner Nyanduga briefed a delegation of the British Foreign and Commonwealth Office, visiting Tanzania, on the mandate of the African Commission and its relationship with the African Human Rights Court.

Report of Activities as Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa

158. Commissioner Nyanduga, in his capacity as Special Rapporteur, participated in a meeting of AU member States Legal Experts, drafting the AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa. This meeting was held in Addis Ababa, Ethiopia from 15-17 December 2007. The Second meeting is scheduled to take place from 2-12 June, 2008.
159. Commissioner Nyanduga issued a statement expressing his grave concern on the human rights, and humanitarian situation in Kenya in the aftermath of the December 2007 elections in Kenya, which resulted into the death of about 1500 people, displacement of about 10,000 Kenyan refugees to Uganda, and of about 500,000 IDPs to different parts of Kenya.
160. While commending the government of Kenya, the Kenyan Red Cross Society and donor community for the assistance and protection of IDPs at the height of the crisis, he also wrote to the Kenyan government to enquire on the measures it had undertaken or intends to take to ensure that the refugees and IDPs are repatriated in dignity and safety.
161. Commissioner Nyanduga commended Uganda for extending asylum to the refugees in a true African Spirit, and the UNHCR and other NGOs for their timely intervention.
162. The Special Rapporteur paid a visit to the victims whose properties were demolished by a local municipal authority in Dar es Salaam Tanzania, on 13 February 2008. He commends the government of Tanzania for investigating the matter and relocating the victims with a compensation of 20,000,000 Tanzanian Shillings (equivalent to USD 17,000), and allocating each of them with a plot to build new homes.
163. Commissioner Nyanduga commended the Islamic Republic of Mauritania for starting to implement the repatriation program of Mauritanian refugees from Senegal, whose rights have been denied for the past 20 years. He called on

the government to also implement the recommendations made by the ACHPR following the fact finding mission undertaken in September, 2007.

164. Due to the reports of fighting in parts of Burundi involving FNL Paliphehutu, and government forces which is likely to force a new wave of refugee flows from Burundi, he urged the FNL Palipehutu leadership to respect the peace agreement signed in 2006 and to join the democratic process in Burundi.
165. In the same light, Commissioner Nyanduga received information about the protests mounted by Liberian refugees in Ghana. He sought clarifications from Ghanaian authorities about the situation, and if Ghana has fulfilled its obligations under the Charter and the 1969 OAU Refugees, and other human rights conventions.
166. The Special Rapporteur recalled the longstanding Saharwi refugees' problem and urged the AU and UN to redouble their efforts to resolve the territorial claims on Western Sahara to enable the Saharwi refugees, in Algeria to return to their country.
167. Commissioner Nyanduga reported on the March 2007 Ouagadougou Peace Agreement on the Cote D'Ivoire conflict that led to the return of IDPs, disarmament and integration of the New Forces into the national army. He noted that this agreement has generated confidence in the sustainability of peace in Cote D'Ivoire.
168. He further noted that, the interim peace in Northern Uganda had enabled the return of about 600,000 IDPs to their respective places, there still remain about 1.17 million IDPs awaiting return due to reasons of safety and lack of infrastructure.
169. The Special Rapporteur reported on the situation in Darfur, where abduction of humanitarian vehicles and supplies, and the fighting involving rebel and government forces continue to affect the safety of civilians and IDPs, inspite of the deployment of UNAMID. He expressed concern at the delay in the full deployment of UNAMID
170. He expressed his concern about the situation in Somalia which continues to cause serious violations of human rights and humanitarian law. Commissioner Nyanduga calls on the AU and UN to take measures to arrest this situation and carry out investigations, about the alleged violations.
171. With respect to migrants, the Special Rapporteur reported that the problem of illegal migrants continues to be a major concern. He stated that illegal migration across the Atlantic and Mediterranean Sea fell considerably, while the flow of illegal migrants across the Gulf of Eden increased with fatal results.
172. Commissioner Nyanduga urged States Parties to exercise the right of

diplomatic protection to all African migrants wherever they may be, and called on State parties to the Charter to guarantee the rights of migrants in their territories.

173. With regards to Zimbabwe, he stated that he has received reports indicating that there are cases of violence perpetrated against sections of the civilian population subsequent to the March 29 Zimbabwe Presidential and general elections. He said that this has caused the displacement of several hundreds of people in rural and urban areas.
174. Commissioner Nyanduga affirmed that he continues to follow the situation affecting an alleged 3 million Zimbabwe asylum seekers in the sub region, hoping that a fact finding mission to a number of states in the sub region will be authorised as requested by the Commission.

Commissioner Pansy Tlakula

Report of activities as Commissioner

175. Commissioner Tlakula attended a workshop on the “Responsibility to protect-the situation of Human Rights in the Republic of Zimbabwe and Darfur,” held in Johannesburg, Republic of South Africa on 6 December 2007. During the workshop, she made a presentation on the Resolution on Freedom of Expression and the upcoming elections in Zimbabwe and the Resolution on the Responsibility to Protect which were adopted by the African Commission at its 42nd Ordinary Session that was held in Brazzaville, Republic of Congo.
176. On 25 January 2008, she attended a conference on the “Dialogue on Diminished Heritage of the Khoe-San People” in Bloemfontein, South Africa, where ownership of land by indigenous people and their right to self determination was discussed. She recommended that the Commission continues to work with both indigenous communities and the government of South Africa to foster the implementation and domestication of Article 19 of the African Charter as elaborated in the “Report of the African Commission Working Group of Experts on Indigenous Populations/Communities” which was adopted by the Commission in November 2003.
177. Commissioner Tlakula was also invited by the Centre for Human Rights, University of Pretoria, South Africa on 9 April 2008, to present a lecture to their LLM students, on the Special Mechanisms of the African Commission, in particular, the Special Rapporteur on Freedom of Expression and Access to Information in Africa.
178. She further undertook a promotional mission to the Republic of Zambia from 14-18 April 2008, accompanied by Dr, Robert Eno, a Senior Legal Officer at the Secretariat of the Commission.

Report of activities as the Special Rapporteur of Freedom of Expression in Africa

179. Commissioner Tlakula, in her capacity as Special Rapporteur of Freedom of Expression in Africa, gave a report of activities undertaken during the period under review. These activities include the following:
- i. Workshop organised by Media Alliance Zimbabwe, on the theme: "Zimbabwe, towards Free, Fair and Credible Elections in 2008" in Harare, Republic of Zimbabwe from 23-24 January 2008. In that workshop, she presented a paper entitled; Freedom of Expression, Access to Information and Elections, with particular reference to the Declaration of Principles on Freedom of Expression in Africa. She recalled among others, the provisions of the African Charter on Democracy, Elections and Governance and the resolution on Freedom of Expression and the Upcoming Elections in Zimbabwe, adopted by the Commission at its 42nd Ordinary Session.
 - ii. Meeting organised by media office of Friedrich Ebert Stiftung in Johannesburg, South Africa, on 5 February 2008, where she presented a paper on "Elections, Freedom of Expression and Information in the SADC Region-The practical implementation of existing principles".
 - iii. Training workshop organised by the Secretariat of the Commission for West African Journalists and Media practitioners in Banjul, The Gambia from 12-14 February 2008. During the workshop, she made a presentation on her mandate and the situation of Freedom of Expression in Africa.
 - iv. Conference on the role of the media in strengthening electoral democracy, organized by the Electoral Commission, South Africa 23-24 April 2008.
 - v. Workshop organized by United Nations Education and Cultural Organisation(UNESCO) in celebration of the World Press Freedom Day, held in Maputo, Republic of Mozambique on 2-3 May 2008. The theme of the workshop was "Freedom of Expression, Access to Information and the Empowerment of People."
 - vi. Meeting organised by the Media Institute of Southern Africa (MISA) at the fringes of the 43rd Ordinary Session of the African Commission on 11 May 2008, in Ezulwini, Kingdom of Swaziland. The Workshop was aimed at strengthening the relationship between media stakeholders in the Kingdom of Swaziland, to discuss the mandate and the work of the Special Rapporteur, and to explore the areas of cooperation. The following organisations attended the Workshop; Swaziland Editors' Forum, Swaziland

National Association of Journalists, Media Workers Union of Swaziland and the African Editors Forum.

180. While highlighting the relationship between freedom of expression, access to information and elections, Commissioner Tlakula appealed to Member States, who will be holding elections in the future, to ensure respect to access to information and freedom of expression.

Commissioner Y.K.J. Yeung Sik Yuen

181. Commissioner Yeung attended a one week Seminar of Chief Justices, on the rights of the child in Lucknow, India in December, 2007.
182. He also attended the 4th Extra-Ordinary Session in Banjul, The Gambia from 17-23 February, 2008.
183. Commissioner Yeung attended a seminar on the Right to Bail at the Human Rights Centre, in Mauritius, organised by Mauritius Bar Association and the British Council in April, 2008.
184. Commissioner Yeung attended the 42nd Ordinary Session from 15-28 November, 2008 in Brazzaville, Republic of Congo.
185. From 2-6 May, 2008, he hosted a Regional Cooperation Exchange Programme on sharing of Electronic datas, namely: Jurisprudence and Statutory Instruments between Mauritius and Seychelles, training of Seychellois Magistrates and Judges in Mauritius, and training of Library Cadres.
186. From 7-22 May, 2008, Commissioner Yeung attended the 43rd Ordinary Session of the African Commission in Ezulwini, Kingdom of Swaziland.

Report of activities as a Focal Point on the Rights of Older Person

187. Commissioner Yeung's first report as the Chairperson of the Focal Point on the Rights of Older Persons was presented in the form of a concept paper. The report gave a brief outline of certain initiatives undertaken at the global level which have established guidelines and drawn up recommendations on the rights of the elderly.
188. He stated that, the problems of ageing which must be linked with problems in ensuring the full enjoyment of human rights have been the subject of research and discussion at the UN level over the past two decades.
189. Commissioner Yeung observed that, the rights of women and children have been provided for by international instruments. However, despite the

number of UN declarations related to the rights of the elderly, such as; Rights of Disabled Persons, Right to Development, Rights of mentally Retarded Persons etc, there is no specific UN Convention that deals with the rights of elderly persons.

190. He mentioned the fact that a few documents exist such as; The 1982 Vienna International Plan of Action on Ageing, the United Nations Principles for Older Persons, and the Madrid International Plan of Action on Ageing 2002 which all contain principles and recommendations that are aimed at ensuring that elderly persons are well catered for. This justifies the reason why the Commission had a purpose to establish a Focal Point on the rights of this group of people.
191. Commissioner Yeung also elaborated on the objective of the focal point. He stated that, it is charged with collecting documents, carrying out research on problems relating to the rights of the elderly, while preparing sessional reports on progress, studying problems in various countries in the continent relating to elderly persons and identify progressive measures taken, envisage recommending the preparation of a Draft Declaration on the Rights and welfare of Older Persons in Africa, and drafting of an African Charter on the Rights and Welfare of Older Persons.

REPORT OF THE SECRETARY, INCLUDING ADMINISTRATIVE AND FINANCIAL MATTERS

192. The Secretary to the African Commission, Dr. Mary Maboreke, presented her report to the African Commission. The report covered the activities undertaken by the Secretariat in the six-month inter-Session period between the 42nd Ordinary Session held in Brazzaville, Congo, and the 43rd Session to which the report was being made. The report presented also covered administrative and financial matters relating to the work of the Commission, including progress regarding the construction of the Commission's Headquarters and implementation of the Commission's Strategic Plan 2008-2012.
193. Further to the decision of the Commission during the 4th Extra-Ordinary Session held in Banjul, The Gambia, requesting the Secretary to the Commission to seek clarifications from certain issues about the Commission, the Secretary to the African Commission, invited a team from the AU headquarters to the 43rd Ordinary Session to meet and discuss with the Commission after consultations with the Chairperson of the Commission.
194. The team from the AU Headquarters attended the discussions in order to provide clarifications on some urgent financial, legal and administrative matters, particularly in light of the substantially increased resource allocations to the Commission, and the premise underpinning that increase. The team included the Director of Administration, Human Resources and

Development (AHRD); the Head of Budget and Programs (B&P); the Head of Resource Mobilization, and a Senior Legal Officer (SLO) from the Office of the Legal Counsel of the AU.

195. The Chairperson recalled that, pursuant to the instructions of the Commission during its 4th Extra-Ordinary Session in February 2008, the Secretariat had sent a Memo to the AUC on 25th March 2008, requesting clarification from the AU on the following issues:
 - i. The status of the Commission;
 - ii. The proposed permanent Chairperson;
 - iii. Extra-budgetary funds;
 - iv. The role of the Secretary to the Commission

196. The Chairperson added that the Commission was also seeking from the team further clarifications on the following:
 - i. The status of the AU Banjul Office;
 - ii. The AU policy on Interns;
 - iii. Financial support received from South Africa;
 - iv. The recruitment of new staff

197. On the issue of staff, the Chairperson appealed that the recruitment of short term staff currently underway be accelerated.

198. Commissioner Nyanduga suggested that clarifications should go beyond the issues identified in the Memo from the Office of the Legal Counsel. He also raised a number of other issues, including:
 - i. Extra-budgetary resources: Is the team aware of the decision on the establishment of the voluntary contribution funds? If yes, what is the position, in light of the new developments?
 - ii. How can the AU/EU fund for human rights and democracy be used to assist the Commission?

- iii. Payment made or to be made to members of the Commission, including administrative expenses: could the accounting system be reviewed, as the current system is difficult for Commissioners?
 - iv. Difficulties faced with regards to payment of half per diem for activities not organised or authorised by the AU – could authorization of missions be expedited to avoid this?
 - v. The amount of the honorarium paid to Commissioners: the honorarium for Commissioners was set a long time ago, the amount no longer corresponds to the reality on the ground, and should be reviewed.
199. Commissioner Atoki indicated that, especially for new Commissioners, more clarification is needed regarding their entitlements. Noting that it seems like honorarium is only given for Sessions, she enquired whether it was not possible to extend it to other missions and activities of the Commission, since Commissioners spend about 50% of their time working for the Commission.
200. The head of the delegation, Mrs. Vera Ngosi, Director/AHRD, started by referring to the response already sent by the AUC to the Memo from the ACHPR seeking clarifications on some issues. Thereafter, she indicated that, while the delegation would provide some answers immediately, other clarifications could be provided latter, since some of the answers to the questions lay beyond the team, either in the AUC management in Addis Ababa, or even further in the AU Policy Organs. She thereafter introduced the team, and then called on the representative of the Legal Counsel to clarify the legal issues raised.
201. In response to the question from the Chairperson whether the Banjul Office is on the same footing as the AU Office in Washington, the SLO indicated that, of all AU Representational Offices, only the Washington Office has embassy status, explaining that this was because the United States Government had specifically insisted on this. He further explained that the existence of the Banjul Office is guided by a Host Agreement, which sets out the diplomatic immunities and privileges to be enjoyed by the staff, adding that the Banjul Office has a specific mandate laid down in the Charter, which is different from that of the other Regional Offices. He also explained that the Commission is closer to the Pan-African Parliament and the African Court, than to the Nairobi, Malawi, New York or Brussels Offices. He indicated that a copy of the Host Agreement was available and could be circulated.
202. With regards to the status of the Commission, the SLO referred to a general

acceptance that the Commission is an AU organ, even though there is no document that explicitly states this. He indicated that the Office Legal Counsel can guide the Commission in the steps to be taken in order to have a decision of the AU Policy Organs clearly declaring the Commission an Organ of the AU, but highlighted the dangers inherent in such an approach: whereas by retaining the status quo, the Commission would continue to enjoy its presumed organ status, attempting to have the issue clarified posed the risk of the Policy Organs deciding differently.

