

ORGANISATION OF AFRICAN UNITY



ORGANISATION DE L'UNITE AFRICAINE

P. O. Box 3243, Addis Ababa, ETHIOPIA Tel.: 51 77 00, Telex 21046; 513822 Fax: (251-1) 519321
E-mail: oau-ews@telecom.net.et

**CONFERENCE OF HEADS OF
STATE AND GOVERNMENT
Thirty-seventh Ordinary Session
74th Session of the Council of Ministers
2ND – 12 July 2001**

**AHG/229(XXXVII)
ORIGINAL: ENGLISH**

**FOURTEENTH ANNUAL ACTIVITY REPORT OF
THE AFRICAN COMMISSION ON HUMAN AND
PEOPLES' RIGHTS**

2000 - 2001

**FOURTEENTH ANNUAL ACTIVITY REPORT OF THE AFRICAN
COMMISSION ON
HUMAN AND PEOPLES' RIGHTS 2000 - 2001**

I. ORGANISATION OF WORK

A. Period covered by the Report

1. The 13th Annual Activity Report was adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) meeting from 10th to 12th July 2000 in Lomé, Togo.

The Fourteenth Annual Activity Report covers the 28th and 29th Ordinary Sessions of the Commission respectively held from 23rd October to 6th November 2000 in Cotonou, Benin and from 23rd April to 7th May 2001 in Tripoli, Libya.

B. Status of ratification

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

C. Sessions and Agenda

3. Since the adoption of the Thirteenth Annual Activity Report in July 2000, the Commission has held two Ordinary Sessions as indicated in the paragraphs above.

The agenda for each of the sessions is contained in **Annex I** to this report.

D. Composition and participation

4. The Commissioners whose names follow participated in the deliberations of the 28th Ordinary Session:

- | | |
|--------------------------------------|---------------|
| - Commissioner E.V.O. Dankwa, | Chairman |
| - Commissioner K. Rezag-Bara, | Vice Chairman |
| - Commissioner A. Badawi El Sheikh | |
| - Commissioner Isaac Nguema | |
| - Commissioner N. Barney Pityana | |
| - Commissioner H. Ben Salem | |
| - Commissioner Florence Butegwa | |
| - Commissioner A. Raganayi Chigovera | |
| - Commissioner Vera M. Chirwa | |

- Commissioner Jainaba Johm

Commissioner Julienne Ondziel-Gnelenga was sick and could not attend the session.

5. Representatives from the following States Parties participated in the deliberations of the 28th Ordinary Session and most of them made declarations: Algeria, Benin, Burkina Faso, Burundi, Central Africa Republic, Congo Brazzaville, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Libya, Mauritania, Mozambique, Nigeria, Rwanda, Senegal, South Africa, Sudan and Uganda.
6. The members of the Commission whose names follow participated in the deliberations of the 29th ordinary session:
 - Commissioner E.V.O. Dankwa, Chairman
 - Commissioner K. Rezag-Bara, Vice Chairman
 - Commissioner A. Badawi El Sheikh
 - Commissioner Isaac Nguema
 - Commissioner N. Barney Pityana
 - Commissioner H. Ben Salem
 - Commissioner J. Ondziel-Gnelenga
 - Commissioner A. Raganayi Chigovera
 - Commissioner Vera M. Chirwa
 - Commissioner Jainaba Johm

Commissioner Florence Butegwa was absent with apology.

7. Representatives from the following States participated in the deliberations of the 29th Ordinary Session and most of them made declarations: Algeria, Benin, Burundi, Burkina Faso, Cameroon, Central Africa, Congo Brazzaville, Côte d'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Libya, Mali, Mauritania, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Senegal, South Africa, Sudan, Togo and Tunisia and Uganda.
8. A Number of National Human Rights Institutions and Non Governmental Organisations (NGOs) also participated in the deliberations of the two Ordinary Sessions.

E. Adoption of the Activity Report

9. The Commission considered and adopted its Fourteenth Annual Activity Report at its sitting of 6th May 2001.

II. ACTIVITIES OF THE COMMISSION

A. Consideration of Periodic Reports of State Parties

10. In accordance with the provisions of Article 62 of the African Charter on Human and Peoples' Rights, each State Party undertakes to present every two years from the date of

AHG/229(XXXVII)
ORIGINAL:ENGLISH

entry into force of the Charter, a report on legislative and other measures taken with a view to giving effect to the rights and freedoms guaranteed under the Charter.

11. It is within this framework that the Periodic Reports of Benin (combining all the overdue reports) and the 1st Periodic Report of Egypt were considered during the 28th Ordinary Session. The Commission was pleased with the quality of the reports and expressed its appreciation to the representatives of Benin and Egypt for the efforts that their Governments had employed in the field of promoting and protecting human rights.
12. During the 29th Ordinary Session, the Commission considered the initial report of Congo-Brazzaville (combining all overdue reports), the second periodic report of Algeria (combining all the overdue reports) and the second periodic reports of both Ghana and Namibia. The Commission expressed its satisfaction with the quality of the reports and the ensuing dialogue and encouraged the States to continue their efforts in fulfilling their obligations under the Charter.
13. The status of submission of Initial and Periodic reports by State parties is contained in **Annex II** of this report.
14. The Commission strongly appeals to those States Parties that have not yet submitted their initial and periodic reports to do so as soon as possible and where possible compile all the overdue reports into one report.

B. Promotional Activities

(a) Report of the Chairman of the Commission

15. In presenting his activity report, the Chairman of the Commission reported that he had carried out the following activities in his capacity as the Chairman -:
 - Participated in the Session of the Inter-American Commission on Human in Washington;
 - Undertook a working visit to the Secretariat of the African Commission in September. During his stay in the Gambia, he held discussions with the Secretary of State for Interior and Religious Affairs of The Gambia on issues relating to the country's penal system. He also met the Secretary of State for Justice of the Republic of the Gambia and other officials with whom he discussed the issue of the construction of the Headquarters of the Secretariat of the African Commission;
 - Undertook a Promotional Mission to Côte d'Ivoire where he had discussions with the relevant State Authorities relating to the respect and observance of the provisions of the African Charter within that country.

(b) Activities of other Members of the Commission

16. The Members of the Commission also presented reports on the inter-session activities that they had undertaken in the promotion and/or protection of human rights. Such

activities included undertaking promotional missions to countries they had been assigned and attending meetings, seminars and symposia.

(c) Seminars and Conferences

17. The Commission was represented in the OAU Statutory Meetings and organised in collaboration with Article XIX, a *Seminar on Freedom of Expression and the African Charter*, which was held from 22nd to 25th November 2000, in Johannesburg, South Africa. The Commission was also represented in many other meetings relating to human rights including -:

- The *Workshop on Multiculturalism in Africa*, organised by the United Nations from 8th -13th January 2001, in Kidal, Mali.
- The African Regional Preparatory Meeting to the World Conference Against Racism, Xenophobia and Related Intolerance, held from 22nd- 24th January 2001, in Dakar, Senegal.

18. The Commission decided to organise the following seminars and conferences:

- Contemporary Forms of Slavery in Africa;
- The Right to Education and Development in Africa;
- Seminar on the Settlement of Social and Ethnic Conflicts;
- The Rights of Persons with Disabilities in Africa;
- Economic, Social and Cultural Rights in Africa
- Workshop on the Prevention of Torture;
- The African Union and the African Charter on Human and Peoples' Rights;
- Refugees and Displaced Persons.