203. On the role of the Secretary, the SLO referred the Commission to the Memo from the Legal Counsel, which indicates that the Secretary is the embodiment of the Chairperson of the AUC.
204. Commissioner Melo raised the issue of the status of the Secretary and the other staff of the Secretariat: more specifically, she wanted to know whether the Secretary and the staff of the Secretariat are diplomats or they just enjoy diplomatic privileges, much in the same way as she does when she travels on her country's diplomatic passport which is issued to her, not because she is a diplomat, but to facilitate her travels.
205. The SLO indicated that the Host Agreement and other relevant AU documents make it clear that the staff members of the Secretariat have diplomatic immunity. This is so for AU staff serving at the AUC Headquarters and in all its Regional Offices. The AU Staff Rules and Regulations, which govern all Staff Members of the Union, also provide for the functional immunity of staff members. He added that, over and above this, the Host Agreement in Addis Ababa had been reviewed to grant staff members of P4 Level and above full diplomatic status, explaining that this would be extended to all staff of similar grade serving in all AU Regional Offices, since what happens to staff in Addis Ababa is the yardstick for pegging the status, conditions and entitlements of all the other AU Offices.
206. While proposing that the Host Agreement be consulted for more details regarding the status of the Secretary and the Secretariat, Commissioner Bitaye also wanted to know who supervises the Secretary with regards to the accomplishment of the mandate of the Commission, since, in his view, the Memo from the Legal Counsel did not address this specific issue.
207. The SLO indicated that the Charter clearly provides that the Secretary is appointed by the Chairperson of the AUC; and that it is the Rules of Procedure of the Commission which added the rider that this appointment should be done in consultation with the Chairperson of the Commission. The SLO added that if the Commission provided more clarification on the nature of the supervision it wants to exercise over the Secretary, then he would be in a better position to provide further clarification on the matter.
208. Commissioner Bitaye commented that, while the Secretary reports to the AUC in terms of the AU Rules and Regulations, when it comes to the

programmes to implement the mandate of the Commission, the Secretary should be guided by the Commission.

209. The response of the SLO was that, with regards to finance, personnel and administration, the Secretary reports exclusively to the AUC; but that the elaboration of programmes should be joint work between the Commission and the Secretary, especially since it is the Secretary who defends these programmes before the AU Policy Organs.
210. Commissioner Gansou stated that the Commission needs a clear answer on its relationship with the Secretary, emphasising that this relationship should be governed by the applicable rules.
211. Commissioner Bitaye further asked whether the Commission's programmes should come from the Commission or from the Secretariat, and whether, when they come from the Secretariat, they are not simple proposals.
212. The Director of Administration and Human Resources Development and Head of the AU delegation explained that in present-day management, the elaboration of programmes is not a matter of bottom-up or top-down process, but rather a joint exercise, since neither the Commission nor the Secretariat could work without each another. That is the rationale behind programmes being a work in tandem; it is a collective responsibility, she said.
213. Commissioner Malila mentioned that Rule 23 of the current Rules of Procedure already provides for the general supervision of the Secretary by the Commission, and enquired whether the SLO was suggesting that the Rules are flawed in that respect.
214. The SLO's response was that there is no problem with the general supervision already provided for under the existing Rules of Procedure, adding that what was of concern was the nature of the supervision contemplated under the draft Rules of Procedure.
215. Commissioner Gansou asserted that the Commission is guided by the Charter and its Rules of Procedure, and that what the SLO was saying was just an opinion.
216. Commissioner Maiga sought clarifications on the difference between general and specific supervision; she also wanted to know the distinction between the current Rules and the draft Rules of Procedure.
217. In Commissioner Nyanduga's view, a resolution of the matter lay in the Memo from Legal Counsel, more specifically, the paragraph which states that "the Secretary is the embodiment of the Chairperson of the AUC and is supervised and takes directives on personnel, administrative and financial matters only from the AUC Chairperson and any other person with direct authority vested in them under the AU Staff Rules and Regulations or the

Financial Rules and Regulations or by delegation of power by the AUC Chairperson”.

218. Commissioner Nyanduga further indicated that, Commissioners incur a lot of administrative expenses, which cannot be accounted for separately since they form part of the running of their regular occupations, such as legal practices. He contented that, the accounting requirements are therefore onerous, adding that since it is recognised that these expenses and costs are incurred by Commissioners, the AU must consider the administrative funds as grants rather than advances. In his view, treating administrative funds as advances has made it impossible for Commissioners to account, and hence Commissioners have been denied a subsequent payment, which means Commissioners have continued to subsidize the AU, by incurring expenses which are not recovered.
219. For his part, the SLO reiterated the need for the Commission and the Secretary to the Commission to work jointly on programmes; the exclusive supervision of the AUC regarding personnel, financial and administrative matters; and the refutation of the supervision of the Secretary as contemplated under the draft Rules of Procedure.
220. Regarding the issue of programmatic planning and extra-budgetary issues, the Head of Resource Mobilization provided the following clarifications:
 - i. On programme proposals - these may come from the Secretariat or from the Commission;
 - ii. On extra-budgetary resources: following the decision of the Executive Council, the AU should have one integrated budget, comprising an operational and a programmes budget. Partner funds can be used on condition that they are included in the budget, and the activities for which the funds are given are consistent with the overall AU plan and are approved by AU Policy Organs. Funds which are not incorporated in the budget cannot be used. They need to be regularised by the Policy Organs first if they are to be used. Regarding ongoing support, no matter where it is coming from, it also needs to be regularised before it can be utilised.
 - iii. On the issue of a Voluntary Fund for Human Rights: the Head of Resource Mobilization said, while he was hearing this for the first time, there is nonetheless a practice in the AU to establish such Funds. However, their proliferation renders their administration difficult, and there is ongoing work in the relevant departments of the AUC to define their operational modalities.
 - iv. On AU-EU Funds: the programmes being implemented by the AUC and the other AU Organs now are already being funded in part from EC funding, especially those relating to institutional and capacity building programmes. However, the Head of Resource Mobilization was not aware of the specific Fund that Commissioner Nyanduga was referring to, and undertook to follow-up on the matter.

221. The issue of treating administrative funds as grants was not addressed in the responses of the AU team.
222. Commissioner Bitaye raised a matter affecting his specific mandate as the Chairperson of the Working Group on Indigenous Peoples and Communities: an amount had been allocated for one activity, and no provision has been made for the other activities which have been carried out by the Working Group for many years with support from partners. The partner funds are not in the ACHPR books and are not reflected in the approved 2008 Budget, which means that they cannot be used. This means that most of the activities of the Working Group will not be carried out despite the fact that funding is available from partners.
223. Commissioner Bitaye also asked whether it is possible to have a virement in the funds that have been allocated to the Commission as a whole, taking into account the consequences attached to the non-exhaustion of the funds allocated. He underlined that if the Rules are such that they jeopardise the execution of the mandate of the Commission, then the Rules are counter-productive.
224. Commissioner Maiga raised concern regarding the situation of the Members of the Commission who were sworn in, in November 2007, when the budgetary process was well underway and almost completed. On extra-budgetary resources, she indicated that most of the partners of the Commission are being turned away due to the Financial Rules, and sought advice on what could be done.
225. While expressing solidarity with the concerns expressed regarding partner funds which could not be utilized because of the Financial Rules, Commissioner Gansou further asked whether the Commission is limited to carrying out only those activities included in the Strategic Plan 2008-2012 in line with the Commission's agreement reached in Brazzaville, or whether other activities can also be carried out.
226. Commissioner Nyanduga sought clarifications on how budgetary provision could be made for unpredictable activities.
227. Commissioner Kayitesi asked whether it is possible to revise the budget, in terms of a mid-term review, and to get exemptions from the AU in order to use the funds that have been received from partners before the adoption of the next budget.
228. Commissioner Maïga raised the issue of honorarium, as well as the possibility of reallocating funds within the approved budget.
229. For her part, the Chairperson, Justice Monageng, wanted to know whether

Interns provided within the framework of assistance to the African Commission, could be based in the countries of residence of the respective Commissioners, to provide on-site assistance.

230. While noting that the problem of capacity to absorb funds allocated is not peculiar to the Commission, the Head of Resource Mobilization reiterated that donor funds can be used, provided that the process already indicated is followed. In his advice, the way forward is to go back to the Policy Organs, acknowledge that a mistake was made to the extent that some activities were omitted from the budget presented and approved, and appeal that the budget be reviewed accordingly.
231. On the issue of virement, the Head of Resource Mobilization indicated that the AU practises a mid-term budget review process, during which a virement request can be made to the Policy Organs. He pointed out that programmes which are not carried out in the first semester, as well as those that may not be carried out during the second semester, can be dealt with during this review process. He, however, stressed that this budget review process cannot be used as an avenue to admit or insert new programmes into the year's work plan.
232. With regards to the budget preparation process, the Head of Resource Mobilization indicated that the relevant documents have to be ready and translated well before the October deadline, when the consideration of the budget for the next fiscal year begins.
233. On the Voluntary Fund, the SLO advised that the matter be brought to the attention of the Executive Council for a decision, adding that the idea came from the Grand-Bay Declaration.
234. For her part, the Director of Administration, Human Resources and Development made clarifications as follows:
 - i. Internship: Interns are accepted subject to the governing AU Rules and Regulations which provide, among other things, that a number of conditions should first be met, including the following: Interns have to be Africans and have a first university degree; the internship attachment is for three months renewable only once, and is not paid; and non-African Interns are not allowed. The Director further distinguished Interns from Technical Assistants, whom she said could be non-African, but had to be needs-driven, and could only come on board on the basis of a Memorandum of Understanding (MOU) signed by the Chairperson of the AUC.
 - ii. On the issue of whether Interns could be located in the countries of the Commissioners, she said there was nothing wrong with this in principle, provided this was part of the support arrangement agreed to in the enabling MOU.

- iii. On the issue of staffing, the Director expressed the hope that the new structure proposed for the ACHPR Secretariat would be approved at the forthcoming July 2008 Session of the AU Summit. In the meantime, she undertook to do everything in her power to expedite and accelerate the recruitment of temporary staff that was already underway.
- iv. On the issue of increasing the honorarium for Commissioners during sittings of the Commission, she advised that the way forward was for the Commission to provide motivation for a review of the current amount, for consideration by the Policy Organs.
- v. Regarding the issue of compensation for Commissioners during other activities of the Commission, she advised that a request be tabled before the relevant AU Policy Organs.
- vi. On the need to expedite authorization for missions for Commissioners, to remove some of the problems Commissioners had faced in the past regarding per diem, the Director said her assumption was that it was the Chairperson of the African Commission who authorised missions for the Commissioners. The Secretary explained that in the past missions for the Commissioners were authorized by the Commissioner for Political Affairs, as the Directorate through which the budget of the Commission was presented, defended and accounted for. She referred to the Executive Council decision now authorizing the African Commission to prepare and defend its own budget before the Policy Organs, and the subsequent clarification Memo from the Legal Counsel which states, *inter alia*, that missions for Commissioners are now to be authorized by the Chairperson of the African Commission, subject to the availability of funds as advised by the Secretary. The Chair indicated that she had just learnt of this new development.

235. The Chair noted the explanations provided by the AUC team on all matters, and underscored the need to ensure the regularisation of all extra-budgetary resources. In that regard, she called upon those Commissioners, who already have interns assisting them as part of assistance to the ACHPR, to have this regularised as soon as possible.

236. The Chair ended the Session by thanking the team from the AUC for coming to engage the Commission, and wishing them a safe journey back.

237. The following issues were discussed by the Commission after the meeting with the AU team:

Honorarium

238. It was agreed that what Commissioners are receiving is an honorarium and not a sitting allowance. The purpose of such honorarium is to compensate the Commissioners for their time spent out of their places of residence/work. It was agreed that the current amount of USD 2,500 had not been reviewed for some time, and no longer correspond to the reality. It was also agreed

that the honorarium should not be limited to the Ordinary Sessions of the Commission, but also be extended to Extra-Ordinary Sessions and Missions, as follows:

- i. Ordinary and Extraordinary Sessions: **USD 5,000.00**
- ii. Promotional and Fact-Finding Missions: **USD 2,500.00**

Accounting

239. On the issue of accounting, the Secretary stated that according to AU Rules, any money received shall be accounted for, and receipts submitted.

Upgrading tickets for Commissioners

240. On the issue of upgrading Commissioners' tickets to business class, the Secretary responded that this is only possible when Commissioners are participating in meetings authorized by the AU. It does not apply to programmes organized by partners.

Interns and Technical Assistants

241. It was agreed that Commissioners who already have Interns and Technical Assistants shall take the necessary steps to regularise them, in line with the AU Rules.

The Issue of Staffing

242. There was a high turnover at the Secretariat at the end of December 2007, with the result that as of now the Secretariat is relying virtually on just the 3 Senior Legal Officers provided for in the Maputo Structure of 2003. For this reason, the Secretariat retained two Legal Officers who had been with the Secretariat over some time, while following up the matter of staff strength with the Headquarters in Addis Ababa quite vigorously.

243. As reported at the 42nd Ordinary Session of the Commission, pursuant to the Decision EX.CL/Dec.344 (X) of the Executive Council, the Secretariat submitted a proposed new Structure to the relevant AU Policy Organs for consideration and decision. While the Sub-Committee on Structure has approved part of the request put before it, consideration of the Sub-Committee's proposal by the Permanent Representatives Committee has been put on hold, to allow the in-coming management team at the AUC to also put together its structural requests, so that the process is not done in a piece-meal manner. The Secretariat thus still awaits a final decision on the matter, and hopes that the proposed structure will be adopted at the forthcoming Summit in July 2008.

244. As a result, a representative of the Administration and Human Resources Directorate visited Banjul for a working visit, during which modalities for recruiting temporary staff were worked out. Permission was sought and obtained to advertise the available positions in the local Newspapers; interviews have been organized, and the new staff members are expected to take up their positions as soon as the recruitment process has been approved by the Directorate of Human Resources and Development.

Relationship with partners

245. The Secretariat continued to engage with its traditional partners. In the interim, discussions involved modalities for continuing the partnership, in light of the new budgetary situation and related developments.

Budgetary allocations

246. The budget approved for 2008 is **US\$6,003,856.86** split into Operational Budget and Programs Budget.
247. The Programs budget is a total of **US\$1,419,466.86** split into three different areas as follows:
- i. Promotion Activities - US\$ 904,466.86
 - ii. Protection Activities - US\$ 260,000.00
 - iii. Capacity Building Activities - US\$255,000.00.
248. The Operational Budget, on the other hand, is a total of **US\$4,584,390.00** and this includes, among other things, the usual running costs and overheads such as salaries and wages, common staff costs, travel costs, communication costs, equipment and cost of organizing the Commission's sessions.

Subvention

249. As at the end of February 2008, the sum of **US\$493,787.95** had been received from AU HQ as subvention for the first quarter.

Expenditure

250. As at the end of February 2008, **6.11 % or US\$366,955.16** of the budget had been utilised.

Extra Budgetary Funds in the Account of the Commission

251. As at the end of February 2008, the Commission had the following extra budgetary amounts from different partners in its Account:

Organisation	Amount balance	Explanation
Frontline	US\$ 95.71	Balance left from funds (US\$3,810.00) sent in August 2006 for the office to buy equipment for the assistant to the Special Rapporteur on Human Rights Defenders. 1 printer, 2 UPS and 1 laptop were purchased in 2007 for a total of US\$3,714.29
Rights and Democracy – Women’s Forum	US\$781.49	Balance of funds (US\$12,860.71) sent to the Commission in April 2007 for the Women’s Forum held in Banjul.
Rights and Democracy	US\$29,457.52	Balance brought forward from 2007, left over from funds sent some time in 2005 and 2006, to support some of the activities of the ACHPR, including a staff retreat in 2007.

Rights and Democracy – Working on Group Specific Issues and Orientation Seminar.	US\$21,269.89	Funds sent by R&D in 2007 to support the meeting of the Working Group on Specific Issues and the Orientation seminar in Brazzaville, in November 2007. These funds were not used as the Government provided facilities for the period.
NORAD	US\$118,873.45	Funds sent by NORAD in December 2007 to support the activities of the SR on Human Rights Defenders.
OHCHR(through AU HQ) - Human Rights Defenders	US\$5,220.00	Balance brought forward from 2006 and 2007, from a project supporting payments to one legal officer and activities of the Special Rapporteur on Human Rights Defenders in Africa.
South African Government	US\$242,543.74	Balance of funds (270,191.99) provided by the South African Government to support the ACHPR in April 2007. The amount was deposited without an agreement having been reached on exactly how this money should be utilized. Draft Diplomatic Exchange of Notes are in the Office of the Legal Counsel for clearance, to regularize the donation. In the mean time part of these have since been used to pay two temporary legal officers and for missions of the South African technical staff member at the ACHPR with the specific approval of the South African Government.

Extra Budgetary Funds in Separate Accounts

252. The balances in the books of Donor Accounts as at the end of February 2008 were as per the table below:

Fund/Name	Balance as at 1/1/2008	Received during the period	Available during the period	Expenditure incurred
Danish Centre for Human Rights ²²	4,625.05	12,975.00	17,600.05	10,260.63
Working group on Indigenous Populations and Communities - IWGIA ²³	24,963.09	0.00	24,963.09	214.16
OSIWA ²⁴	158,537.81	0.00	158,537.81	51,140.79
	188,125.95	12,975.00	201,100.95	61,615.58

CONSIDERATION OF STATE REPORTS

253. In accordance with the provisions of Article 62 of the African Charter, the

²² **Danish Centre for Human Rights** in November 2007 agreed to extend the contract to support the Legal Expert working on the Strategic Plan for three months.

²³ **IWGIA's** contract has come to an end and some of the money reflected is being used to print the Indigenous Peoples Report in English, Arabic, French and English. The rest of the funds will be returned to them as soon as all payments for the reports are done.

²⁴ **OSIWA** had sent US\$124,975.00 in March 2007 as part of the agreement to extend their already existing agreement with the ACHPR from 2004 to the end of 2007, mainly to support IT, like designing of the web-site, digitization equipment and a Journalist Workshop. The Regional Workshop took place in February 2008 in Banjul.

Republic of Tanzania, and the Republic of The Sudan presented their Periodic Reports to the African Commission. During the examination of these State Reports, the Commission engaged the respective State Parties in a constructive dialogue with regards to the enjoyment of human rights in their countries.

Status of submission of state party reports

254. The status of submission and presentation of the Periodic Reports of states as at the 43rd Ordinary Session of the Commission stood as follows:²⁵

No.	Category	Number of States
6.	States which have submitted and presented all Reports	9 ²⁶
7.	States which have submitted all their Reports and will present the next Report at the 44 th Ordinary Session of the African Commission	2
8.	States which have submitted two (2) or more Reports but still owe one or more Reports	7
9.	States which have submitted one (1) Report but still owe more Reports	13
10.	States which have not submitted any Report	12

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

No.	State Party
1.	Cameroon
2.	Central African Republic
3.	DRC
4.	Egypt
5.	Lybia
6.	Mauritania
7.	Nigeria
8.	kenya
9.	Uganda

²⁵

Updated: May 2008

²⁶

This number includes State reports scheduled to be presented at the current session

10.	Seychelles
11.	South Africa
12.	Sudan
13.	Tanzania
14.	Zambia
15.	Zimbabwe

b) States which have submitted all their Reports and will present the latest one at the 44th Ordinary Session of the ACHPR::

No.	State Party
1	DRC
2	Namibia

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

No.	State Party	Status
1.	Benin	3 overdue Reports
2.	Burkina Faso	1 overdue Report
3.	Gambia	6 overdue Reports
4.	Ghana	3 overdue Reports
5.	Namibia	2 overdue Reports
6.	Senegal	1 overdue Report
7.	Togo	2 overdue Reports

d) : States which have submitted one report but owe more:

No.	State Party	Status
1.	Angola	4 overdue Reports
2.	Burundi	3 overdue Reports
3.	Cape Verde	5 overdue Reports
4.	Chad	3 overdue Reports
5.	Congo(Brazzaville)	2 overdue Reports

6.	Guinea Republic	4 overdue Reports
7.	Lesotho	2 overdue Reports
8.	Mali	4 overdue Reports
9.	Mauritius	5 overdue Reports
10.	Mozambique	5 overdue Reports
11.	Niger	1 overdue Report
12.	Saharawi Arab Democratic Rep	1 Overdue Report
13.	Swaziland	3 overdue Reports

e) States which have not submitted any reports:

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

PROTECTION ACTIVITIES

255. Pursuant to Articles 46-59 of the African Charter, during the period covered by this Activity Report, the African Commission undertook several measures to ensure the protection of human and peoples' rights on the continent. These included, among others, writing Urgent Appeals, in reaction to allegations of human rights violations received from stakeholders, Press Releases addressing human rights violations, and request of Provisional Measures to Member States.

256. In addition, during the 43rd Ordinary Session, **80** Communications were tabled before the African Commission: 7 on seizure; 44 on admissibility; 28 on merits; and 1 on review. However, further consideration of some the Communications was differed to the 44th Ordinary Session, for various reasons.
257. The Commission considered and adopted decisions on the merits of 3 Communications:
- i. **292/04 IHDRA v Angola**
 - ii. **293/04 IHRDA/ZLHR v Zimbabwe**
 - iii. **262/02 MIBH v Cote d'Ivoire**
258. The decisions of Communications **292/04 and 263/04** are attached to the present Report as **Annex II**. However, the decision on Communication **262/02** is being processed i.e. translation and harmonisation with the various AU languages. It will be attached to the 25th Activity Report of the African Commission.

ADOPTION OF REPORTS

259. During the Session, the African Commission adopted the following reports:
- i. Report of the Research and Information visits to Uganda;
 - ii. Report of Central African Republic, undertaken by the Working Group on Indigenous Populations/Communities;
 - iii. Report of the Fact-finding mission to Egypt, which will be transmitted to the latter for its comments; and
 - iv. The 42nd Ordinary Session Report.

ADOPTION OF CONCLUDING OBSERVATIONS

260. The Commission also adopted Concluding Observations on the Periodic Reports of: Algeria, Tunisia, and the United Republic of Tanzania. The Concluding Observations of The Sudan are under consideration for adoption at a later stage.

ADOPTION OF RESOLUTIONS

261. During the Session, the African Commission adopted the following Resolutions:
- i. Resolution on the human rights situation of migrants in South Africa
 - ii. Resolution on the forthcoming runoff election in Zimbabwe

ACTIVITIES UNDERTAKEN BY THE SECRETARIAT OF THE COMMISSION DURING THE INTERSESSION, INCLUDING WORKSHOPS AND SEMINARS

262. During the intersession, November 2007-May 2008, the Secretariat undertook a number of activities as reflected hereunder:

- i. The Secretariat, accompanied by the Chairperson, presented and defended the budget of the Commission before the AU Policy Organs in Addis Ababa, Ethiopia. As a result, the Commission was allocated an amount of USD6,003,856.86 for the 2008 fiscal year, made up of a Programs Budget of USD1,419,466.86, and an Operational Budget of USD4,584,390.00;
- ii. Participated in the AU Policy Organ Meeting, Addis Ababa in January and February, 2008;
- iii. Organised and serviced the meeting of the Working Group on Specific Issues which took place in Banjul in February 2008, to work on the draft Terms of Reference of the Commission, in preparation for the 4th Extra-Ordinary Session of the Commission;
- iv. Organised a Workshop on Human Rights for Journalists, from 12-14 February, 2008;
- v. Organised and serviced the 4th Extra-Ordinary Session of the Commission, which took place in Banjul in February 2008;
- vi. The Secretary and Financial and Administrative Officer(FAO) attended a meeting convened by the AUC on the management of the funding from the EC, in Addis Ababa, at the beginning of March 2008;
- vii. The Secretary and FAO received training in Performance-based Evaluation for Staff, in March, 2008;
- viii. The Secretariat participated in a Staff Retreat which took place from 27-29 March,2008, in Banjul, The Gambia, focusing on the new AU performance evaluation system;
- ix. The Secretariat participated in a Training Workshop on the AU Process Facility which took place from 1-2 April 2008, provided by a team from Headquarters;
- x. The Secretariat participated in, and provided logistical and technical backstopping for a Workshop on Human Rights Education that was organised by the Political Affairs Directorate of the AUC in Banjul, The Gambia, from 12-16 April 2008.

PROPOSED VENUE FOR THE 44th ORDINARY SESSION

263. The African Commission decided that the 44th Ordinary Session will be held in Abuja, Nigeria from 10-24 November, 2008.

**THE 4TH EXTRA-ORDINARY SESSION OF THE AFRICAN COMMISSION,
17-23 FEBRUARY, 2008, BANJUL, THE GAMBIA**

264. The African Commission held its 4th Extra-ordinary Session in Banjul, The Gambia from 17-23 February, 2008, which was preceded by the Working Group on Specific Issues from 15-17 February, 2008.
265. The following members of the African Commission attended the Session:
- Commissioner **Sanji Mmasenono Monageng** - Chairperson;
 - Commissioner **Angela Melo**-Vice-Chairperson;
 - Commissioner **Reine Alapini-Gansou**;
 - Commissioner **Catherine Dupe Atoki**;
 - Commissioner **Musa Ngary Bitaye**;
 - Commissioner **Zainabo Sylvie Kayitesi**;
 - Commissioner **Soyata Maiga**;
 - Commissioner **Mumba Malila**;
 - Commissioner **Bahame Tom Mukirya Nyanduga**;
 - Commissioner **Pansy Tlakula**;
 - Commissioner **Yeung Kam John Yeung Sik Yuen**.
266. The Session was chaired by Honourable Commissioner Sanji Mmasenono Monangeng.
267. It was convened, amongst other reasons, to clear the backlog of the Communications before the Commission, and to finalise consideration of the revised Rules of Procedure (ROP) of the African Commission, before the meeting with the African Court later in the year, to harmonise the ROP of both Institutions.
268. The 4th Extra-Ordinary Session also discussed the human rights situations in Kenya and Somalia. This led to the adoption of two Resolutions, namely:
- i. Resolution **ACHPR/Res.129 (EXT.OS/IV) 08** on the Human Rights Situation in Somalia;
 - ii. Resolution **ACHPR/Res.130 (EXT.OS/IV) 08** on the Human Rights Situation in Kenya.

269. The African Commission could not, however, finalise the ROP as originally planned due to time constraints and the intensity of the work involved. Consequently, further discussions were deferred to the 43rd Ordinary Session of the Commission.

ADOPTION OF THE TWENTY- FOURTH ACTIVITY REPORT

270. In accordance with Article 54 of the African Charter on Human and Peoples' Rights, the African Commission submits the present Twenty fourth (24th) Activity Report to the 13th Ordinary Session of the Executive Council of the African Union, for consideration and onward transmission to the 11th Summit of Heads of State and Government of the African Union, to be held in Sharm El Sheikh, Egypt, from 30 June -1 July, 2008.

LIST OF ANNEXURES

- i. **Annexure I:** Agenda of the 43rd Ordinary Session of the Commission held from 7-22 May 2008, in Ezulwini, Kingdom of Swaziland.
- ii. **Annexure II:** Decisions on Communications decided on the merits, at the 43rd Ordinary Session and attached hereto.

Annex I

*Agenda of the 43rd Ordinary Session held from 7-22 MAY 2008 in Ezulwini, in
the Kingdom of Swaziland*

**AGENDA OF THE 43rd ORDINARY SESSION OF THE
AFRICAN COMMISSION ON HUMAN AND PEOPLES'
RIGHTS**

(From 7th – 22nd May 2008, Ezulwini, Swaziland)

Item 1: Opening Ceremony (Public Session)

Item 2: Adoption of the Agenda (Private Session)

Item 3: Organisation of Work (Private Session)

Item 4: Human Rights Situation in Africa (Public Session)

- e) Statements by State Delegates and Guests;
- f) Statements by Intergovernmental Organisations;
- g) Statements by National Human Rights Institutions; and
- h) Statements by NGOs.

Item 5: Cooperation and Relationship with National Human Rights Institutions and NGOs (Public Session)

- b) Cooperation between the African Commission on Human and Peoples' Rights and National Human Rights Institutions:

Relationship with National Human Rights Institutions

- c) Cooperation between the African Commission on Human and Peoples' Rights and NGOs.
 - i. Relationship with NGOs; and
 - ii. Consideration of applications of NGOs for Observer Status.

Item 6: Consideration of State Reports (Public Session):

- c) Status of Submission of State Party Reports
- d) Consideration of -:
 - i. The Periodic Report of the United Republic of Tanzania;
 - ii. The Periodic Report of the Democratic Republic of Congo; and
 - iii. The Periodic Report of the Republic of Sudan.

Item 7: Presentation of Activity Reports of the: (Public Session)

- m) Chairperson, Vice-Chairperson and Members of the African Commission;
- n) Special Rapporteur on Prisons and Conditions of Detention in Africa;
- o) Special Rapporteur on the Rights of Women in Africa;
- p) Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa;
- q) Special Rapporteur on Human Rights Defenders in Africa;
- r) Special Rapporteur on the Freedom of Expression and Access to Information in Africa;
- s) Chairperson of the Working Group on the Implementation of the Robben Island Guidelines;
- t) Chairperson of the Working Group on the Situation of Indigenous Peoples/Communities in Africa;
- u) Chairperson of the Working Group on Economic, Social and Cultural Rights in Africa;
- v) Working Group on Specific Issues Relevant to the Work of the African Commission;
- w) Working Group on the Death Penalty;
- x) Focal Point on the Rights of Older Persons.

Item 8: Draft Rules of Procedures of the ACHPR (Private Session)

Item 9: Consideration and Adoption of: (Private Session)

- c) Recommendations, Resolutions and Decisions
- d) Concluding Observations on the Periodic Reports of:
 - i) Algeria
 - ii) Tunisia

Item 10: Consideration of Communications (Private Session)

Item 11: Consideration and Adoption of Concluding Observations on the Periodic Reports of: (Private Session)

- a) Tanzania
- b) Sudan
- c) Democratic Republic of Congo

Item 12: Consideration and Adoption of the Draft Report on: (Private Session)

- a) Promotional Mission to *Egypt*

- b) Report of the Research and Information visit to Uganda
- c) Report of the Research and Information visit to Central African Republic

Item 13: (Private Session)

- a) Report of the Secretary including administrative and financial matters
- b) Consultations with officials of the African Union Commission (AUC)

Item 14: Adoption of: (Private Session)

- a) 42nd Ordinary Session Report;
- b) 43rd Ordinary Session Report.

Item 15: Adoption of: (Private Session)

- a) 23rd Activity Report
- b) Final Communiqué of the 43rd Ordinary Session

Item 16: Dates and Venue of the 44th Ordinary Session of the African Commission (Private Session)

Item 17: Any Other Business (Private Session)

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

Item 19: Press Conference (Public Session)

Annex II

*Decisions on Communications
Decided on the Merits Brought Before the African Commission*

Communication 292/2004 Institute for Human Rights and Development in Africa/Republic of Angola

Summary of Facts

1. The complaint is filed by the Institute for Human Rights and Development in Africa (IHRDA) on behalf of Mr. Esmaila Connateh and 13 other Gambians deported from Angola in March, April and May of 2004.
2. The complaint alleges the capricious arrest and deportation, in violation of their human and peoples' rights, of the said Gambians who were alleged to have been legally residing and working in Angola.
3. It is alleged that the government of Angola put into effect the *Operação Brilhante*, a campaign with the objective of expelling foreigners from Angola. Many foreigners were deported from many areas especially those in the diamond mining areas. The complainants, who are of Gambian nationality, alleged that they were arbitrarily arrested, detained and later deported from Angola without any legal protection. It is estimated that 126,247 foreigners were deported from Angola.
4. The complaint further alleges that those expelled were maltreated due to their nationalities and origin, and in the process the Angolan authorities confiscated their official documents, including passports, visas, residence permits, work authorization. In some cases, money was demanded from them, and those who could not afford the money were seriously beaten.
5. The Complainant alleges further that those expelled were detained in detention centres in different areas of Angola including Cafunfu, Kisangili, Saurimo, and Launda, under conditions which were not suitable for human habitation. It is alleged that the detention camps were initially used to house animals and contained a plethora of animal waste. The detainees were faced with harsh conditions such as: no medical attention; lack of food; poor sanitation. For instance, there where there were only 2 buckets of water provided for 500 detainees to use in the bathroom; the bathroom was not separated from the sleeping and eating areas.