19. The Commission sought for the support of Member States, International Organisations and NGOs in organising the above mentioned seminars and conferences and designated Commissioners to co-ordinate their organisation.

C. Report of the Special Rapporteur on Extra-judiciary, Summary or Arbitrary Executions in Africa

20. During the 29th Ordinary Session, there was no report presented as Commissioner Hatem Ben Salem had resigned as Special Rapporteur on Extra-Judiciary, Summary or Arbitrary Executions.

D. Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa

21. At the 28th Ordinary Session, the Chairman Prof. E.V.O. Dankwa and Special Rapporteur on Prisons and Conditions of Detention in Africa, informed the Commission that his mission report to Benin had been published. He indicated that he had recommended that Government urgently address the problem of the health of the prisoners and was pleased to learn that the Government had allocated funds to address this problem. He informed the Commission that the report on his second visit to Mali was translated into Arabic and that the report on Central African Republic will soon be

published. He also informed the Commission that he had received comments and observations on his reports from the relevant authorities in the Gambia and Mozambique.

22. Following a decision of the Commission that Members of the Bureau should not hold positions as Special Rapporteurs, Commissioner E.V.O. Dankwa thereby resigned from his position as a Special Rapporteur on Prisons and Conditions of Detention in Africa. At the 28th Ordinary Session Commissioner Vera M. Chirwa was appointed to complete the term of the outgoing Special Rapporteur on Prisons and Conditions of Detention in Africa. During the 29th ordinary session Commissioner Chirwa presented a report on the activities that she had undertaken which included a visit to the prisons in Mozambique.

E. Report of the Special Rapporteur on the Rights of Women in Africa

23. During the 28th ordinary session the Commission noted that the mandate of the Special Rapporteur on the Rights of Women in Africa had come to an end. However, at the 29th Session, the Commission decided to extend this mandate to October 2001.
24. At the 29th Ordinary Session, the Special Rapporteur on the Rights of Women in Africa, Commissioner Julienne Ondziel-Gnelenga, reported on the process of the preparation and adoption of the Draft Protocol to the African Charter on the Rights of Women. She also informed the Commission that she had carried out the following activities -:
- Initiated, in collaboration with other partners, studies on Poverty amongst Women in Francophone West and Central Africa and Violence Against Women.
 - Undertook promotional mission on women's rights in Chad, Côte d'Ivoire and Nigeria.

F. Process of preparation of the draft Protocol to the African Charter on the Rights of Women in Africa

25. The Special Rapporteur on the Rights of Women informed the Commission that in accordance with her mandate, she had kept up to date with the arrangements being made by the OAU General Secretariat to convene meetings of Inter-Governmental Experts to examine the Draft Protocol. She stated that she had received information that two Experts' meetings are planned to be held in September/October and December 2001 respectively. These meetings would be followed immediately by the meeting of Ministers and Plenipotentiary, who will adopt the Draft prepared by the Experts.

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

26. The Commission, at its 28th and 29th Sessions, deplored the delay in ratification of the above mentioned Protocol. It noted that only Senegal, Burkina Faso, The Gambia, and Mali had deposited their Instruments of ratification. Eleven (11) Instruments of ratification are still required for the Protocol to come into force. The Commission, called upon States Parties and the Human Rights Defenders' Community to work together to ensure quick ratification of this important Instrument.

H. Promotional Missions to State Parties

27. Following the events that took place in the Republic of Côte d'Ivoire during its presidential elections of 2000, the African Commission at its 28th Ordinary Session resolved to send a human rights promotional mission to the country comprising of the Chairman, the Vice Chairman and the Member of the Commission responsible for that country. The African Commission successfully undertook that mission from 2nd to 4th April 2001.
28. The Commission also undertook promotional missions to the following States Parties:- Botswana, Benin, Chad, Nigeria, Côte d'Ivoire and Saharawi Arab Democratic Republic. The Commission will continue carrying out promotion and protection missions to States Parties.
29. The distribution of State Parties among Commissioners for their promotion and protection activities is contained in **Annex III** of the report.

I. Adoption of Resolutions

30. At its 28th and 29th Ordinary Sessions, the African Commission adopted eleven (11) Resolutions on various issues relating to human and peoples' rights. The list and texts of these Resolutions are contained in **Annex IV** of this report.

J. Relations with observers

31. At its 29th Ordinary Session, the African Commission deliberated further on its co-operation with NGOs and the co-operation framework amongst the NGOs. The matter remains on the Agenda of the Commission.
32. At its 28th and 29th Ordinary Sessions, the African Commission granted Affiliate Status to the following National Human Rights Institutions:
 - Comité Sénégalais des Droits de l'Homme;
 - Commission Nationale des Droits de l'Homme et des Libertés Fondamentales du Niger ;
 - National Commission for Democracy and Human Rights (Sierra Leone);
 - Commission Nationale des Droits de l'Homme du Tchad.

Altogether the African Commission has granted affiliate status to Seven (7) National Human Rights Institutions.

33. The Commission reiterated its appeal to State parties to create National Human Rights Institutions and strengthen the capacities of those already in existence.
34. At its 28th and 29th Ordinary Sessions, the Commission granted Observer Status to the following NGOs:

- Aliancia Muçulmana de Angola (ALMUA);
- Ligue Nationale des Droits de l'Homme du Cameroun;
- Human Rights Network (HURINET-Uganda);
- Arab Programme for Human Rights Activists;
- Social Alert;
- Association Béninoise d'Assistance à l'Enfant et à la Famille;
- Volunteers for Prison Inmates;
- Legal and Human Rights Centre;
- Association pour la Promotion des Libertés Fondamentales;
- Association des Femmes Juristes du Tchad;
- Association Algérienne d'Alphabétisation;
- ONG «l'œil d'Aujourd'hui »;
- CI-AF Bénin;
- Survival International;
- Centre for Democracy and Development;
- Centre Africa Obota;
- Association Nigérienne pour la Défense des Droits de l'Homme;
- Que Choisir Bénin;
- CADDHOM absl;
- Human Rights Institute of South Africa;
- Académie de la Théorie des Droits de l'Homme.

This brings the total number of NGOs granted Observer Status with the African Commission to two hundred and fifty eight (258) as at 7th May 2001.

K. Tribute to Commissioner Isaac Nguema

35. The Commission was informed that Commissioner Isaac Nguema's would be retiring at the end of his term in October 2001.
36. In recognition of the services he rendered, in his capacity as member and Chairman of the Commission since 1987, (13 years including 6 years as Chairman), the Commission decided to confer upon him the unique title of "***Chairman Emeritus of the African Commission on Human and Peoples' Rights***".
37. Representatives of States Parties and NGOs attending the 29th Ordinary Session joined the Commission in paying tribute to Commissioner Isaac Nguema.

L. Protection Activities

38. The African Commission considered twenty-two (22) Communications at its 28th Ordinary Session and delivered decisions on the merits on six (6) communications.
39. At its 29th Ordinary Session, the Commission considered twenty-one (21) Communications and delivered decisions on the merits on three (3).

The decisions on these communications are contained in **Annex V** of the report.