6. The complaint further alleges that the Angolan Armed Forces raided villages where the victims resided. They were arrested in their homes as well as on the streets at checkpoints. There was no arrest warrants issued or any reason given for the arrests. Moreover, the victims were not provided access to courts of law in order to challenge the reasons for their arrests.
7. It is further alleged that the victims' property was seized and they were denied to take their property during the alleged deportation. Some of the items that were confiscated from them they left behind, and that were confiscated from them include: television sets, shoes, wristwatches, clothing, generators, television, furniture and cash.
8. According to the complainant, although the victims had work permits and relevant documents to engage in mining activities in Angola, they were arrested on the mere premise that foreigners were not allowed to engage in mining activities in the country.

Complaint

9. The Complainant alleges violation of Articles 1, 2, 3, 5, 6, 7(1) (a), 12(4) (5), 14 and 15 of the African Charter on Human and People's Rights.

Procedure

10. The Complaint was dated 4 October 2004 and received at the Secretariat of the African Commission on 6 October 2004.
11. At its 36th Ordinary Session held in Dakar, Senegal from 2^d November to 7 December 2004, the African Commission examined the complaint and decided to be seized thereof.
12. On 23 December 2004, the Secretariat wrote to the Complainant and Respondent State informing them of this decision and requesting them to forward their written submissions on admissibility before the 37th Ordinary Session of the Commission.
13. Similar reminders were sent out to the parties on 2 February and 4 April 2005.

14. On 14 April 2005, the Secretariat received the complainant's written submission on admissibility, which was forwarded to the Respondent State on 23 April 2005.
15. At its 37th Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered this Communication and deferred its decision on admissibility to the 38th Ordinary Session.
16. On 12 May 2005, the Secretariat wrote to both parties to inform them of this decision and requested the Respondent State to forward its written submissions on admissibility before the 38th Ordinary Session.
17. On 12 September 2005, the Secretariat sent a reminder to the Respondent State.
18. At the 38th Ordinary Session held from the 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on admissibility to the 39th Ordinary Session to allow the respondent state more time to forward its submissions.
19. On 30 January 2006, the Secretariat wrote to the Complainant informing it of this decision.
20. On 5 February 2006, a similar notification was emailed and also sent by DHL to the Respondent state also requesting it to forward its written submissions on admissibility.
21. At its 39th Ordinary Session, the African Commission considered this communication and declared it admissible.
22. The Secretariat of the African Commission informed the parties of this decision and requested them to forward their submissions on the merits before the 40th Ordinary Session. The Respondent State's delegates were also provided with copies of this decision during the 39th Ordinary Session.
23. On August 21 August 2006, the Secretariat of the African Commission received the submissions of the Complainant on the merits, which was forwarded to the Respondent State.

24. At its 40th Ordinary Session, the African Commission deferred the consideration of the communication on the merits pending the written submission on the same by the Respondent State.
25. A copy of the Complainant's submission on merits was availed to the delegates of the Respondent State at the session.
26. At the request of the Angolan delegates present at the second brainstorming meeting on the African Commission in Maseru, Lesotho in April this year, the Secretariat of the African Commission emailed a copy of the Complainant's written submission on to the Respondent State's embassy in Addis Ababa, Ethiopia in May 2007.
27. At its 41st Ordinary Session, the African Commission deferred the consideration of the matter to the 42nd Ordinary Session.
28. On 8 July 2007, the Secretariat of the African Commission notified both parties of this decision.
29. On 11 September 2007, the Secretariat of African Commission wrote to the Respondent State requesting it to forward to the African Commission its written submissions and/or observations on the merits at its earliest convenience.
30. The Respondent State is yet to forward its written submission on the merits.
31. At its 42nd ordinary session, the Commission considered the communication and decided to defer it to its 43rd session due to lack of time.
32. By note verbale of 19 December 2007 and letter of the same date, both parties were notified of the Commission's decision.

The Law

Admissibility

33. The Complainant submitted its written submissions on the merits. The respondent state, however, failed to respond to the various notifications addressed to it in the context of this Communication.
34. In the face of the state's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication in accordance with its Rules of Procedure. In Communications **155/1996 - Social and Economic Rights Action Center, Center for Economic and Social Rights / Federal Republic of Nigeria, and 159/1996 Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme/Republic of Angola**, the African Commission decided that it would proceed to consider Communications on the basis of the submission of complainants and information at its disposal, even if the State fails to submit.
35. In its submission on admissibility, the Complainant alleges that the Angolan government embarked on a campaign termed *Operação Brilhante*, which was characterised by the systematic process of identifying and rounding up of foreigners working and residing in the diamond-mining regions of Angola, resulting in the detention and deportation of the victims. It avers that tens of thousands of non-nationals were deported from Angola, including Mr. Esmaila Connateh and 13 other Gambians on whose behalf the present complaint is filed. Their immediate arrest, and the absence of prior notice being given to them, resulted in the automatic loss of their property. And during the course of the arrests, Angolan authorities confiscated and destroyed the identity documents belonging to the complainants, including their Gambian passports and visas, residence permits and work permits which explicitly authorized the Gambians to live and work in Angola. Physical property was inevitably abandoned with no possibility for the transfer of such to the Gambia and large amounts of money were extorted from the foreigners by the Angolan authorities. The complainant alleges that the victims were detained for several weeks, and some for months in a series of detention centres within Angola, under conditions below acceptable minimum human rights standards. Principles of due process of law and respect for international human rights norms were not respected during the process from arrest to their deportation.

36. The Complainant further avers that the deportees were not given any opportunity to contest or challenge the irregularity and illegality of the detention and expulsion by the Angolan government in a court of law. That they did not have access to legal counsel was provided at any stage before their deportations that no national local remedy was made available to the Gambian nationals at any stage prior to the deportations. It further claims that as a matter of physical impossibility, therefore notes national remedies are no longer available to the Gambians as they are now no longer in the territory of Angola.
37. The African Commission notes that there are no indications in the submissions of the Complainant that warrant a declaration of inadmissibility of the present communication. In terms of Article 56 (5) of the African Charter, however, the African Commission has further examined the assertions of the complainant on the matter as outlined in the preceding paragraphs. Article 56 (5) stipulates that Communications shall be considered only if they *“are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”*
38. It is a well-established rule of customary international law that before international proceedings are instituted against a State, the various domestic remedies provided by the State should have been approached. This is also known as the exhaustion of local remedies rule, which is a principle under international law permitting States to solve their internal problems in accordance with their own constitutional procedures before accepted international mechanisms can be invoked.
39. This, however, is not a strict requirement that must always be met. In the present communication, the African Commission notes that there were no domestic remedies available to the deportees as they were rounded up, detained and deported in such a manner that they could not gather their personal belongings or entrust same with friends and relatives for safe keeping, let alone be able to seize the appropriate authorities to challenge the manner of their detention, and subsequent expulsion.
40. Time and again, ***In Communication 71/1992 - Recontre Africaine pour la Defense des Droits de l'Homme/Republic of Zambia***, the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, deny victims the opportunity to establish the legality of these actions in the courts. In

the present case, there is no indication as to whether the deportees were accorded the opportunity to contact their families, much less attorneys, thereby making the requirement of exhausting local remedies impracticable.

41. It is not a contested fact that the Complainants are no longer in Angola the territory where the action arose, and that they are unable to return thereto to seek redress. For purposes of redress. This, in accordance with the Commission's decisions in Communications **87/1993 – Civil Liberties Organisation / Federal Republic of Nigeria and 101/1993 – Civil Liberties Organisation (in respect of the Nigerian Bar Association) / Federal Republic of Nigeria and 215/1998 – Rights International / Federal Republic of Nigeria**, constitute constructive exhaustion of domestic remedies per the jurisprudence of the African Commission, and the latter could only but exempt the complainant from this particular requirement. In **Communication 159/96 Union Inter Africaine des Droits de l'Homme, Federation Internationale des Liges des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme/Republic of Angola**, the Commission arrived at a similar decision, holding that, it would be impractical to require the complainants to return to Angola for purposes of seeking redress in the national courts.

42. For the above reasons, the African Commission declares this communication **admissible**.

Decision on the Merits

43. The Complainant prays the African Commission to find the Respondent State in violation of **Articles 1, 2, 3, 5, 6, 7(1)(a), 12(4), 12(5), 14 and 15** of the African Charter as a result of the alleged systematic arrest, detention and subsequent deportation of thousands of foreigners from Angolan territory, including at least 205 Gambian nationals.

44. The African Commission will examine the allegations of the Complainant under each of the provisions of the African Charter alleged to have been violated by the Respondent State.

Alleged violations of Article 3(2)

45. The Complainant alleges that the mass arrest, detention and expulsion of the Gambians from Angola violated their right to equal protection of the law. Equal protection of the law under Article 3 (2) relates to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of the law, but in particular, applies to equal treatment as an element of fundamental fairness.
46. In terms of Article 60 of the Charter, this Commission can also be inspired in this regard by the famous case of **Brown v. Board of Education of Topeka**,²⁷ in which the **Chief Justice of the United State of America**, Earl Warren argued that ‘equal protection of the law refers to *‘the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness’*.²⁸
47. In order for a Complainant to establish a successful claim under Article 3 (2) of the Charter therefore, it must show that, the Respondent State had not given the victims the same treatment it accorded to the others. Or that, the Respondent State had accorded favourable treatment to others in the same position as the victims.
48. In the present Communication, the Commission has examined the evidence submitted by the complainant and is of the view that it (the complainant) has not demonstrated the extent to which the victims in the present communication were treated differently from the other nationals arrested and detained under the same conditions. The Commission thus does not find the Respondent State to have violated Article 3 (2) of the African Charter.

Alleged violation of Article 5

49. Article 5 of the African Charter provides that “every individual shall have the right to the respect of the dignity inherent in a human

²⁷ 347 U.S 483 (1954).

²⁸ www.legal-explanations.com

being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”.

50. The Complainant alleges that the condition of their detention in the detention centres were inhumane as the facilities were overcrowded and unsanitary. According to the complainant, the detention centre at Kisangili had been used to house animals just prior to its conversion into a detention centre to hold approximately 300 people and few measures had been taken to accommodate the detainees, including cleaning out the animal waste. The complaint further alleges that since the Gambians, at any time from arrest, detention, leading to their expulsion, were not informed of the reasons of their detention and its duration thereof, which in itself, the African Commission had held, constituted a “mental trauma.”²⁹

51. In further corroborating the failure of the Respondent State, the complaint alleges that guards frequently beat the Gambians and extorted money from them. Food was not regularly provided and medical attention was not readily available, despite repeated requests. Complainants were transported between detention centres in overcrowded cargo planes and lorries. The detention centre in Saurimo had no roof or walls and complainants were exposed to the elements of weather for five consecutive days. At the Cafunfu detention centre, bathroom facilities consisted solely of two buckets for over 500 detainees, and these were located in the same one room where all detainees were compelled to eat and sleep. This, for the African Commission, is clearly a violation of Article 5 of the African Charter since such a treatment cannot be called anything but degrading and inhuman.

52. In **Communication 224/1998 - Media Rights Agenda v. Federal Republic of Nigeria**, the African Commission held the terms “cruel, inhuman or degrading punishment or treatment” to be “interpreted so as to extend to the widest possible protection against abuses, whether physical or mental,”³⁰ referring to any act ranging from denial of contact with one’s family and refusing to inform the family of where the individual is being held,³¹ to conditions of overcrowded

²⁹ See the Commission’s decision in Communication 225/1998, *Huri-Laws v. Nigeria*, para 27.

³⁰ Communication 224/1998 - *Media Rights Agenda v. Nigeria*, para 71.

³¹ See the Commission’s decision in Communications 48/1990, 50/1991, 52/1991 and 89/1993 - *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for*

prisons and beatings³² and other forms of physical torture, such as deprivation of light, insufficient food and lack of access to medicine or medical care.³³ The African Commission also reiterates its position taken in *Huri-Laws v. Nigeria*, in which it ruled that such “treatment meted out to the victim” constituted a breach of Article 5 of the African Charter, as well as the Minimum Standards of Treatment for Prisoners as laid out by the United Nations.³⁴

53. There is nothing from the Respondent State to counter these allegations and the African Commission, thus, is of the view that Angola is in violation of Article 5 of the African Charter.

Alleged violation of Article 6

54. Article 6 of the African Charter provides for the prohibition of arbitrary arrest. In its Resolution on the Right to Recourse Procedure and Fair Trial, the African Commission further states that “persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.”³⁵ Furthermore, the prohibition of arbitrary arrest includes prohibition of indefinite detention³⁶ and arrests and detentions “based on grounds of ethnic origin alone.”³⁷

Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan, para 54.

³² See the Commission’s decision in Communication 78/1992 - *Krishna Achuthan v. Malawi*, 64/92, *Amnesty International v. Malawi*, para 7.

³³ See the Commission’s decision in Communication 151/1996 - *Civil Liberties Organisation v. Nigeria*, para 27. See also, at the international level, the UN Human Rights Committee’s views in Communication 253/1987 - *Kelly v. Jamaica* where it held that respect of the inherent dignity of the human being required provisions of adequate medical care and food and basic sanitation facilities during detention. In *Kalenga v. Zambia*, the UN Human Rights Committee went further to state that where the complainant was denied access to food and medical assistance during his detention, the detention did not respect the inherent dignity of the human being.

³⁴ See Communication 232/1999 - *John D. Ouko v. Kenya*, para 24 in which the Commission held that a violation of the Minimum Standards of Treatment in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment effectively constitutes a violation of Article 5 of the Charter.

³⁵ See *Media Rights Agenda v. Nigeria*, para 43.

³⁶ See *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah v. Zaire*, 25/89, 47/90, 56/91, 100/93, para 42.

55. In the present case, there is nothing from the Respondent State to indicate that the manner of victims' arrests and subsequent expulsion was not arbitrary as alleged by the complainant. As the complainant puts it, at no point were any of the victims shown a warrant or any other document relating to the charges under which the arrests were being carried out. The African Commission thus finds the Respondent State to have violated Article 6 of the African Charter.

Alleged violation of Article 7(1) (a)

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

57. The complaint alleges that prior to expulsion, the complainants were held in several Angolan detention centres, including Canfunfu, Saurimo and Kisangili. They were held there arbitrarily as they knew of no laws forbidding their residence and work in Angola prior to their arrest, and that during their detention they were afforded no explanations as to their arrest and detention and no the opportunity to speak to a lawyer or go before a judge.

58. The complaint alleges that circumstances of this case made it impossible for complainants to access the Angolan courts or other national organs to question their arrest, detention and deportation. The abrupt manner in which they were arrested, detained and deported denied them of the opportunity to engage a lawyer to take their case to court to challenge the regularity and legality of their arrest, detention and deportation. The African Commission has ruled that every individual has the right to appeal to competent national organs for violations of his/her fundamental rights, and as such, if one is detained without charge or trial³⁸ and there exists

³⁷ See *Organisation Mondiale Contre La Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes (C.I.J.), Union Interafricaine des Droits de l'Homme v. Rwanda*, 27/89, 46/91, 49/91, 99/93, para 29.

³⁸ See Communications 143/1995 and 150/1996 - *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, para. 28.

no legal remedy to challenge the detention,³⁹ it is a clear violation of Article 7(1)(a).

59. In Communication 71/1992 - **RADDHO v. Zambia**, where the deportees similarly were denied “the opportunity to seize the Zambian courts to challenge their detention or deportation,” the African Commission found this to constitute violation of the deportees’ rights under Article 7.⁴⁰ Similarly, in Communication 159/1996 - **UIDH, FIDH, RADDHO, ONDH v. Angola**, the African Commission held that the State failed to afford the victims with the “opportunity to challenge the matter before the competent jurisdictions which should have ruled on their detention, as well as on the regularity and legality of the decision to expel them was a violation of Article 7(1) a of the African Charter.

60. The African Commission is thus of the view that, given the facts before it, the Respondent State is thus in violation of Article 7(1) (a) of the African Charter.