M. Administrative and Financial Matters

a) **Administrative Matters**

40. The Secretary to the African Commission presented a report on the financial and administrative situation of the Secretariat. The Members of the Commission exchanged views on the administrative situation of the Secretariat. The Commission commended the excellent work done by the Secretariat and encouraged the latter to keep it up.
41. The Commission also deplored the precarious situation suffered by legal officers recruited under extra budgetary subventions who, because of different sources of funding, are paid different salaries for the same work done. Furthermore, the Commission expressed its dissatisfaction at the fact that officers recruited under such subventions usually have to leave the Secretariat at the end of the projects. The Commission therefore loses the services of those officers who have undergone training and are therefore experienced in the work of the Commission. The Commission requested the Secretariat to increase its efforts in sensitising more donors on the urgent need to ensure more stable and equal working conditions for staff paid under extra-budgetary projects.

b) **Financial matters.**

1. **O.A.U Budget**

42. Under Article 41 of the Charter, the General Secretariat of the OAU is responsible for meeting the costs of the African Commission's operations including provision of staff, resources and services. The Commission expressed appreciation for the improvement of its working conditions (such as extension of the duration of the Ordinary Sessions from 10 days to 15 days, the possibility of undertaking more promotion and protection missions within Member States, publication of documents etc.) as a result of the additional budgetary allocation by the OAU.

2. **Extra-Budgetary Funds**

43. In order to complement the limited resources allocated by the OAU, the Commission had to solicit financial and material assistance from the following partners.

a) Assistance from the African Society of International and Comparative Law

44. With the assistance of the African Society of International and Comparative Law, the Secretariat enjoys the services of two (2) Legal Officers for a period of one year. Publication of the Review of the Commission is also done through technical assistance from the Society, which has also assumed responsibility for its printing and distribution.

b) Assistance from the Danish Centre Human Rights

45. The working conditions of the Secretariat of the Commission have improved remarkably thanks to the assistance of the Danish Centre for Human Rights, which has enabled the

Secretariat to hire additional staff, produce documents, acquire computer equipment and documents for the library. The Danish Centre for Human Rights is presently assisting the Secretariat and the Commissioners in developing a three-year plan of activities and mobilising resources for the implementation of these activities.

c) Assistance from SIDA

46. The Swedish Government granted the Commission a subvention of four million five hundred thousand Swedish Kroners (SEK 4,500,000.00) for a period of three years. SIDA is responsible for managing this subvention which covers the promotion and protection activities of the Commission, particularly the on-site visits of the Members of the Commission, publications, activities of the Special Rapporteur on the Rights of Women and preparation of the Draft Protocol on the Rights of Women in Africa.

d) Assistance from the Government of the Netherlands

47. The Government of the Netherlands granted the Commission a subvention amounting to nine hundred and sixty-five thousand, one hundred and seventy-five Netherlands Guilders (NLG 965,175) aimed at strengthening the Information and Documentation Centre as well as the Press and Information Section at the Secretariat of the Commission. This subvention is granted for a period of three (3) years (2000-2002).

e) Assistance from the Irish Government

48. The Irish Government granted the Commission a Subvention amounting to thirty seven thousand six hundred and seventy eight Irish Pounds (IR£ 37,678.00) to support the activities of the Special Rapporteur on the Rights of Women in Africa.

f) Assistance from Friedrich Naumann Foundation

49. The Friedrich Naumann Foundation continues to mobilise resources for the Commission especially with the European Union and other European partners.

g) International Commission of Jurists (ICJ)

50. The ICJ has continued its co-operation with the Commission. Within the framework of this co-operation, it organised the 14th NGO Forum in Cotonou (Benin), before the 28th Ordinary Session in preparation of their contributions to the work of the African Commission.

h) Other partners

51. The Commission enjoys various forms of assistance from other African and Non-African partners, which enables it to carry out some of its work of promoting and protection human and peoples' rights. The Commission intends to strengthen such co-operation and collaboration.

AHG/229(XXXVII)
ORIGINAL:ENGLISH

Contacts are being made with the Office of the United Nations High Commission for Human Rights, the European Union, Great Britain and Italy, to conclude co-operation and/or assistance agreements.

52. The African Commission expresses its profound gratitude to all the donors and other partners whose financial, material and other contributions has enabled it to carry out its mandate during this past period.

N. Adoption of the Report by the Assembly of Heads of State and Government of the OAU.

53. The Assembly of Heads of State and Government of the OAU, after due consideration, adopted the present report by a decision in which it expressed its satisfaction at the Report and authorised its publication.

LIST OF ANNEXES

- Annex I** **Agenda of the 28th Ordinary Session (23rd October to 6th November 2000, Cotonou, Benin)**
- Agenda of the 29th Ordinary Session (23rd April to 7th May 2001, Tripoli, Libya)**
- Annex II** **Status of Submission of State Periodic Reports to the African Commission on Human and Peoples' Rights (as at 30th March 2001)**
- Annex III** **Geographical Distribution of State Parties among Commissioners**
- Annex IV** **Resolutions adopted during the 28th and 29th Ordinary Sessions**
- Annex V** **Decisions on Communications brought before the Commission**

Annex I

Agenda of the Twenty-eighth Ordinary Session
(Cotonou, Benin, 23rd October to 6th November 2000)

Agenda of the Twenty-ninth Ordinary Session
(Tripoli, Libya, 23rd April to 7th May 2001)

African Commission on Human &
Peoples' Rights

Kairaba Avenue
P.O. Box 673
BANJUL, The Gambia



Commission Africaine des Droits
de l'Homme et des Peuples

Tel.: (220) 392962
Fax: (220) 390764
Telex: 2346 OAU BJL GV
e-mail: achpr@achpr.gm

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28th Ordinary Session
23rd October - 6th November 2000
Cotonou, Bénin

Distribution: General

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AGENDA

1. Opening Ceremony (public session).
2. Adoption of the Agenda (private session).
3. Organisation of work (private session).
4. Election of Vice-President (private session).
5. Designation of the Special Rapporteur on Prisons and Conditions of Detention in Africa (private session).
6. Observers : (public session):
 - a. Statements by State Delegates and guests;
 - b. Co-operation between the Commission and the National Human Rights Institutions;
 - c. Consideration of applications for Affiliate status;
 - d. Relationship and co-operation between the Commission and NGOs;
 - e. Consideration of applications for observer status.
7. Consideration of periodic Reports (public session) :
 - a) Status of submission of Periodic Reports by States Parties;
 - b) Periodic Report of Egypt;
 - c) Periodic Report of Bénin;
 - d) Periodic Report of Namibia;
 - e) Periodic Report of Ghana.
8. Promotional Activities (public session):
 - a) Human Rights situation in Africa;
 - b) Activity report of the Chairman and the Members of the Commission;

AHG/229(XXXVII)
ORIGINAL: ENGLISH

- c) Consideration of the report of the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions;
 - d) Consideration of the report of the Special Rapporteur on Prisons and Conditions of Detention in Africa;
 - e) Consideration of the report of the Special Rapporteur on the Rights of Women in Africa;
 - f) Situation of Refugees and Internally Displaced Persons in Africa;
 - g) Situation of people with disability;
 - h) Organisation of Seminars and Conferences;
 - i) Situation of Indigenous People/Communities;
 - j) World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance;
 - k) Situation of Human Rights Defenders in Africa.
9. Review and Newsletter of the African Commission on Human and Peoples' Rights (public session).
10. Protection Activities (private session): Consideration of Communications.
11. Administrative and financial matters (private session):
- a. Financial and administrative situation of the Secretariat;
 - b. Construction of the Commission's Headquarters;
 - c. Participation of the Commission in certain activities of the OAU.
12. Methods of work of the Commission: Operational system of the Special Rapporteurs of the Commission, Commissioners' approach to Promotional Activities (private session).
13. Adoption of resolutions, recommendations and decisions of the 28th Ordinary Session (private session).
14. Dates, venue and provisional Agenda for the 29th ordinary session (private session).
15. Any other business (private session).
16. Preparation of:
- a. The Session Report;
 - b. The Final Communiqué.
17. Adoption of the Session Report and the Final Communiqué (private session).
18. Reading of the Final Communiqué and Closing ceremony (public session).
19. Press Conference.