Violation of Article 12(4) of the African Charter on Due Process before Expulsion

61. Article 12 (4) of the African Charter provides that “a non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

62. The complaint alleges that the victims in the present Communication were subjected to arbitrary arrest, detention and subsequent expulsion and were denied due process of law before their expulsion from Angola. Prior to their deportation, complainants were not taken before a court of law to answer any charge concerning their activities and stay in Angola or without a decision or order made in accordance with the applicable laws. It is alleged by the complainants that the victims were legally in the territory of the Respondent State, and when they presented their legal documents to the authorities, they were either confiscated or destroyed. The African Commission finds no contrary submission from the Respondent State to challenge these allegations.

³⁹ See *Huri-Laws v. Nigeria*, above para. 45.

⁴⁰ See Communication 71/1992 - *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia*, para. 30.

63. In **Communication 159/1996 - UIDH, FIDH, RADDHO, ONDH v. Angola**, the African Commission stated that although African States may expel non-nationals from their territories, the measure that they take in such circumstances should not be taken at the detriment of the enjoyment of human rights, and that while the Charter does not bar a State's right to deport non-nationals *per se*, it does require deportations to take place in a manner consistent with the due process of law.⁴¹

64. The African Charter's requirement of due process as outlined above is also shared by similar systems elsewhere. The Human Rights Committee under the International Covenant on Civil and Political Rights, for instance, had expressed a similar concern over the treatment of aliens being deported from Switzerland when it held the latter liable for degrading treatment and use of excessive force resulting on some occasions in the death of the deportee during deportation of aliens.⁴² The Committee recommended that Switzerland should "ensure that all cases of forcible deportation are carried out in a manner which is compatible with articles 6 and 7 of the Covenant" and that "restraint methods do not affect the life and physical integrity of the persons concerned".⁴³

65. The African Commission notes that the import of this provision under the African Charter is to ensure that due process is followed before legally admitted non-nationals are expelled from a Member State. Very clearly, the situation as presented by the complainant did not afford those expelled due process of law for protection of the rights that have been alleged to be violated by the Respondent State and that they were not allowed access to the remedies under domestic law to at least challenge, if not reverse, their expulsion.⁴⁴ The African Commission thus holds the Respondent State in violation of the provisions of Article 12(4) of the African Charter.

Alleged violation of Article 12(5)

⁴¹ Id. Para 23.

⁴² The UN Human Rights Committee, ICCPR, A/57/40 vol. I (2002) at para. 76 (13).

⁴³ Ibid.

⁴⁴ *Communication 232/99 – John Ouko/Kenya*.

66. Article 12(5) of the African Charter reads “the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups”.

67. In the present communication, the Complainant alleges that the group of Gambians was expelled from Angola *en masse* on May 23, 2004.⁴⁵ In addition to the 217 Gambians, tens of thousands of other non-nationals have been expelled from Angola in the same year. The complaint further alleges that the Angolan government itself reported that 126,247 foreigners had been repatriated as of 14 May 2004. It quotes a United Nations estimate that 3,500 of this number originate from West Africa, with much of the remainder coming from the Democratic Republic of Congo.⁴⁶ It adds that nationals from many different countries have been affected, including individuals from the Democratic Republic of Congo, Guinea Conakry, Mali, Mauritania, Côte d’Ivoire, Senegal and Sierra Leone. These expulsions were hastily carried out, permitting little in the way of advance planning and coordination of resettlement assistance for those expelled.⁴⁷ It claims that the number, coupled with the subsequent expulsions under such conditions constitute mass expulsions under Article 12(5) of the African Charter.

68. The African Commission has ruled that “mass expulsion was a special threat to human rights,” adding that a government action specially directed at specific national, racial, ethnic or religious groups is generally qualified as discriminatory in the sense that, none of its characteristics has any legal basis or could constitute a source of particular incapacity.⁴⁸ Similarly, the African Commission, held that:

⁴⁵ *See for instance*, Ebrima JT Kubaji, *217 Gambians Deported from Angola*, The Daily Observer, 24 May 2004 at 24; Lugard WE Osayande, *Consular meets deportees*, The Daily Observer, 27 May 2003 at 24 (both available at <http://www.observer.gm>).

⁴⁶ *Angola - Guinea: Deported Guineans complain of ill treatment*, UN Office for the Coordination of Humanitarian Affairs, 11 Jun. 2004 at <http://www.irinnews.org/print.asp?ReportID=41644>.

⁴⁷ *Humanitarian Situation in Angola Monthly Analysis Apr 2004*, The United Nations Office of Coordination of Humanitarian Affairs, 30 Apr. 2004 at <http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/41292ac0a994c0eb85256e9a00697388?OpenDocument> (“Unfortunately, the entire process of this round of ‘Operação Brilhante’ was poorly executed, without respect for the dignity of those involved and rife with abuses, significant human rights abuses.”).

⁴⁸ *159/96 Union Inter Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, Organisation*

“African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, States often resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations, “constitute special violation of human rights.”⁴⁹

69. The Respondent State has failed to advance any argument to justify its actions. As shown above, the position of the African Commission regarding mass expulsions is clear. And as the complainant avers, “simply because the victims were a part of a larger group of non-nationals, not just Gambians, but also other West and Central Africans, does not negate discrimination on the part of the Respondent State,” and that the fact that “so many aliens received the same treatment is tantamount to an admission of a violation of Article 12(5).” Moreover, the fact that the deportees as a group were arrested over a period of several months at different places and may have been served with deportation orders on different dates does not qualify, for purposes of the African Commission, to be sufficient to negate the *en masse* element of the expulsions.⁵⁰ The African Commission underscores that any expulsions or deportations must comply with the human rights obligations found in the African Charter. Accordingly, the African Commission finds the Respondent State in violation of Article 12 (5) of the African Charter.

70. The African Charter is not unique in prohibiting mass expulsions. The European Convention on Human Rights provides some protection against expulsion. The Fourth Protocol to the same Convention similarly prohibits collective expulsion of aliens as well

Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme/Angola.

⁴⁹ Ibid.

⁵⁰ *Id.* at para. 27.

as the expulsion of nationals from their own state. Its Seventh Protocol prohibits expulsion of an alien lawfully resident in a state except when a decision to that effect is taken in accordance with law. Here, the person concerned is entitled to submit reasons against the expulsion, have the case reviewed and be represented for these purposes before a competent authority.

Alleged violation of Article 14

71. The complaint alleges that, members of the Angolan Armed Forces raided villages where victims were living and began shooting live ammunition down the street, deliberately targeting items that would explode, such as generators. In the resulting confusion, mass numbers of people were arrested, including some of the complainants. Other complainants were arrested at checkpoints on the street. Violence frequently accompanied these arrests and victims' possessions were confiscated. In several cases, Angolan authorities attempted to extort money from complainants before proceeding to arrest them. Following their arrest, complainants were immediately taken to various detention centres where they were kept until their expulsion from the country.

72. The Complainant alleges that in the course of the arrest, victims' property was confiscated by Angolan authorities, including television sets, shoes, wrist watches and clothing. It further claims that the abruptness of their arrest forced them to leave behind all property in Angola giving them no opportunity to make arrangements regarding the transport or disposal of their belongings.

73. The African Commission is of the view that the actions of the Respondent State as shown in the preceding paragraphs not only denied fair treatment of the victims with opportunity to challenge their deportation but also failed to allow them opportunity to deal with their belongings. The Complainant argues and the African Commission concurs that the type of deportations involved in the present case (i.e. mass expulsions without due process) challenge a series of rights and protections afforded by the Charter, including the right to property, and, as such, the measures taken by the Respondent State in its arrest, detention and subsequent deportation of the victims "called into question a whole series of rights recognized and guaranteed in the Charter," including the right to property. While the right to property under the African Charter is not absolute, the Respondent State has not provided evidence to prove that its actions were necessitated either by public need or

community interest. Without such a justification and the provision of adequate compensation determined by an impartial tribunal of competent jurisdiction, the African Commission finds the Respondent State's actions in violation of the right to property under Article 14 of the African Charter.⁵¹

Alleged violation of Article 15

74. Article 15 of the African Charter provides that: "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".
75. The Complainant alleges that the victims were in possession of official documents, including passports, visas, work and residence permits, allowing them to stay and work legally in Angola. The victims were required on a monthly basis to pay for their work permits that enabled them to continue working in the mines. Nevertheless, they were arrested on the grounds that foreigners were not permitted to engage in mining activities in Angola.
76. As indicated above, the Respondent State has regrettably not forwarded any arguments to refute any of the allegations made in this communications including the alleged violation under Article 15 of the African Charter. The facts indicate and the African Commission agrees that the abrupt expulsion without any possibility of due process or recourse to national courts to challenge the Respondent State's actions severely compromised the victims' right to continue working in Angola under equitable and satisfactory conditions. Accordingly, the African Commission holds that the Respondent States actions of arbitrary arrest, detention and subsequent deportation resulted in persons who were lawfully working in Angola losing their jobs in a manner that is in violation of Article 15 of the African Charter.

Alleged violation of Article 2

77. The complaint alleges that the circumstances under which the victims were expelled constitute a violation of Article 2 of the African Charter in that the victims had been living in Angola for

⁵¹ See *Huri-Laws / Nigeria*, above at para 53.

varying lengths of time, after having obtained official documentation, including visas, residence and work permits, in order to lawfully reside and work in Angola. Several of the victims were engaged in diamond mining and had paid appropriate sums of money each month to obtain the required licenses. Nevertheless, despite possession of proper documentation, the victims were arrested, detained and expelled, and their property and documentation were confiscated, specifically because they were foreigners.

78. In interpreting the African Charter, the African Commission relies on its own jurisprudence, and as provided by Articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. In the present case, the African Commission has dealt with communications alleging similar violations of freedom from discrimination. Article 2 of the African Charter basically forms the anti-discrimination principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises.⁵²

79. The facts as presented by the Complainant are not challenged by the Respondent State as the latter has not sent any submission whatsoever. It appears that the victims were targets of a government action which aimed at rounding up and deporting foreigners or non-nationals. Although governments have the right to regulate entry, exit and stay of foreign nationals in their territories, and as the complainant rightly avers that although the African Charter does not bar deportations per se, the African Commission reaffirms its position that “a state’s right to expel individuals is not absolute and it is subject to certain restraints,” one of those restraints being a bar against discrimination based on national origin. As mentioned above, there is no submission from the Respondent State countering this in that the victims belonged to a larger group which did not consist of only Gambian nationals, but nationals of several foreign countries. However, even if such an argument were to be advanced here, the Commission has previously ruled that “the simultaneous expulsion of nationals of many countries does not negate the charge of discrimination.”

80. From the foregoing, it is clear that the various violations allegedly committed by the actions of the Respondent State have, as their target, foreigners or non-nationals. This, in the opinion of the

52 See Communication 241/2001 - Purohit and Moore / The Gambia, para 49.

African Commission, is a clear violation of the provisions of the African Charter under Article 2, which encapsulates crucial human rights holding at bay such practices as that of the Respondent State. Rights under the African Charter are to be enjoyed by all, without discrimination, by citizens and non-national residents alike. Although some rights, like the right to vote and to stand for election are reserved for citizens of the particular State, human rights are in principle to be enjoyed by all persons.⁵³

Alleged violation of Article 1

81. Article 1 of the African Charter reads: "the Member States of the Organisation of African Unity, parties to the present 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".

82. The Complainant alleges that "a violation of any provision of the Charter automatically means a violation of Article 1, so that 'If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article.'⁵⁴ The African Commission is of the view that State parties to the African Charter (including the Respondent State) have the obligation of recognising the rights, duties and freedoms enshrined in the Charter, as well as the responsibility of providing an environment in which those rights and freedoms can be enjoyed through the adoption of legislative or other measures that give effect to them.

83. The African Commission had held that Article 1 of the African Charter proclaims a fundamental principle that not only do the States Parties recognise the rights, duties and freedoms enshrined in the Charter, they also commit themselves to respect them and to take measures to give effect to them.⁵⁵ In other words, if a State Party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the African Charter even if the State or its agents were not the perpetrators of the violation. The

⁵³ See, for example, General Recommendation 30 of the UN Committee on the Elimination of Racial Discrimination (CERD), HRI/GEN/1/Rev.7/Add.1, at para. 3.

⁵⁴ *Communications 147/95 and 149/96, Sir Dawda K Jawara v. The Gambia, paragraph 46.*

⁵⁵ *Communication 231/99 Avocats Sans Frontières (on behalf of Gaëtan Bwampamyé)/Burundi, at Para. 31.*

actions of the Respondent State constitute a violation of certain provisions of the Charter and hence in violation of the provisions of Article 1 of the African Charter, since instead of adopting measures to promote and protect human rights, the Respondent State pursued a course of action which failed to take into account the various safeguards envisioned by the African Charter.

84. The African Commission wishes to emphasize that there is nothing in the African Charter that requires Member States of the African Union to guarantee for non-nationals an absolute right to enter and/or reside in their territories. This, however, does not in anyway mean that the African Charter gives Member States the free hand to unnecessarily and without due process deal with non-nationals to such an extent that they are denied the basic guarantees enshrined under the African Charter for the benefit of everyone. Member States may deny entry to or withdraw residence permits from non-nationals for various reasons including national security, public policy or public health. Even in such extreme circumstances as expulsion, however, the affected individuals should be allowed to challenge the order/decision to expel them before competent authorities, or have their cases reviewed, and have access to legal counsel, among others. Such procedural safeguards aim at making sure that non-nationals enjoy the equal protection of the law in their country of residence, ensure that their daily lives are not arbitrarily interfered with, and that they are not sent back/deported/expelled to countries or places they are likely to suffer from torture, inhuman or degrading treatment, or death, among others.

For these reasons, the African Commission finds the Respondent State in violation of **Articles 1, 2, 5, 6, 7(1)(a), 12(4), 12(5), 14 and 15** of the African Charter, but holds that there wasn't enough evidence to establish a violation of **Article 3** of the Charter.

85. In its submission, the Complainant pleads the African Commission to order the Respondent State to remedy the violations enumerated above by way of , including but not limited to, replacing the travel and work documents of the complainants, which were taken from them at the time of their arrest prior to their expulsion; reinstating the victims to works they had been lawfully engaged in and paying compensation to the victims as a result of unlawful mass expulsion; ensuring the restitution of complainants' property forcibly taken from them at the time of their arrest prior to their expulsion, providing for compensation to those complainants physically harmed as a result of their inhumane arrest and detention and clarify and make the necessary changes in its deportation

procedures, such that the process from arrest through detention and deportation comply with the provisions of the African Charter on Human and People's Rights.

86. The African Commission recommends that the Respondent State take the necessary measures to redress the violations enumerated in the preceding paragraphs, taking into account its obligations under Article 1 of the African Charter and the exigencies of the situation.

87. The African Commission notes that the present communication is not the first in which it found similar violations of the human rights of non-nationals in the context of mass expulsions/deportations by the Republic of Angola. It, therefore, recommends that the Republic of Angola should:

- Ensure that its immigration policies, measures and legislations do not have the effect of discriminating against persons on the basis of race, colour, descent, national, ethnic origin, or any other status, and particularly take into account the vulnerability of women, children and asylum seekers;
- Take measures to ensure that all persons in detention are provided with proper medical examination and medical treatment and care;
- Ensure regular supervision or monitoring of places of detention by qualified and/or experienced persons or organisations;
- Put in place mechanisms allowing all detained persons access to effective complaint procedures regarding their treatment with a view to curb, in particular, cases of physical and/or psychological abuse;
- Put in place procedural safeguards or clear procedures/policies that guarantee for all persons deprived of their liberty (nationals and non-nationals alike) effective access to competent authorities such as administrative tribunals and courts responsible for prison/detention oversight and/or review;
- Establish a Commission of inquiry to investigate the circumstances under which the victims were expelled and ensure the payment of adequate compensation of all those whose rights were violated in the process.
- Institute safeguards to ensure that individuals are not deported/expelled to countries where they might face torture or their lives could be at risk;

- Allow representatives of the African Commission, relevant international organisations, ICRC, NGOs, concerned consulates and others access to detainees and places of detention, including to those where non-nationals are held;
- Institute human rights training programmes for law enforcement agencies and relevant civil servants dealing with matters involving non-nationals on non-discrimination, due process, and the rights of detainees, among others;
- The African Commission further requests that the Republic of Angola report back to it, at a later stage, measures it has taken to implement the recommendations made in this communication.