**African Commission on
Human & Peoples' Rights**

**Kairaba Avenue
P.O. Box 673
BANJUL, The Gambia**



OAU – OUA

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

**Tel.: (220) 392962
Fax: (220) 390764
Telex: 2346 OAU BJL GV
e-mail: achpr@achpr.gm**

**29th Ordinary Session
23 April – 7 May 2001
Tripoli, Libya**

**Distribution: General
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Original: FRENCH / ENGLISH**

AGENDA

1. Opening Ceremony (public session).
2. Adoption of the Agenda (private session).
3. Organisation of work (private session).
4. Adoption of the Report of the 28th Ordinary Session.
5. Observers : (public session).
 - a) Statements by State Delegates and guests;
 - b) Co-operation between the Commission and the National Human Rights Institutions;
 - c) Consideration of applications for Affiliate status;
 - d) Relationship and co-operation between the Commission and NGOs;
 - e) Consideration of applications for observer status.
6. Consideration of States Reports (public session)
 - a) Status of submission of Periodic Reports by States Parties;
 - b) Periodic Report of Namibia;
 - c) Periodic Report of Ghana;
 - d) Periodic Report of Algeria;
 - e) Initial Report of Congo (Brazzaville).
7. Promotional Activities (public session):
 - a) Human Rights situation in Africa;
 - b) Activity report of the Chairman and the Members of the Commission;
 - c) Consideration of the report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions;

AHG/229(XXXVII)
ORIGINAL: ENGLISH

- d) Consideration of the report of the Special Rapporteur on Prisons and Conditions of Detention in Africa;
 - e) Consideration of the report of the Special Rapporteur on the Rights of Women in Africa;
 - f) Situation of refugees and displaced persons in Africa;
 - g) Situation of people with disability;
 - h) Organisation of Seminars and Conferences;
 - i) Situation of Indigenous People/Communities
 - j) World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance;
 - k) Situation of Human Rights defenders in Africa;
 - l) The African Charter on Human & Peoples' Rights and the African Union.
8. Review and Newsletter of the African Commission on Human and Peoples' Rights (public session).
 9. Protection Activities (private session): Consideration of Communications.
 10. Administrative and financial matters (private session):
 - a) Financial and administrative situation of the Secretariat;
 - b) Construction of the Commission's Headquarters;
 - c) Participation of the Commission in certain activities of the OAU.
 11. Methods of work of the Commission (private session).
 12. Adoption of resolutions, recommendations and decisions of the 29th Session (private session).
 13. Dates, venue and Provisional Agenda for the 30th Ordinary Session (private session).
 14. Any other business (private session).
 15. Preparation of :
 - a) The Session Report;
 - b) The 14th Annual Activity Report;
 - c) The Final Communiqué;
 - d) Adoption of the Session Report, 14th Annual Activity Report and the Final Communiqué (private session);
 - e) Reading of the Final Communiqué and Closing ceremony (public session);
 - f) Press Conference.

Annex II

Status of Submission of Periodic Reports

to the

African Commission on Human and Peoples' Rights
(As at May 2001)

ENGLISH

African Commission on Human
& Peoples' Rights

Kairaba Avenue
P.O. Box 673
BANJUL, The Gambia



OAU – OUA

Commission Africaine des
Droits de l'Homme et
des Peuples

Tel.: (220) 392962
Fax: (220) 390764
Télex: 2346 OAU BJL GV
Email: achpr@achpr.gm

Statistics on States Initial/Periodic Reports
(As at May 2001)

I- General Information

- | | |
|--|----|
| 1. Number of States that have not submitted any Report | 24 |
| 2. Number of States that have submitted one (1) Report but owe more | 09 |
| 3. Number of States that have submitted two (2) or more Reports but owe more | 4 |
| 4. Number of States that have submitted all their Reports: | 16 |
| a) States that have submitted and presented all their reports | 15 |
| b) States that have submitted all their reports but have not presented all | 1 |

II - States that have not submitted any report:

- | | |
|-------------------|---------------------|
| 1. Botswana | (7 overdue reports) |
| 2. Cameroon | (5 overdue reports) |
| 3. Comoros | (7 overdue reports) |
| 4. Congo (D.R.C.) | (6 overdue reports) |
| 5. Côte d'Ivoire | (4 overdue reports) |
| 6. Djibouti | (4 overdue reports) |
| 7. Eritrea | (1 overdue report) |
| 8. Ethiopia | (1 overdue report) |
| 9. Gabon | (7 overdue reports) |

ENGLISH

10. Guinea-Bissau	(7 overdue reports)
11. Equatorial Guinea	(7 overdue reports)
12. Kenya	(4 overdue reports)
13. Lesotho	(4 overdue reports)
14. Liberia	(7 overdue reports)
15. Madagascar	(4 overdue reports)
16. Malawi	(5 overdue reports)
17. Mauritania	(7 overdue reports)
18. Niger	(7 overdue reports)
19. Central African Republic	(7 overdue reports)
20. Saharawi Arab Democratic Republic	(7 overdue reports)
21. Sao Tome and Principe	(7 overdue reports)
22. Sierra Leone	(7 overdue reports)
23. Somalia	(7 overdue reports)
24. Zambia	(7 overdue reports)

III - States that have submitted one report but owe more:

1. Angola	(1 overdue report)
2. Cape Verde	(2 overdue reports)
3. Guinea	(1 overdue report)
4. Mauritius	(2 overdue reports)
5. Mozambique	(2 overdue reports)
6. Nigeria	(3 overdue reports)
7. Seychelles	(3 overdue reports)
8. Sudan	(1 overdue report)
9. Tanzania	(4 overdue reports)

IV - States that have submitted two or more reports but owe more:

1. Gambia	(3 overdue reports)
2. Senegal	(4 overdue reports)
3. Tunisia	(2 overdue reports)
4. Zimbabwe	(2 overdue reports)

V- States that have submitted all their reports:

1. Algeria	(next report due in 2003)
2. South Africa	(next report due in 2001)
3. Benin	(next report due in 2002)
4. Burkina Faso	(next report due in 2001)
5. Burundi	(next report due in 2002)
6. Congo Brazzaville	(next report due in 2003)
7. Namibia	(next report due in 2003)
8. Chad	(next report due in 2001)
9. Egypt	(next report due in 2002)
10. Ghana	(next report due in 2003)
11. Libya	(next report due in 2002)
12. Mali	(next report due in 2001)
13. Rwanda	(next report due in 2002)
14. Swaziland	(next report due in 2002)

ENGLISH

15. Uganda (next report due in 2002)
16. Togo (next report due in 2003)

VI- States that have submitted and presented all their Reports:

1. Algeria
2. Benin
3. Burkina Faso
4. Burundi
5. Chad
6. Congo Brazzaville
7. Egypt
8. Ghana
9. Libya
10. Namibia
11. Mali
12. Uganda
13. Rwanda
14. Swaziland
15. South Africa

VII - States that have submitted all their reports but have not presented all:

1. Togo (2nd Report scheduled to be presented before the ACHPR at the 30th Session, October 2001)

VIII - States who have submitted a report but have never presented it before the Commission

1. The Seychelles (1st Report submitted in 1994 but never presented before the ACHPR since)

Annex III

**Geographical Distribution of Countries
Among Commissioners**

**AHG/229(XXXVII)
ORIGINAL:**

ENGLISH

African Commission on Human &
Peoples' Rights

Kairaba Avenue
P.O. Box 673
BANJUL, The Gambia



OAU – OUA

Commission Africaine des Droits
de l'Homme et des Peuples

Tel.: (220) 392962
Fax: (220) 390764
Telex: 2346 OAU BJL GV
e-mail: achpr@achpr.gm

**Geographical Distribution of Countries among
Commissioners for their Promotion Activities**

1. **Prof. E.V.O. Dankwa** Ghana, Cameroon, Guinea-Bissau, Sierra Leone and Ethiopia.
2. **Mr. Kamel Rezag-Bara** Algeria, Saharawi Arab Democratic Republic, Mauritania, Chad, Central African Republic and Djibouti.
3. **Mrs. Julienne Ondziel-Gnelenga** Burundi, Côte d'Ivoire, Rwanda, Mauritius, Madagascar and Niger.
4. **Prof. Isaac Nguema** Gabon, Equatorial Guinea, Sao Tome & Principe, Burkina Faso and Republic of Congo (Brazzaville).
5. **Dr. Ibrahim A. Badawi** Egypt, Sudan, Somalia and Seychelles
6. **Dr. Mohamed H. Ben Salem** Tunisia, Libya, Mali, Comoros and Guinea
7. **Dr. Nyameko B. Pityana** Zimbabwe, Botswana, Mozambique, Swaziland and Lesotho
8. **Mrs. Jainaba Johm** Nigeria, Togo, Senegal, Cape Verde, Gambia, Benin and Liberia
9. **Dr. Vera M. Chirwa** Malawi, Kenya and Tanzania
10. **Mr. Andrew R. Chigovera** South Africa, Namibia, Angola, Democratic Republic of Congo
11. **Mrs. Florence Butegwa** Uganda, Zambia and Eritrea

Annex IV

Resolutions adopted

at the

28th and 29th Ordinary Sessions

**RESOLUTION ON THE RIGHTS OF INDIGENOUS
PEOPLE/COMMUNITIES IN AFRICA**

The African Commission on Human and Peoples' Rights meeting at its 28th Ordinary Session in Cotonou, Benin from 23rd October to 6th November 2000,

- *Recalling* that at its 26th Ordinary Session held in Kigali, Rwanda, it constituted a Committee made up of 3 Commissioners to further consider the issue of Indigenous People in Africa and advise accordingly;
- *Having reconsidered* the issue and its implications;

Resolves to:

1. **Establish** a working group of experts on the rights of indigenous or ethnic communities in Africa ;
2. **Set up** a working group constituted of 2 members of the African Commission, one of whom should be designated as convenor and 2 African experts in the field of human rights or indigenous issues;
3. **Assign** the following mandate to the working group:
 - a) Examine the concept of indigenous people and communities in Africa;
 - b) Study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to :
 - *the right to equality (Articles 2 and 3);*
 - *the right to dignity (Article 5);*
 - *protection against domination (Article 19);*
 - *on self-determination (Article 20); and*
 - *the promotion of cultural development and identity (Article 22).*
 - c) Consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities;
4. **Have** a funding proposal prepared with a view to raising donor funds to meet the costs of the work of the working group;
5. **Submit** a report at the 30th Ordinary Session of the Commission.

Done in Cotonou, Benin, 6th November 2000

RESOLUTION ON COTE D'IVOIRE

The African Commission on Human and Peoples' Rights meeting at its 28th Ordinary Session in Cotonou, Benin from 23rd October to 6th November 2000,

Considering that Côte d'Ivoire is a party to the African Charter on Human and Peoples' Rights and other international human rights instruments;

Deploring the events of Wednesday 25th and Thursday 26th October 2000 in Côte d'Ivoire, which were marked by shootings, wounding and massacres of innocent civilians;

Welcoming with appreciation the Government's statement that it is going to set up a Commission of Enquiry;

1. ***Urges*** the OAU to set up an International Commission of Enquiry, which would involve the African Commission, to investigate all human rights abuses that occurred on or about Wednesday 25th October through to Friday 27th October 2000 and all consequences thereof;
2. ***Urges*** the Ivorian Government to co-operate closely with the Commission of Enquiry and give it all the necessary assistance;
3. ***Calls*** on the Ivorian Government to undertake to bring to justice all persons who would have been found to be involved in the human rights violations by the investigation;
4. ***Further calls*** upon the Ivorian Government to ensure full compliance with the provisions of the African Charter on Human and Peoples' Rights and other international human rights instruments.

Done in Cotonou, Benin, 6th November 2000

**RESOLUTION ON THE SITUATION IN PALESTINE
AND THE OCCUPIED TERRITORIES**

The African Commission on Human and Peoples' Rights, meeting at its 28th Ordinary Session held in Cotonou, Benin, from 26th October to 6th November 2000;

- *Considering* the values and fundamental principles of the African Charter on Human and Peoples' rights and the commitment to the people of Africa and to the human and people's rights and freedoms contained in the Declarations, Conventions and other instruments adopted within the framework of the Organisation of African Unity, and the United Nations Organisation;
- Noting the status of the Palestine Liberation Organisation within the O.A.U. and the concerns that a prolonged state of conflict and instability in the Middle East will adversely affect a number of States Parties to the Charter;
- *Noting with deep indignation* the excessive and inconsiderate use of military force against civilians which has led since the beginning of the conflict to about 150 deaths, including the death of children, and to more than 3000 wounded;
- *Bearing in mind* the Resolution adopted during the Special Session of the United Nations Human Rights Commission held in Geneva from 17 to 19 October 2000 devoted to the situation of human rights in occupied Palestine;
- *Calls upon* the competent organs of the OAU. to:
 1. **Condemn** strongly the repression and the inconsiderate and disproportionate use of force by the army of Israel in Palestine and in the occupied territories which resulted in many deaths and injuries among the Palestinian civilians, especially children;
 2. **Support** the efforts of the International Community for the creation of an International Commission of Inquiry into the events that occurred in September 2000 and that led to the killings of Palestinian civilians, including children, by the Israel occupation forces.