Done at the 43rd Ordinary Session in Ezulwini, Kingdom of Swaziland, from 7 – 22 May, 2008

293/2004- Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development /Republic Of Zimbabwe

Summary of Facts:

1. The communication is submitted by the Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (Complainants) and deals with the Zimbabwean Government's (Respondent) failure to expedite administration of justice, the functioning of the judiciary and alleged violation of the right to participate in government.
2. The Complainants allege that in the 2000 General Elections that took place in Zimbabwe the results of 40 constituencies were contested and the court was petitioned to invalidate the results. It is alleged that Movement for Democratic Change (MDC), the main opposition party file petitions to invalidate results in 38 constituencies, the ZANU (PF), the ruling party filed one petition and the Zimbabwe Union of Democrats (ZUD) filed one petition.
3. The Complainants also allege that in an attempt to prevent the filing of petitions the President of the Republic of Zimbabwe passed a regulation giving him a wide variety of power in order to alter electoral laws as he sees fit. Further reasons for this action were to eliminate the jurisdiction of the courts from entertaining election petitions. According to the complainants, the Electoral Act (Modification) No. 3 Notice of 2000 Statutory Instrument 318/2000 (Annexure 1) passed by the Respondent had the effect of legalising the outcome of the elections and oust the jurisdiction of the courts from hearing the petitions.
4. The MDC challenged the Regulation in the Supreme Court, and the Court held in its favour stating that "the notice effectively deprived them of that rights...*The right of unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes*". This ruling opened the way for the filing of election petitions in 40 constituencies.
5. According to the Complainants, in spite of the ruling, the Supreme Court has failed to provide meaningful redress to the

petitioners. They claim that by delaying to address the grievances the Courts have deprived the petitioners of the right to protection of the law, and have their matter heard within a reasonable time by an independent and impartial court and invariably, the citizens' right to participate in their government.

6. The Complainants further allege that by failing to respect their own judgments, the judiciary and the Courts have proved ineffective in providing meaningful and practical redress which would constitute an effective remedy at national level. Thus, according to the complainants, the State has undermined the independence of the judiciary contrary to Article 26 of the Charter.
7. The Complainants hold that failure of the judiciary to expeditiously deal with the election petitions is not only in contravention of international norms but contrary to domestic laws of the country, in particular, Rule 31 of the Electoral (Applications, Appeals and Petitions) Rules 1995, (SI 74A/95) which states that "*the Registrar and all parties to any stated case, petition or application referred to in these rules shall take steps necessary to ensure that the matter is dealt with as quickly as possible*".
8. The Complainants annexed to the communication the different classes of petitions that were submitted to the Court. 7 petitions presented by political parties have not been addressed and no decisions have been made concerning them; in addition, any efforts made to have the petitions addressed have been met with reluctance and indifference on the part of the Court. Furthermore, 11 petitions have been dismissed by the High Court; and any appeals made in regards to the dismissal of the petitions have not been resolved.

Complaint

9. The Complainants allege that the Respondent has violated articles 1, 2, 3, 7 (1) (a), (d), 13(1), and 26 of the African Charter on Human and People's Rights.

Procedure

10. The complaint was received at the Secretariat of the African Commission on 6 October 2004.
11. On 12 October 2004, the Secretariat wrote to the Complainants acknowledging receipt of the complainant and informing them that it will be considered at the Commission's 36th Ordinary Session.
12. At its 36th Ordinary Session the African Commission considered the communication and decided to be seized thereof.
13. By Note Verbale of 13 December 2004 and letter of the same date the Secretariat informed the Parties of the Commission's decision.
14. By letter dated 3 February 2005, the Complainant submitted its arguments on admissibility and by letter dated 22 February 2004, the Secretariat acknowledged receipt of the complainant's submissions.
15. By Note Verbale dated 22 February 2005, the Secretariat transmitted the Complainant's submission to the Respondent State and informed the latter that the African Commission would like to receive its arguments by 13 March 2005.
16. By letter of 14 March 2005, the Office of the Attorney General of Zimbabwe requested the African Commission to defer consideration of the communication to its 38th Ordinary Session as it had not had time to prepare the responses.

17. By letter of 18 March 2005 addressed to the Attorney General, the Secretariat granted the State an extension of thirty days and requested it to submit its arguments by 18 April 2005.
18. At its 37th Ordinary Session held in Banjul, The Gambia, the African Commission deferred consideration on admissibility of the communication pending the Respondent State's submission of its arguments.
19. By Note Verbale of 24 May 2005, the Respondent State was notified of the Commission's decision and requested to submit its arguments within three months of the notification. By letter of the same date, the complainant was notified of the Commission's decision.
20. By Note Verbale of 2 September 2005, the Respondent State was reminded to send its arguments of admissibility of the communication.
21. By Note Verbale of 18 October 2005, the Respondent State was reminded to send its arguments of admissibility of the communication before 31 October 2005.
22. On 1 November 2005, the Secretariat received a Note Verbale from the Respondent State indicating that the latter's submissions with regards to six communications brought against it were ready for submission but due to logistical problems beyond its control, the transmission of the submissions had been slightly delayed.
23. On 23 November 2005 the Zimbabwean delegation attending the 38th Ordinary Session of the Commission handed the Respondent State's response on the communication. The Secretariat was informed that a copy had been given to the complainants, and the latter confirmed receipt thereof.
24. At its 38th ordinary session held from 21 November to 5 December 2005, the African Commission considered the communication and decided to declare it admissible.
25. By Note Verbale of 15 December 2005 and by letter of the same date, the Secretariat of the African Commission

informed both parties of the African Commission's decision and requested them to submit their arguments on the merits within three months.

26. By letter of 21 December 2005, the Complainant acknowledged receipt of the Secretariat's letter of 15 December and indicated that it will furnish its arguments on the merits "within the procedurally stipulated period".
27. By Note Verbale of 6 March 2006 and by letter of the same date the Secretariat of the African Commission reminded both parties to submit their arguments on the merits before 31 March 2006.
28. By letter dated 19th April 2006, the Secretariat received the submissions of the complainant on the merits of the communication. The Secretariat was informed that the State had equally been served with the same.
29. During the 39th ordinary session of the African Commission, the Secretariat received the submissions of the Respondent State.
30. At its 39th Ordinary Session held from 11 – 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and deferred further consideration on the merits to its 40th ordinary session because the State's submissions were received late.
31. By Note Verbale of 29 May 2006 and by letter of the same date both parties were notified of the Commission's decision.
32. At its 40th session, the African Commission deferred consideration of the communication to its 41st session due to lack of time.
33. At its 41st ordinary session the African Commission deferred consideration of the communication to its 42nd session to allow the Secretariat more time to prepare the draft decision.

34. By note verbale of 10 July and letter of the same date, both parties to the communication were notified of the Commission's decision.
35. At its 42nd Ordinary Session held in Brazzaville, Republic of Congo from 15 – 29 November 2007, the African Commission considered the Communication and decided to defer its decision on the merits due to lack of time.
36. By Note Verbale of 19 December 2007, and by letter of the same date, both parties to the Communication were notified of the Commission's decision.

The Law

Admissibility

Submissions on admissibility

37. The Respondent state argued that the communication be declared inadmissible claiming it does not meet the requirements of Articles 56 (2), (3), (4) and (5).
38. Article 56(2) stipulates that the communication should be in conformity with the Charter of the OAU and the African Charter on Human and Peoples' Rights. According to the State, and quoting from the African Commission's Information Fact Sheet No. 3 – Communication Procedure, the author of a communication should make precise allegations of facts attaching relevant documents, if possible, and avoid making allegations in general terms. The State avers that the complaint is written in general terms and does not make any precise allegations. The State notes further that the complainants simply alleged that the state has violated the Charter without stating the rights violated, where the violation took place and the date on which the violation took place and that the complainants did not provide the names of the victims.
39. The Complainants submit that four years after the elections the Supreme and High Court have failed to provide a speedy

and effective remedy. That the High Court initially allocated three judges to handle the matters. One of the judges resigned citing threats after he had ruled in favour of the opposition. The three judges were replaced and the matters have not been completed. That the violations that occurred during the election period have not been addressed for over four years.

40. The Complainants on the other hand aver that the communication details infringements of the provisions of the African Charter on Human and Peoples' Rights and according to them, a prima facie violation of human rights, and argued that the communication fulfilled the condition under Article 56 (2) of the Charter.

41. With respect to Article 56 (3), the State argues that the communication is written in disparaging language directed at the State of Zimbabwe and its Judiciary. It indicates that the complainants allege a failure of the State to guarantee the independence and competent functioning of the judiciary, and that the government has failed to observe the principle of separation of powers. The state argues further that the communication alleges that a judge resigned under pressure after ruling in favour of the MDC. The state added that none of the judges have been victimized or resigned as a result of their judgment and concluded that the complaint is a misrepresentation of facts and full of false information which are insulting to the State and its judiciary – aimed at bring the State into disrepute and therefore does not conform with the provisions under Article 56 (3) of the African Charter. The complainants aver that the communication is not written in an insulting or disparaging language, that no disparaging or insulting language of the government of the Republic of Zimbabwe or any institutions under the Organisations of African Unity has been used and as such it conforms to Article 56 (3).

42. The State further argues that the communication is based on information disseminated through the mass media or author's imaginations and as such not be admitted as stipulated under Article 56(4) which stipulates that communications should not be exclusively based on news disseminated through the mass media. The State adds that the communication does not state who was discriminated against or in which case a party was discriminated and by which judge, as a result the complaint is illusory and should not be admitted. The complainants on their part argue that the communication has been compiled from

affidavits and applications from the High and Supreme Court of Zimbabwe.

43. On the exhaustion of local remedies, the State argues that the complainants have not exhausted the local remedies available to them, noting that all election petitions are dealt with speedily and that all the petitions referred to by the complainants were dealt with, some were dismissed and some were withdrawn. The State indicates that it did nothing to frustrate the process as alleged by the complainants noting that in cases of any frustration, the parties to the petition can approach the Judge President or the Chief Justice and the government has no role to play in election petitions. The State notes that most of the petitions to the High Court were dealt with in 2001; some were appealed to the Supreme Court. The Complainants argue that the exception to the rule on the basis of unduly prolonged procedure applies in this case. They argue that the delays in the finalisation of the petitions by the Supreme and High Courts were unreasonable and warrants, according to the Complainants, invoking of the exclusionary rule to the exhaustion of local remedies as they are non-existent.

Commission's decision on admissibility

44. In its jurisprudence the African Commission on Human and Peoples' Rights (the Commission) has articulated a framework for allocating the burden of proof between complainants/petitioners and Respondent states. For purposes of seizure the complainant needs only to present a *prima facie* case and satisfy the conditions laid down in Article 56 of the Charter for admissibility. Once this has been done, the burden then shifts to the Respondent state to submit specific responses and evidence refuting each and every one of the assertions contained in the complainant's submissions.
45. In the present communications, the Complainants submit that the admissibility conditions in Articles 56 of the African Charter on Human and Peoples' Rights have been fulfilled while the State argues that some have not been, in particular Article 56 (2), 3, 4 and 5. Regarding the compatibility of the communication as provided in Article 56(2), the African Commission notes that the communication establishes a *prima facie* violation of the provisions of the African Charter and is thus compatible with both the Constitutive Act and the African

Charter. The communication alleges unreasonable delays in dealing with election petitions and as a consequence a violation of the right to fair trial under Article 7 (1) (d) and to participate of government under Article 13 of the Charter. It is hard to find the incompatibility invoked by the State.

46. Article 56 (3) requires that the communication is not written in an insulting or disparaging language. The State argues that by stating that the State has failed to guarantee the independence and competent functioning of the judiciary, and that the government has failed to observe the principle of separation of power, the complainants have used disparaging language. The state argues further that the communication alleges that a judge resigned under pressure after ruling in favour of the MDC. The state concludes that the complaint is a misrepresentation of facts and full of false information which are insulting to the State and its judiciary – aimed at bring the State into disrepute and therefore does not conform to the provisions under Article 56 (3).
47. A fundamental question that has to be addressed in the present communication *is how far one can go in criticizing the judiciary or State institutions generally in the name of free expression*, and whether the statement made by the complainant constitutes *insulting or disparaging* language within the meaning of Article 56 (3) of the African Charter. Indeed, the communication invites the Commission to clarify the ostensible relationship between freedom of expression and the protection of the reputation of state institutions.
48. The operative words in sub-paragraph 3 in Article 56 are *disparaging* and *insulting* and these words must be directed against the State Party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, *disparaging* means *to speak slightingly of... or to belittle....* and *insulting* means *to abuse scornfully or to offend the self respect or modesty of...*
49. The judiciary is a very important institution in every country and cannot function properly without the support and trust of the public. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One such protective device is to deter insulting or

disparaging remarks or language calculated to bring the judicial process into ridicule and disrepute.

50. The freedom to speak one's mind and debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual officers. A clear line cannot be drawn between acceptable criticism of the judiciary and statements that are downright harmful to the administration of justice. Statements concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. Because of the grave implications of a loss of public confidence in the integrity of the judges, public comment calculated to bring the judiciary into disrepute and shame has always been regarded with disfavour.
51. In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, or any other State institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.
52. To this end, Article 56 (3) must be interpreted bearing in mind Article 9 (2) of the African Charter which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as, in this case, the right to freedom of expression.
53. The importance of the right to freedom of expression was aptly stated by the African Commission in Communications **140/94**,

141/94, 145/94 against Nigeria⁵⁶ when it held that freedom of expression is

A basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance.

54. Over the years, the line to be drawn between genuine criticism of the judiciary and insulting language has grown thinner. With the advancement of the politics of human rights, good governance, democracy and free and open societies, the public has to balance the question of free expression and protecting the reputation of state institutions such as the judiciary. Lord Atkin expressed the basic relationship between the two values in **Ambard v A-G of Trinidad and Tobago (1936) 1 All ER 704 at 709** in the following words:

But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public act done in the seat of justice. The path of criticism is a public way...Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even though outspoken comments of ordinary men.

55. In the present communication, the Respondent State has not established how by stating that the government has failed to observe the principle of separation of power and that a judge resigned under pressure after ruling in favour of the MDC, the complainant has brought the judiciary and the government into disrepute. The State hasn't shown the detrimental effect of this statement on the judiciary in particular and state institutions as

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Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria, 13th Annual Activity Report of the OAU, 1999–2000, para. 36.

a whole. There is no evidence adduced by the State to show that the statements were used in bad faith or calculated to poison the mind of the public against the government and its institutions.

56. The African Commission does not therefore believe there has been any use of disparaging or insulting language against the government of the Republic of Zimbabwe or any of its institutions or the African Union. The African Commission is also of the view that the communication complies with Article 56(4) which stipulates that communications should not be exclusively based on news disseminated through the mass media. The present communication has been compiled from affidavits and applications from the High and Supreme Court of Zimbabwe.
57. Regarding Article 56 (5) relating to the exhaustion of domestic remedies the Complainants argue that the exception to the rule on the basis of unduly prolonged procedure should apply. They argue that the delays in the finalisation of the petitions by the Supreme and High Courts was unreasonable and warrants, according to the Complainants, the invoking of the exclusionary rule to the exhaustion of local remedies as they are non-existent.
58. What constitutes unduly prolonged procedure under Article 56 (5) has not been defined by the African Commission. There are therefore no standard criteria used by the African Commission to determine if a process has been unduly prolonged, and the Commission has thus tended to treat each communication on its own merits. In some cases, the Commission takes into account the political situation of the country, in other cases, the judicial history of the country and yet in others, the nature of the complaint.
59. The subject matter of the present communication is the validity of election results. Election results are supposed to be released as quickly as possible so as to enable those vying for office to know the outcome. In most jurisdictions, because of the very nature of elections, mechanisms are put in place to ensure that the results are released as expeditiously as possible and that whatever petitions are submitted by disgruntled contestants, they are dealt with speedily.