Done in Cotonou, Benin, 6th November 2000

**RESOLUTION ON COMPLIANCE AND IMMEDIATE
IMPLEMENTATION OF THE ARUSHA PEACE AGREEMENT FOR
BURUNDI**

The African Commission on Human and Peoples' Rights meeting at its 28th Ordinary Session in Cotonou, Benin, from 23rd October to 6th November 2000,

Considering the massacres of innocent people committed in Burundi since 21st October 1993;

Considering the effects of the protracted civil war on the economy and well-being of the people of Burundi;

Considering with concern that the on-going armed conflict between the rebels and the Government army has caused serious violations of human rights and freedoms of the people of Burundi;

- ***Expresses*** its support for the Arusha Peace Agreement for Burundi and urges the conflicting parties to conclude a cease-fire and immediately and unconditionally implement the Arusha Accord signed in Arusha on 28th August 2000;
- ***Congratulates*** former President Nelson Mandela for the progress achieved through his mediation and exhorts him to continue with his efforts towards achieving lasting peace in Burundi;
- ***Calls upon*** the rebel groups who have not yet signed the peace agreement concluded under the auspices of former President Nelson Mandela to do so urgently;
- ***Makes an urgent appeal*** to the Great Lakes countries to give their full support to the peace process and put pressure on all the belligerents to renounce violence;
- ***Calls upon*** the OAU and UN to take all appropriate measures to put a stop to the hostilities in Burundi and bring the belligerents to give greater importance to negotiation for the resolution of their dispute ;
- ***Urges*** the International Community to support the peace process and settlement of the conflict that has rocked Burundi.

Done in Cotonou, Benin, 6th November 2000

**RESOLUTION ON THE WORLD CONFERENCE AGAINST RACISM,
RACIAL DISCRIMINATION, XENOPHOBIA
AND RELATED INTOLERANCE**

The African Commission on Human and Peoples' Rights, meeting at its 28th Ordinary Session in Cotonou, Benin, from 23rd October to 6th November 2000,

Having considered the report on the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance due to take place in South Africa from 31st August to 7th September 2001;

Noting that the African Commission and the OAU have not been adequately involved in the regional preparations for the World Conference;

Noting further that a regional experts seminar in preparation for the World Conference was held in Addis Ababa, 4th - 8th October 2000 and that a regional preparatory Conference is scheduled to take place in Dakar, Senegal in January 2001;

Considering that it is critical that African States in general, including regional institutions and civil society be fully involved in the preparations for, and to influence the outcomes of the World Conference;

Recalling its decision to nominate Commissioner Jainaba Johm as the focal point for the preparation of this World Conference;

1. **Resolves** to seek observer status with the Preparatory Committee of the World Conference, the next session of which will take place in Geneva in May 2001;
2. **Nominates** a Committee of 4 members with the focal point as a convenor with the following mandate as follows:
 - To represent the Commission in all matters relating to the preparation for the World Conference and invite the OAU to take an active part in the preparation and holding of the Conference ;
 - To prepare a document on the issues to be considered by the World Conference and propose a strategy for effective participation by the Commission;
 - To disseminate within Member States information materials likely to raise awareness of the World Conference;
 - To encourage State parties to the African Charter and civil society to organise national preparatory meetings and to engage in preparations for the World Conference with all diligence ;
 - To report on developments at the 29th Ordinary Session of the African Commission;
3. **Resolves** to have this item on the Agenda of its 29th and 30th Ordinary Sessions; of the African Commission;
4. **Requests** the Secretariat to make all appropriate arrangements for the implementation of this resolution and report to the 29th Session.

Done in Cotonou, Benin, 6th November 2000

**RESOLUTION ON THE AFRICAN UNION AND THE AFRICAN
CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

The African Commission on Human and Peoples' Rights, meeting at its 29th Ordinary Session in Tripoli, Great Socialist People's Libyan Arab Jamahiriya, from 23rd April to 7th May 2001,

- *Recalling* the Sirte Declaration of 9th September 1999, adopted during the 4th Extraordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity;
 - *Recalling* the adoption of the Constitutive Act of the African Union by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU held in Lomé, Togo, from 10th to 12th July, 2000;
 - *Noting* that all Member-States have signed the Constitutive Act of the African Union and that the legal conditions for its entry into force are now met, after the deposit of the 36th instrument of ratification;
 - *Recalling* that one of the objectives of the African Union, aims at “promoting and protecting human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments” (Article 3 of the Constitutive Act);
 - *Noting* with satisfaction the substantial contributions made by the participants during the consideration of this agenda item at the 29th Ordinary Session;
 - *Noting* the need to initiate in-depth discussion on all the implications of the entry into force of the Constitutive Act of the African Union on the provisions of the African Charter on Human and Peoples’ Rights and on the functioning of the African Commission on Human and Peoples’ Rights;
1. **Expresses** its total adherence to the noble ideals, principles and objectives contained in the Constitutive Act of the African Union, in particular the commitment of States Parties “to promote and protect human and peoples’ rights, promote gender equality consolidate democratic institutions and culture, to ensure good governance and the rule of law, to promote the respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities as well as unconstitutional changes of governments;
 2. **Decides to set up** a three-member working group of the Commission with a mandate to initiate an in-depth discussion on all the implications of the entry into force of the Constitutive Act of the African Union on the African Charter and the African Commission on Human and Peoples’ Rights;
 3. **Requests** the working group to present an interim report at the 30th Session and a final report at its 31st Session;
 4. **Requests** the Secretariat to provide the working group with the necessary means to carry out its mandate and decides to keep this issue on its agenda.

Done in Tripoli, 7th May 2001

**RESOLUTION ON HIV/AIDS PANDEMIC – THREAT AGAINST HUMAN
RIGHTS AND HUMANITY**

The African Commission on Human and People's Rights, meeting at its 29th Ordinary Session in Tripoli, the Great Socialist Peoples' Libyan Arab Jamahiriya from 23rd April to 7th May 2001,

- *Noting* the rampant escalation of the HIV/AIDS pandemic in Africa especially in sub-Saharan Africa where estimates show that some 9 million people have died and within the next decade some 25 million people will become infected;
 - *Noting* with satisfaction the convening of the Africa Summit on HIV/AIDS in Abuja, Nigeria, from 24th to 26th April 2001 where the crisis was declared and interventions of emergency proportions called for;
 - *Welcoming* the statement of the Abuja Summit and the emergency measures declared there especially the announcement by the Secretary General of the UN on the establishment of a US\$10 billion war chest to fight HIV/AIDS in Africa;
 - *Welcoming* the forthcoming UN General Assembly Special Session on HIV/AIDS to be held in June 2001 and trusting that it will increase awareness of the need for international action to fight the pandemic and devise strategies by international co-operation against HIV/AIDS;
 - *Mindful* of the mandate of the Commission in terms of the Charter to “promote human and peoples’ rights and ensure their protection in Africa” and especially in this regard allow the right of every individual to “enjoy the best attainable state of physical and mental health” (Article 16);
1. ***Declares*** that the HIV/AIDS pandemic is a human rights issue which is a threat against humanity;
 2. ***Calls*** upon African Governments, State Parties to the Charter to allocate national resources that reflect a determination to fight the spread of HIV/AIDS, ensure human rights protection of those living with HIV/AIDS against discrimination, provide support to families for the care of those dying of AIDS, devise public health care programmes of education and carry out public awareness especially in view of free and voluntary HIV testing, as well as appropriate medical interventions;
 3. ***Calls*** upon the international pharmaceutical industries to make affordable and comprehensive health care available to African governments for urgent action against HIV/AIDS and invites international aid agencies to provide vastly increased donor partnership programmes for Africa including funding of research and development projects.

Done in Tripoli, 7th May 2001.