60. The exception under Article 56 (5) requires that the process must not only be prolonged but must have been done so “unduly”. Unduly means, “Excessively” or “unjustifiably”. Thus, if there is a justifiable reason for prolonging a case, it cannot be termed “undue”, for example, where the country is caught in a civil strife or war, or where the delay is partly caused by the victim, his family or his representatives. While the Commission has not developed a standard for determining what is “unduly prolonged”, it can be guided by the circumstances of the case and by the common law doctrine of a “reasonable man’s test”. Under this test, the court seeks to find out, given the nature and circumstances of a particular case, how any reasonable man would decide.

61. Thus, given the nature of the present communication, would a reasonable man conclude that the matter has been unduly prolonged? For all intents and purposes, the answer would be yes. More than four years after the election petitions were submitted, the Respondent State’s courts have failed to dispose of them and the positions which the victims are contesting are occupied and the term of office has almost come to an end.

For the above reasons, the African Commission holds that the communication meets the exception rule under Article 56 (5) and the other requirements of Article 56, and thus declares it **admissible**.

Submissions on the merits

Complainant’s submissions

62. The Complainants submit that the State Party has violated articles 1, 2, 3, 7(1)(a), (d), 13 and 26 of the African Charter on Human and Peoples’ Rights, and further that the violations were as follows:

(a) the right to equal protection of the law under Articles 2 and 3 based on the fact that the law courts failed to decide on the election petitions within a reasonable time and that the petitioners were discriminated against on the protection of law due to the political opinions which were expressed in the petitions;

(b) the right to be heard and tried within a reasonable time by an impartial court or the tribunal under Article 7 as the Zimbabwe courts failed to provide a remedy to the election petitions;

(c) the right of every citizen to participate freely in the government of his country either directly or through freely chosen representatives in accordance with provisions of the law under Article 13 by enacting laws that curtailed freedoms such as association, assembly and expression ; and

(d) the duty of the State to guarantee the independence of the courts and the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter under Article 26 based on the fact that the principle of separation of powers was not duly observed as one of the judges resigned and fled the country citing threats after he ruled in favour of the opposition.

63. Regarding article 1, the communication alleges that the Respondent state has failed to adopt legislative and administrative measures to give effect to the provisions of the Charter. It is submitted that the fact that elections that took place in Zimbabwe were organised in accordance with the Constitution and the laws of Zimbabwe does not mean that the manner in which those elections were conducted or their dispute were adjudicated do not violate provisions of the Charter. The law itself (including the constitutional provisions) can constitute the means whereby the rights protected under the Charter are violated.

64. The Complainants rely on the jurisprudence of the Inter-American Court on Human Rights in the case *Velasquez Rodriguez* where the Court held that:

*“The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it impossible to comply with this obligation... it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights”.*⁵⁷

65. The Complainants also quote the advisory opinion delivered by the Inter-American Court on Human Rights where the Court found that:

“... The fact that these are domestic laws adopted in accordance with the provisions of the Constitution means nothing if they are

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Velasquez Rodriguez case, Judgment of July 29, 1988.

*the means through which protected rights and freedoms are violated”.*⁵⁸

66. It is submitted that although the Respondent State has enacted laws that make provisions for remedies, it has failed to render those remedies efficient as the proceedings can be unduly prolonged as was the case in the matter under consideration where “it failed to implement and uphold electoral laws through reasonably expeditious resolution or other measures that protect the rights of the citizens”.
67. The Complainants allege that the government of Zimbabwe has violated article 1 of the Charter because the existing electoral laws are not sufficiently certain, do not prevent candidates whose election is contested from sitting in the parliament before the Courts rule on their cases, and do not create any obligation upon the courts to determine the electoral challenges brought before them within a fixed period. The Complainants also rely on the jurisprudence of the Inter-American Commission on Human Rights, in the case of *Gustavo Arranza v Argentina* where it held that:

*“The absence of an effective remedy to violations of the rights recognised by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasised that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognised, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective”.*⁵⁹

68. The communication further recalls the interpretation made by the African Commission of article 1 in the case of ***Jawara v The Gambia***, where the Commission found that:

Article 1 gives the Charter the legally binding character always attributed to international

⁵⁸ Inter-American Court on Human Rights Advisory Opinion 13/93 paragraph 26-27.

⁵⁹ Case No. 10.087 (September 30, 1997)

treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1. If a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of the Article. Its violation therefore goes to the root of the Charter."

69. The Complainants note that the Respondent State's failure to enact laws that further the enjoyment of the rights and freedoms enshrined in the Charter and its failure to provide real and efficient remedy in the events of the violation of the same rights and freedoms amount to a violation of article 1. It is further submitted that the failure of the judiciary to decide promptly, effectively and meaningfully to the alleged violations of rights and electoral irregularities is imputable to the State since the Judiciary is a branch of the latter. The communication then quoted the decision of the Inter-American Court on Human Rights in the aforementioned *Velasquez Rodriguez* case, where it is stated that:

"This obligation implies the duty of the State party to organise all the State apparatus and in general, all structures through which the exercise of public power is manifested, in such a manner that they are able to legally ensure the free and full exercise of human rights".

70. The Complainants allege that the Respondent State cannot rely on its domestic law to justify its failure to perform its obligations under the Charter.

71. As for article 3 of the Charter, the communication recalls that equality before and equal protection of the law means equality with regard to interpretation, application and enforcement of the law. It emphasised that rights are guaranteed to all regardless of one's political opinion.

72. The Complainants note that successful petitions before Zimbabwean courts would have granted the opposition Movement for Democratic Change (MDC) a large majority in Parliament "should be taken into consideration by the judiciary in terms of the urgency with which the matters were disposed of". It is submitted that the MDC was victim of discrimination by the judiciary, although such discrimination might have been caused by the lack of resources or manpower to deal with the petitions. The lack of resources and manpower, it is alleged, cannot dispense the state from its obligation to respect and protect the rights enshrined in the Charter.

73. According to the authors of the communication, since the successful disposition of the petitions would have drastically altered the composition of Parliament, the failure of the Judiciary to deal promptly with those petitions is tantamount to the absence of equality before the law and equal protection of the law for victims of human rights violations.
74. The Complainants allege that the inordinate delay in dealing with petitions constitute a violation of Article 7 (1) (d), as that affects the right to have one's case heard within a reasonable time (right to due process of law). The Complainants quote the United Nations Human Rights Committee (HRC) General Comment No 13, where the HRC held that the right to have one's case heard within a reasonable time includes not only the time by which the trial should start, but also the time by which it should end and the judgment rendered both in first instance and on appeal.
75. In the Complainants' view, the right to due process of law was violated in the matter before the Commission as the courts have failed to rule on the electoral petitions within a reasonable period of time. It is also alleged that appeal to the High Court and the Supreme Court was ineffective. The communication recalls the approach of the African Commission to the right to appeal adopted in its decision on ***Amnesty International, Lawyers Committee for Human Rights v Sudan***, where the Commission held that:
- “The right to appeal being a general and non-derogable principle of international law must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice”*
76. The authors of the Communication further denounce the lack of the independence of the judiciary in Zimbabwe. They cite the report of the Special Rapporteur on the Independence of Judges and Lawyers submitted with the United Nations Commission on Human Rights Resolution 2002/43,⁶⁰ and conclude that the “absence or weakening of institutions whose mandate is to provide remedies in instances of violations supports the assertion of petitioners of institutions that are not competent to render real and effective remedies, contrary to

⁶⁰ E/CN.4/2003/65/Add.1.25 February 2003.

the intentions of the drafters of the Charter under Articles 7 and 26”.

77. As regards article 13 of the Charter, the communication recalls the importance of the right to political participation and insists, in the wake of the Resolution on Electoral Processes and Participatory Governance adopted by the Commission at its 19th Ordinary Session, that:

a. *“Elections are the only means by which the people can elect democratically the government of their choice in conformity to the African Charter on Human and Peoples’ Rights”.*

78. That position, it is alleged, was confirmed by the Commission in **Constitutional Rights Project & Another v Nigeria**, where the Commission found that:

“To participate freely in government entails, among other things, the right to vote for the representative of one’s choice. An inevitable corollary of this right is that the results of the free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless. In the light of this, the annulment of the election results, which reflected the free choice of voters, is in violation of Article 13(1)”

79. The Complainants further submit that the right to freely participate in government is also rendered meaningless if the judiciary fails to decide expeditiously on the electoral disputes brought before it, since that allow candidates whose elections are contested to sit in Parliament while the petitions are still *lis pendens*. The Complainants quote the Inter-American Commission on Human Rights according to which:

“the close relationship between representative democracy as a form of government and the exercise of the political rights so defined, also presupposes the exercise of other fundamental rights... the concept of representative democracy is based on the principle that it is the people who are the nominal holders of political sovereignty and that, in the exercise of that sovereignty, elects its representatives, moreover, are elected by the citizens to apply certain political measures, which at the same time implies the prior existence of an ample political debate on the nature of the policies applied – freedom of expression – between organised political groups – freedom of assembly. At the same time, if these rights and freedoms are exercised, there must be juridical and institutional systems in which laws outweigh the will of leaders and in which some institutions

*exercise control over others for the sake of guaranteeing the integrity of the expression of the peoples' will – rule of law. ... Indeed any mention of the right to vote and to be elected would be mere rhetoric if unaccompanied by a precisely described set of characteristics that the elections are required to meet*⁶¹

80. The Complainants pray the African Commission to follow the jurisprudence of the Inter American Commission and to find the Respondent State to be in violation of article 13(1) of the Charter.

81. Regarding article 26 of the Charter, the authors of the communication recalls the comment made by the Commission in its 9th Annual Report, where it declared that:

“Article 26 of the African Charter reiterates the right enshrined in article 7 but is even more explicit about State Parties’ obligations to ‘guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and the protection of the rights and freedoms guaranteed by the present Charter’. While Article 7 focuses on the individual’s right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of courts which have traditionally been the bastion of protection of the individual’s rights against the abuses of State Power”

82. The complainants are of the view that trials conducted in accordance with the principles of due process of the law, and the conclusion of such trials within a reasonable time, *inter alia*, are essential tenets of a properly functioning judiciary. It is alleged that the failure by the Respondent to decide on the election petitions within a reasonable time contravenes Articles 13(1) and 26 of the Charter.

Respondent State’s submissions on the merits

83. The Respondent State submitted that both parties to the election petitions filed in the Zimbabwean courts were afforded equal protection of the law evidenced by a reference to a number of decided cases. The State denies that the Complainants were discriminated against on the basis of political opinions expressed in the petitions.

⁶¹ Report 01/90 on cases 9768, 9780 and 9828 Mexico paragraphs 411 and 42, Annual Report of the Inter American Commission 1989-1990.

84. The Respondent State submits further that in **Sibangani Mlanda vs. Eleck Mkandla HC 8228/00**, the petitioner was a candidate for the Movement for Democratic Change Party (MDC) in the general election of June 24 & 25, 2000. The Respondent who was the candidate for Zimbabwe Africa national Union (Patriotic-Front) (ZANU PF) won the parliamentary seat by 15, 932 votes while the petitioner garnered 3,967 votes. The petitioner alleged corrupt practices during the election and that the electorate was coerced to support and vote for the Respondent and refrain from voting for him. He alleged that his campaign team were abducted, tortured and their property burned and destroyed. The Court held that it was grossly unfair for the Respondent to canvass for votes and the election was set aside.
85. The State noted further, in spite of the political opinions expressed in the petition suggesting that ZANU “PF” was a violent party which won elections through violence, the Complainants were not discriminated upon by the courts, and were afforded equal protection, as was evidenced with the setting aside of the election result of the Gokwe North Constituency.
86. To buttress its argument that the Complainants were not discriminated, the Respondent State drew the Commission’s attention to the case of **Lameck Nkiwane Muyambi vs. Jaison Kokerai Machaya HC 8226/00**, where the petitioner was an opposition member of the MDC while the Respondent was a candidate of ZANU PF. The petitioner alleged that the Respondent and his party members were guilty of corrupt practices leading to a wide range of violent activities in the Constituency. The Court decided to set aside the election results and ruled in favour of MDC. The State also indicated that in many other cases involving election petitions, the Courts have ruled in favour of the opposition, for example, **Phioneas Chivazve Chiota vs. Registrar General of Elections and Ben Tumbare Mutasa HC 8221/00**, **Moses Mope vs. Elliot Chauke HC 110/01**, and **Edna Akino vs. Tobaiwa Muded N.O and Davison Tsopo and City of Mutare HC 14490/99**.
87. With respect to equal protection of the law, the Respondent State thus submitted that since seven or more election petitions were ruled in favour of the MDC, it is enough proof that the courts have not been biased towards the ruling ZANU PF, and have applied the law objectively, thus affording the

petitioners equal protection of the law as guaranteed in Article 3 of the African Charter and the Constitution of Zimbabwe.

The right to be heard and tried within a reasonable time by an impartial court or tribunal under Article 7 (1) (d).

88. The Respondent State submitted that it has always afforded the Complainants the right to be heard by impartial courts, and within a reasonable time, adding that Zimbabwean courts have in several judgments recognized this right.
89. The Respondent State contends that all the petitions filed in the High Court and more recently, in the Electoral Court were heard within a reasonable time, in accordance with Rule 31 of the Electoral (Application, Appeal and Petition Rules 1995) which provides that: *“The Registrar and all parties to any case, petition or application shall take all steps necessary to ensure that the matter is dealt with as quickly as possible.”*
90. According to the State, parties to an election petition have a duty to ensure the petition is determined quickly in accordance with Rule 31, adding that in most of the cases brought before the courts, the Complainants failed to expeditiously file papers to ensure the matters were dealt with quickly.
91. The State added further that in terms of Section 182 of the **Electoral Act [Chapter 2:13]**, *“Every election petition shall be determined within six months from the date of its presentation.”*
92. According to the Respondent, in order to give effect to this law, it has set up an Electoral Court to have petitions dealt with within six months, which the State considers as a reasonable time. However, the MDC is challenging the composition of the Electoral Court which, as a result of that challenge, has delayed petitions before Court, and it can therefore not be said that the judiciary itself has been reluctant to deal with petitions expeditiously.
93. It is further submitted by the State that it is the duty of the parties to avail the witnesses and apply for a set down date within the 6 months prescribed by law. In case of any frustrations, the concerned party can approach the Judge President or Chief Justice for redress. The Complainants, according to the State, have failed to show, the specific frustrations faced, if any, in having the election petitions set

down for hearing and what steps the petitioners undertook to have the matters expeditiously dealt with. Instead the Complainants have only resorted to allegations that the judiciary has been reluctant to deal with, and finalizing the petitions before it.

94. The Respondent State submits that the Government has no role in the determination of election petitions thus it is untrue to allege that it frustrated the petitioners in the hearing of their petitions. The State added that most petitions filed in the High Court in 2001 were heard and judgments delivered to the parties within six months.
95. To substantiate the above argument, the State cited a number of cases that were disposed of within six months, including **Lucia Makesea vs. Isaiah Shumba HC 8070/00**, **Phineas Chivazve Chiota vs. Registrar General of Elections and Ben Tumbare HC 8221/00** which was set down for hearing on 18th July 2001 and judgment delivered on January 23, 2002; **Godfrey Don Mumbamarwo vs. Saviour Kasukuwere** set down on 9th July 2001 and judgment delivered on January 17th 2002; **Moses Mare vs. Elliot Chauke HC 8068/00** judgment delivered on June 20, 2001 and; **Patrick Tsumele vs. Aaron Baloyi HC 8072/00** judgment delivered on June 21, 2001.
96. More recently after setting up of the Electoral Court, petitions have been disposed of in six months. In cases decided by the High Court, the losing parties appealed to the Supreme Court. The Supreme Court heard most of the appeals and the MDC lost in some of the cases, such as **Hove vs. Joram Gumbo** with respect to the Mberengwa West Constituency. Some cases were dismissed as the appellants were not willing to prosecute their cases, for example, **Mazurani vs. Mbotekw**, with respect to the Zvishavane Constituency and **Mumbamarwo vs. S Kasukuwere** with respect to the Mt Darwin Constituency.
97. According to the Respondent State, in the above cited cases the petitioners were asked by the Supreme Court to file their heads of argument but they failed and the cases were subsequently dismissed under Rule 44 of the Supreme Court Rules for non-compliance with court rules. The same applies to Order 238 Rule 2 (b) of the High Court Rules.
98. The State added that the petitioners have over time withdrawn petitions after realizing the weaknesses of their cases and

paid wasted costs to the Respondents acknowledging their fault for bringing uncommitted and misconceived petitions. This was the case with respect to **Elphas Mukonoweshuro vs. Ben Mahofa Case No. EP 11/05; Aaron Chinhara vs. Lovemore Mupukuta EP 20/05; Eileen Heather Dorothy Bennet vs. Samuel Undenge Case No. EP 11/05; Evelyn Masaiti vs. Mike Nyambuya EP 18/05; Hilda Suka Mafudza vs. Patrick Zhuwawo 16/05 and; Ian Kay vs. Sydney Tigere Sekeremayi Case No. EP 16/05.**

99. It is further submitted by the State that in the above mentioned circumstances the Government did not frustrate the petitioners in pursuing legal recourse according to the law. In fact, it is the petitioners who did not pursue their petitions expeditiously.