RESOLUTION ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN TUNISIA

The African Commission on Human and Peoples’ Rights, meeting at its 29th Ordinary Session in Tripoli, Great Socialist People's Libyan Arab Jamahiriya, from 23rd April to 7th May 2001,

Considering that the Republic of Tunisia is a party to the African Charter on Human and Peoples' Rights;

Considering the relevant provisions of the African Charter on Human and Peoples' Rights, in particular articles 9(2), 10(1), 12(1) and 12(2);

Considering the provisions of other international and regional human rights instruments on freedom of conscience, freedom of movement, and right to association;

Considering the Declaration of 9th December 1998 of the United Nations General Assembly on the "rights and responsibilities of individuals, groups and organs of society to promote and protect universally recognised human rights and basic freedoms" and in particular Article 1 which states that "every individual has the right, individually, or in association with others, to promote the protection and the implementation of human rights and basic freedoms";

Concerned by the decision dated on 27th November 2000 suspending the activities of the Ligue Tunisienne de Défense des Droits de l'Homme (LTDH), one of the oldest human rights NGOs in Africa;

Welcoming with satisfaction the recent initiatives by Tunisian authorities to address the situation.

1. **Invites** the Chairman of the African Commission on Human and Peoples' Rights to write to the President of the Republic of Tunisia to express its concerns about the situation of human rights defenders in Tunisia;
2. **Offers to send** a mission of good offices, if necessary, led by the Chairman of the Commission, in view of addressing the problem of the suspension of the Ligue Tunisienne de Défense des Droits de l'Homme.

Done in Tripoli, 7th May 2001

RESOLUTION ON THE RECENT VIOLENCE IN KABYLIA, ALGERIA

The African Commission on Human and Peoples' Rights, meeting at its 29th Ordinary Session in Tripoli, the Great Socialist People's Libyan Arab Jamahiriya, from 23rd April to 7th May 2001,

Noting the recent upsurge of violence in the Kabylia region of north-east Algeria where some 50 people are reported to have died and scores of others injured or arrested. The riots were sparked by the death of a student, Guermah Massinissa while held at a police station on 18th April 2001;

Encouraged by the announcement by President Abdelaziz Bouteflika on Monday 30 April 2001 of the establishment of a national commission of inquiry to bring light into the circumstances of the events and also the establishment of a Parliamentary Commission of Enquiry;

Mindful of its obligations in terms of the African Charter “to promote human and peoples’ rights and ensure their protection” and especially conscious of the rights in the Charter to enjoy the rights and respect to economic, social and cultural development;

Recalling its Resolution on the rights of Indigenous Populations/Communities and the establishment of a Working Group to propose appropriate mechanisms for the promotion and protection of the rights of indigenous populations/communities in terms of the Charter;

Inspired by the leadership of President Abdelaziz Bouteflika in Africa and the hopes his democratic election aroused in 1998 for an end to sectarian violence, the establishment of human rights, good governance and security as well as the end to impunity especially within the security forces;

Satisfied that Algeria presented its periodic report, which was examined at the 29th Ordinary Session in Tripoli, the Great Libyan Jamahiriya and commending this country on the measures taken to give effect to the rights, duties and freedoms enshrined in the Charter.

1. **Requests** the Chairman of the Commission to write to the Government of Algeria and convey its deep concerns of the Commission at the recent events especially as it concerns a vulnerable community;
2. **Commends** the Government of Algeria on the speedy establishment of a National Commission of Enquiry and also a Parliamentary Commission of Enquiry and seeks the assurance that those responsible for human rights violations will be brought to justice;
3. **Offers** its good offices to help resolve the human rights problems underlying the disturbances and to send a fact-finding mission to Algeria at the earliest opportunity;
4. **Sends** condolences to the families of those who died during the tragic events.

Done in Tripoli, 7th May 2001.

RESOLUTION ON FREEDOM OF EXPRESSION

The African Commission on Human and Peoples’ Rights meeting at its 29th Ordinary Session in Tripoli, the Great Socialist People's Libyan Arab Jamahiriya, from 23rd April to 7th May 2001,

Recalling Article 9 of the African Charter on Human and Peoples' Rights which guarantees the right to freedom of expression;

Recognising that freedom of expression is an essential attribute of human existence in all spheres of life and that there is now widespread international recognition of the cardinal role of freedom of expression in human progress;

Noting that freedom of expression is a potent and indispensable instrument for the creation and maintenance of a democratic society and the consolidation of development;

Concerned at the widespread violation of this right by States parties to the Charter through the harassment, arbitrary arrest and detention of journalists, victimisation of media houses deemed critical of the establishment, inadequate legal frameworks for regulating electronic media especially broadcasting, and criminal and civil laws that inhibit the right to freedom of expression;

Mindful of the potentially narrow scope of protection given by Article 9 of the African Charter on Human and Peoples' Rights;

Recognising the increasingly specialised nature of information technology and its impact on various aspects of the right to freedom of expression;

Recalling the recommendations of the Seminar on Freedom of Expression and the African Charter, it held in Johannesburg, South Africa, from 22nd to 25th November 2000;

Decides:

1. **To develop** and adopt, through a consultative process, a *Declaration of Principles on Freedom of Expression*, drawn from a comprehensive range on international standards and jurisprudence, to elaborate and expound the nature, content and extent of the right to freedom of expression provided for under Article 9 of the African Charter,
2. **To initiate** an appropriate mechanism to assist it review and monitor adherence to freedom of expression standards in general, the Declaration in particular to investigate violations and make appropriate recommendations to the Commission,
3. **To hold** periodic meetings with NGOs and African journalists to review progress in guaranteeing freedom of expression across the continent and in implementing the Declaration of Principles.

Done in Tripoli, 7th May 2001.

**RESOLUTION ON THE IMMEDIATE LIFTING OF SANCTIONS
IMPOSED ON LIBYA**

The African Commission on Human and Peoples' Rights, meeting at its 29th Ordinary Session in Tripoli, The Great Socialist People's Libyan Arab Jamahiriya, from 23rd April to 7th May 2001;

Having considered the evolution of the Lockerbie case and in particular the fact that the Government of Libya has complied fully with the resolutions of the United Nations;

Bearing in mind that the sanctions imposed on Libya has seriously affected the enjoyment by the people of Libya of the rights enshrined in the African Charter on Human and People's Rights;

Taking note of the motion on the Lockerbie affair adopted by the Assembly of the OAU Heads of State and Government, meeting at its 5th Extraordinary Session held on 1st and 2nd March 2001 in Sirte, The Great Socialist People's Libyan Arab Jamahiriya ;

Bearing in mind the relevant OAU resolutions and decisions and those of other international and regional organisations;

1. **Notes with satisfaction** the motion on the Lockerbie affair adopted by the Extraordinary Session held on the 1st and 2nd March 2001 in Sirte, the Great Socialist People's Libyan Arab Jamahiriya.
2. **Urges** the Security Council of the United Nations Organisation to consider the immediate lifting of sanctions imposed on Libya.
3. **Decides** to monitor all further aspects of the legal proceedings initiated in the Lockerbie affair in conformity with the principles of the right to a fair trial.

Done in Tripoli, 7th May 2001.