100. Further in terms of the Practice Directions of the Supreme Court, Practice Direction No. 1 of 1993 reported in the Zimbabwe Law Reports pages 241 (5) the Supreme Court as per Gubbay CJ directed that:-

“If in any particular case, whether of a criminal nature, a delay in obtaining judgment should occur which is considered inordinate the aggrieved party or his legal practitioner is invited to bring such delay to the attention of the Chief Justice or the Judge President if it be in respect of a High Court matter, and to the Chief Magistrate, if it be a magistrates Court matter. Upon receipt of such notification the Chief Justice, the Judge President or the chief Magistrate whoever has been addressed to will proceed to investigate the complaint, and provided he is satisfied that in all circumstances the delay is unreasonable, will apply his best endeavors to obviate it.”

101. The Respondent State submits that the Communication does not indicate if at any point the various Complainants addressed the issue of delays to the Judge President or Chief Justice, and if that was so whether the Judge President and the Chief justice did nothing after receiving the complainant. The complainant’s allegations are unsubstantiated and thus ought to be dismissed as unfounded.

102. Thus, in the opinion of the State, the judiciary and indeed relevant provisions of laws enable petitions to be concluded within a reasonable time contrary to the complainant allegations.

103. Concerning allegations of violations of Article 13, the Respondent State denied that the Republic of Zimbabwe violated Article 13 by enacting laws curtailing

freedoms of association, assembly and expression hence violating the rights of citizens to participate in governance issues and to exercise their right to a referendum in a transparent and conducive environment.

104. The State submitted that the Complainants simply aver that the Government has passed such laws, but did not state the specific laws enacted. Neither did they describe the human rights violations that took place, the dates or place the violations occurred, nor provide the names of the victims who suffered as a result of the enacted laws.

105. By making general and unsubstantiated allegations the Complainants are being untruthful and their claims should not be accepted. The Government is being called upon to “defend” itself in the dark which is very unfortunate.

106. Further, it is submitted that in terms of the African Commission’s Information Sheet No. 3 on Communication Procedure, it is a requirement that the author of the communication should make precise allegations of fact attaching relevant documents and not general allegations. Hence the Complainants have failed to prove a violation of Article 13.

107. With respect to allegations regarding violations of Article 26 of the Charter, the Respondent State denied that it had violated this Article. It denied that the Government failed to guarantee the independent functioning of the judiciary. It submitted that the judiciary of Zimbabwe has always been independent and free from executive interference, adding that this was evidenced by the fact that the election petitions filed in the courts resulted in the Courts setting aside the election results where irregularities were found. This, according to the State, was regardless of the party to which the petition belonged. The State added that quite a number of petitions were ruled in favor of the opposition, a situation which according to the State, would not have been so if there was executive interference, as alleged by the Complainants.

108. On the issue of the legal status of the Judges, the State submits that Section 79B of the Constitution of Zimbabwe states that members of the judiciary “**shall not be subject to the direction or control of any person or authority**”

109. On the issue of the removal of the Judges from office, the State drew the Commission's attention to Section 87 (1) of the Constitution of Zimbabwe which provides that **"Inability to discharge the functions of [the], whether arising from infirmity of the body or mind or any other cause, or for misbehavior is the only ground upon which dismissal may be authorized. The words 'any other cause'",** it is submitted, refer to medical causes or causes not relating to the moral blameworthiness of the judge in question.
110. On the issue of salaries payable to the judges, the State submits that the salaries of judges may not be reduced during the tenure of office in terms of the Constitution. This provision is meant to uphold the independence of the judiciary.
111. On the issue of judicial proceedings, the State notes that all court proceedings in Zimbabwe are carried out in open court in accordance with Section 18 (10) and (14) of the Constitution. This includes the announcement of the court's decision and the reasons for the decision delivered at the same time.
112. The Respondent State affirms that all election petitions were held in open court, and that the State endeavored to guarantee the independence of the courts.
113. The State concluded in the regard by submitting that in light of the above mentioned provisions to guarantee the independence of the judiciary, the Complainant's assertion that a number of judges were victimized after they ruled in favor of the MDC is denied.
114. The State cited the case of Justice Makarau who according to the State, was re-appointed to the Electoral Court despite ruling against ZANU PF in the Election Petitions, while Justice Ziyambi was promoted to the Supreme Court. The State added that several petitions were decided in favour of the MDC and none of the judges were victimized for the judgments.
115. The Respondent State submits that Mr. Morgan Tsvangira, the leader of the opposition MDC was acquitted of the treason charges. The presiding judge, Justice Paddington Garwe was not victimized for the decision and he remains the Judge President of the High Court of Zimbabwe.

116. For all the judges who resigned from the bench, no specific reasons were availed as is mandatory in law. None has openly stated if they resigned because of political reasons.

117. The State submits that the Complainants make bold allegations to the effect that one judge who ruled in favour of the MDC was victimized and fled the country without naming the judge or giving proof for the reasons of his resignation. Thus the complainants have failed to establish a case against the Respondent State.

118. The Respondent State submits that the relief sought by the Complainants is not sustainable because the Republic of Zimbabwe has complied with the provisions of the African charter in letter and spirit by:

- Enacting laws which improve Electoral transparency;
- See Section 182 of the Electoral Act [Chapter 2:13];
- Rule 31 of the Electoral (Applications Appeals and Petitions) Rules 1995 Statutory Instrument 74A/95;
- Practice Directions of the Supreme Court No. 1 of 1993, relating to complaints on delays;
- Constitution of Zimbabwe Section 87 (1), 79B, 18 (10 and (14);
- Zimbabwe Electoral Commission Act No. 22/04, which Act established the Zimbabwe Electoral commission and independent Board responsible inter alia of the preparation and conduct of elections in Zimbabwe;
- Setting up the Electoral Court.

The African Commission's decision on the merits

119. In this Communication, the Complainants alleged violation of Articles 1, 2, 3, 7(1) (a), (d) 13 (1) and 26 of the African Charter.

120. The Complainants allege that Article 2 was violated in the sense that there was discrimination in the protection afforded and equality before the law, and that this failure by the domestic courts to protect the rights of the petitioners amounted to discrimination. The Complainants noted that if the Courts had dealt with the petitions and finalised them as envisaged by the petitioners, then the composition of Parliament would have been different and this would have altered the balance of power. This, in the opinion of the

Complainants, is a 'plausible ground for supporting the assertion of non-equality in the protection of the law and discrimination'. The Respondent State does not advance any arguments regarding the allegations of discrimination, but noted that all the parties to election petitions were afforded equal protection of the law.

121. To establish discrimination, it must be shown that, the Complainants have been treated differently in the enjoyment of any of the Charter rights by virtue of their race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

122. The Complainants have failed to set forth with clarity any particular instance in which they were denied the enjoyment of any of the Charter rights by virtue of the reasons set forth in Article 2 of the African Charter. The claim under this head therefore fails.

123. The Complainants also allege the violation of Article 3 of the African Charter. This Article provides: *'Every individual shall be equal before the law, and every individual shall be entitled to equal protection of the law'*. According to the Complainants, since the successful disposition of the petitions would have drastically altered the composition of Parliament, the failure of the Judiciary to deal promptly with those petitions is tantamount to the absence of equality before the law and equal protection of the law for victims of human rights violations. The State on its part cited a number of cases to demonstrate that both parties to the election petitions filed in the Zimbabwean courts were afforded equal protection of the law, and denied that the parties were discriminated against on the basis of political opinions. In fact, this position is confirmed through the analysis the Commission made on the list of different petitions that were cited in the complaint submitted to the Commission.⁶²

124. Article 3 of the African Charter has two arms, one dealing with equality before the law, that is, Article 3(1), and the other, equal protection of the law, that is, Article 3(2). The most fundamental meaning of equality before the law or equality under the law is a principle under which each individual is subject to the same laws, with no individual or groups having

⁶² See paragraph 8 which refers to annex in the Communication, and also paragraphs 84 and 86 herein above on petitions filed by both parties.

special legal privileges. On the other hand, equal protection of the law under Article 3 (2) relates to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of the law, but in particular, applies to equal treatment as an element of fundamental fairness.

125. In its decisions on Communication **211/98 - Legal Resources Foundation v/ Zambia**,⁶³ the Commission makes this distinction even clearer by linking the principle of discrimination to that of equal protection of the law. This Commission held in that Communication that 'Article 2 of the Charter abjures (sic) discrimination on the basis of any of the grounds set out, among them "language... national or social origin, birth or other status..." The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one's place of birth or social origin suffers indignity as a human being...'

126. In terms of Article 60 of the Charter, this Commission can also be inspired in this regard by the famous case **Brown v. Board of Education of Topeka**,⁶⁴ in which the Chief Justice of the United State of America Earl Warren argued that 'equal protection of the law refers to *the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.*⁶⁵

127. In order for a party to establish a successful claim under Article 3 (2) of the Charter therefore, it must show that, the Respondent State had not given the Complainants the same treatment it accorded to the others. Or that, the Respondent

⁶³ See para 63, communication 211/98. It is observed that the use of the word 'abjures' could have been intended to mean 'abhors', hence the use of the (sic) to show that it was an incorrect word.

⁶⁴ 347 U.S 483 (1954)

⁶⁵ www.legal-explanations.com

State had accorded favourable treatment to others in the same position as the Complainants.

128. In the present Communication, the Commission has examined the evidence submitted by both parties and is of the view that the Complainants have not demonstrated the extent to which the Courts treated the petitioners differently from the Respondent State, or vice versa, to the extent that their rights were violated. The Commission thus does not find the Respondent State to have violated Article 3 of the African Charter.

129. The Complainants allege violation of Article 7 (1) (a) and (d) of the African Charter. This Article provides: *“Every individual shall have the right to have his cause heard. This comprises: 1(a) ‘the right to an appeal to competent national organs against acts violating his fundamental rights recognised and guaranteed by conventions, laws, regulations and customs in force’ and (d) ‘the right to be tried within a reasonable time by an impartial court or tribunal.’*

130. It should be noted that even though the matter before the Commission is a civil matter, the principles enshrined under Article 7 (1) still apply in the consideration of this matter, that is, the principles to have one’s cause heard and the principle to have one’s matter decided within a reasonable time.

131. The Complainants argue that the inordinate delay in dealing with petitions affects the right to have one’s case heard within a reasonable time (right to due process of law). They refer to General Comment No. 13 of the United Nations Human Rights Committee (HRC) where the HRC held that the right to have one’s case heard within a reasonable time includes not only the time by which the trial should start, but also the time by which it should end, and the judgment rendered both in first instance and on appeal. In their view, the right to due process of law has been violated as the courts have failed to rule on the electoral petitions within a reasonable period of time. It is also alleged that appeal to the High Court and the Supreme Court was ineffective.

132. On its part, the Respondent State cited several cases to demonstrate that it has always afforded the Petitioners the right to be heard by impartial courts or tribunals within a reasonable time. The Respondent State contends further that all the petitions filed in the High Court and more recently, in

the Electoral Court were heard within a reasonable time. The State cited Rule 31 of the Electoral (Application, Appeal and Petition rules 1995) Statutory Instrument 74A/95 and Section 182 of the **Electoral Act [Chapter 2:13]** and concluded that parties to an election petition have a duty to ensure the petition is determined quickly, adding that in the present situation, in most of the cases brought before the court, the Petitioners failed to expeditiously file papers to ensure the matters were dealt with quickly. The State further submitted that it set up an Electoral Court to have petitions dealt with within a reasonable time. However, the MDC challenged the composition of the Electoral Court which delayed the petitions before it and it cannot therefore be said that the judiciary has been reluctant to deal with petitions expeditiously.

133. Article 7 (1) (d) of the Charter imports two things; the right to be heard within a reasonable time and the right to be heard by an impartial tribunal. These are the issues which must be borne out by the evidence to warrant the Commission's findings of a violation thereof.
134. In respect of the first arm of this claim – the right to be tried within a reasonable time, the Responded State conceded in its response to delays in disposing with some of the claims, but emphasized that the delay was occasioned by the Complainants who had failed to file processes expeditiously before the Courts as required by the law and/or failed to file their heads of arguments as required by the Supreme Court. These are not a mere blanket denial of the allegations; they raise serious irregularities against the Complainant's averments, which were not controverted by the Complainants.
135. In respect of the second arm of the claim – the right to be heard by an impartial tribunal, the submission of the Respondent State and the evidence before the Commission show that, the Courts had actually resolved some cases in favour of the petitioners as against the ruling party (ZANU-PF), that the Supreme Court had thrown out some cases in which the petitioners failed to comply with the Court's directives requesting them to file their heads of arguments. There is no evidence to suggest that the Courts refused to adjudicate on the Complainants cases as filed before the Courts, but did so in respect of cases filed by the ruling party (ZANU-PF), or that the Court failed or refused to grant the Complainants the relief sought, but did so to other petitioners. This Commission does

not therefore find any violation of Article 7 (1) (d) of the Charter.

136. The Complainants also alleged violation of Article 13 (1) of the Charter which provides that: *“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”*.

137. The Complainants’ submissions in support of this allegation hinged on their argument that the Courts failed to render judgment on the elections petitions on time. According to the Complainant, the right to freely participate in government is rendered meaningless if the judiciary fails to decide expeditiously on the electoral disputes brought before it, since that would allow for candidates whose elections are contested to sit in Parliament while the petitions are still *lis pendens*. The Respondent State on its part argued on the expeditious disposal of petitions by the High Court, usually, within six months as stipulated by the law establishing the Electoral Court.⁶⁶ The Complainants have not adduced any evidence before this Commission to contradict the assertions of the State. It is thus the findings of this Commission that the Complainants have failed to convince it that there has been a violation of Article 13 (1).

138. The Complainants submitted further that violation of Article 7 (1) (d) constitutes in one respect violation of Article 26 of the Charter. Article 26 of the Charter provides that:

“State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”.

139. According to the Complainants, the judiciary is weak and ineffective. The Complainants argue that the judiciary in Zimbabwe is not independent and further that judges who entered decisions against the government interest were victimized. The Respondent State replied that the Judiciary in Zimbabwe was independent and judges were not victimized

⁶⁶ See para 95 and 96 for details about these petitions in which the judiciary disposed them within the prescribed time limit.

for their decisions, adding that one such judge was promoted to the Supreme Court.

140. The Respondent State submits that those judges who resigned never made any public statement as to the cause of the resignations. For the Complainants to link their resignations to victimization from the government, without leading any evidence in support thereto, does in the view of the Commission, amount to speculations.

141. The evidence before the Commission relating to the conduct of the judiciary in respect of the petitions forming the basis of this Communication does not show that the judiciary was influenced by other institutions or persons in the discharge of its functions but acted with full independence. The Commission does not therefore find a violation of Article 26 of the Charter.

142. Relating to the issue of the violation of Article 1 of the Charter, the Commission finds that the Respondent State did not violated any of the rights, alleged by the complainants, and cannot therefore be held to have violated Article 1 of the Charter.

In conclusion, the African Commission on Human and Peoples' Rights finds that the Respondent State has not violated **Articles 1,2,3,7 (1) (a) and (d), 13 (1) and 26** of the African Charter as alleged by the Complainants.

*Done at the 43rd Ordinary Session in Ezulwini, Kingdom of Swaziland,
from 7 – 22 May, 2008*