Annex V

Decisions on Communications

before the Commission

At the 28th and 29th Ordinary Sessions

97/93 John K. Modise v. Botswana

**Rapporteur: 17th Session: Commissioner Umozurike
18th Session: Commissioner Umozurike
19th Session: Commissioner Umozurike
20th Session: Commissioner Umozurike
21st Session: Commissioner Umozurike
22nd Session: Commissioner Dankwa
23rd Session: Commissioner Dankwa
24th Session: Commissioner Dankwa
25th Session: Commissioner Dankwa
26th Session: Commissioner Dankwa
27th Session: Commissioner Dankwa
28th Session: Commissioner Dankwa**

Summary of Facts

1. The Complainant is claiming the right to Botswana citizenship, under the following circumstances: his father, a Botswana citizen, immigrated to South Africa to work there. During his stay, he got married and the Complainant was born of that marriage. His mother died shortly after his birth, and he was thus brought to Botswana, where he grew up. The Complainant is therefore claiming Botswana nationality by ancestry.
2. He alleges that in 1978, he was one of the founders and leaders of an opposition party called Botswana National Front. He is of the view that it is because of his political activities that he was declared an “undesirable immigrant” in Botswana by the government.
3. On 17th October 1978, he was arrested and handed over to the South African police without being brought before a tribunal. He already had a judicial action pending before a Botswana court, regarding a temporary work permit, but with his deportation, he was unable to follow the case.
4. Having returned to Botswana, he was once again arrested and deported without trial. After his third attempt at returning, he was charged, convicted of illegal entry and declared an undesirable immigrant. He was serving a ten-month prison term and had filed an appeal when he was deported for the fourth time to South Africa, before the case was concluded.
5. Since the Complainant did not have South African nationality, he was obliged to settle in the homeland of Bophutatswana. He lived there for seven years until the government of Bophutatswana issued a deportation order against him and he found himself in the no-man’s land between Bophutatswana and Botswana, where he remained for five weeks, when he was admitted into Botswana on a humanitarian basis. He obtained a three-month entry permit, renewable at the entire discretion of the competent Ministry, until June 1995.
6. The Complainant does not and has never held a South African passport or citizenship of Bophutatswana.
7. He claims to have suffered heavy financial losses, since the government of Botswana confiscated his belongings and property. He cannot work, since he does not have the relevant permit, and he is constantly under threat of deportation. He has gone to great lengths to try to prove his Botswana nationality, and the appeal against his prison sentence is still pending. He presently has no funds to prosecute his claims in court.
8. He is asking the government to concede him his nationality by birth.

Complaint

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

Procedure:

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

10. The Commission was seized of it at its 13th Session, held in March 1993.
11. The government was notified of it on 12th April 1993 without any reaction coming from its side.
12. On 13th May 1993, a letter was addressed to Mr. John K. Modise informing him that the communication had been examined at the 13th Session, and that the Commission required some clarifications from him regarding the exhaustion of local remedies.
13. A second notification was addressed to the government on 12th August 1993, with the same result.
14. On 7th September 1993, the Complainant replied to the Secretariat's letter dated 13th May 1993 emphasising that he had exhausted the available local remedies. He added that he could no longer pursue his case before the national jurisdictions due to lack of financial resources.
15. Another notification was sent to the government on 29th January 1994, with a copy to the Complainant.
16. On 30th January 1994, the Secretary to the Commission received correspondence from the spouse of the Complainant, stressing that Mr. John K. Modise had no more money to pursue the case brought before the national jurisdiction, since he had been forced into exile and that he had suffered heavy financial losses due to the confiscation of his belongings by the Botswana Police.
17. On 22nd February 1994, the Complainant acknowledged receipt of the copy of the notification addressed by the Secretariat to the government on 29 January 1994. He also called on the Commission to consider his case, as he believed that he had exhausted all the available local remedies. A short chronicle of the case was attached to the said correspondence.
18. The Complainant wrote again on 24th October 1994 in reply to the Secretariat's correspondence dated 8th August 1994, to confirm having exhausted local remedies.
19. At its 16th Session held in October 1994, the Commission re-examined the communication and decided to defer its decision until it received information on the manner in which other human rights bodies handle cases involving Complainants who are lacking financial means.
20. At the 17th Session, the communication was declared admissible. It was considered appropriate to assign the case to the Commissioner covering Botswana to deal with under his human rights promotion activities. Consequently, responsibility was assigned to Commissioner Janneh. However, no concrete measures were taken.
21. On 20th April 1995, a correspondence was dispatched to the Complainant to inform him of the decision regarding the admissibility of the communication.
22. On 18th May 1995, a letter was received from the European Commission on Human Rights in reply to the Secretariat's request regarding the issue of financial difficulties.
23. On 26th May 1995, a correspondence was sent to the Botswana government to inform it of the decision on admissibility taken by the Commission and to request it

to consider an amicable settlement of the case. There was no response from the government of Botswana.

24. On 23rd September 1995, the Commission received a correspondence dated 15 May 1995 from the non-governmental organisation, Interights informing it that it had been designated by Mr. Modise to represent him at the next session of the Commission. Mr. Modise's letter to Interights dated 2nd December 1994 in this regard was annexed to the said correspondence.
25. The same envelope contained a second letter from Interights dated 15th May, stating that the NGO had just been informed of the decision on admissibility taken by the Commission at its 17th Session and requesting, therefore, that a formal notification of the said admissibility be addressed to it. Interights also enclosed an explanatory note on the case and the demands of the Complainant, and indicated its intention to be present at Praia, at the 18th Session, to argue the case.
26. At the 18th Session held in October 1995, the Commission heard the counsel of the Complainant, Mr. Odinkalu. It was decided to defer the decision on the merits in order to allow some time for the efforts at arranging an amicable settlement and, if necessary, the case would be re-examined at the 19th Session.
27. On 19th October 1995, the Secretariat received by fax a Note Verbale from the Ministry of Foreign Affairs of Botswana with the information that the Head of State had granted Botswana nationality to Mr. Modise, and that his certificate of nationality had been sent to him by post on 26th June 1995.
28. On 30th November 1995, a copy of this Note Verbale was dispatched to Mr. Odinkalu with a letter informing him that if the Commission did not receive any contrary information before its next session, the granting of nationality would be considered an amicable settlement.
29. On 14th December 1995, the Secretariat received a letter from Mr. Odinkalu, counsel to the Complainant, indicating that he did not consider the granting of nationality as an amicable settlement and asking the Commission to continue the examination of the case.
30. On 28th December 1995, the Secretariat received correspondence from Commissioner Dankwa asking for copies of all documentation relevant to the case for his use during a mission to Botswana.
31. On 25th January 1996, the Secretariat received faxed correspondence from Mr. Odinkalu indicating his intention to send some supplementary information to the Commission.
32. On 13th February 1996, the Secretariat received a letter from Commissioner Dankwa asking for copies of certain pages of Mr. Modise's passport. The Secretariat forwarded them to him by fax.
33. On 23rd February 1996, the Secretariat sent a fax message to Commissioner Dankwa inquiring about the results of his mission to Botswana.

34. On 28th February 1996, Mr. Odinkalu, counsel for the Complainant presented an additional note describing the special conditions of the nationality by naturalisation granted to Mr. Modise.
35. On 1st March 1996, the Secretariat received a fax message from Commissioner Dankwa informing it that he had not been able to carry out his mission to Botswana before the 19th Session.
36. During the 19th Session, the communication was not examined.
37. On 8th May 1996, a letter was sent to the Botswana government, acknowledging receipt of its Note Verbale of 19th October 1995, and informing it that the communication was not examined at the 19th Session, but that it would be done at the 20th Session slated for October 1996.
38. On 8th May 1996, a letter was sent to the Complainant giving him the same information as above. A copy of the Note Verbale addressed to the Commission by the government on 19th October 1995 was attached to the letter.
39. On 9th October 1996, the Secretariat of the Commission received a fax message from Interights mainly to transmit a copy of Mr. Modise's letter stating that all domestic remedies had been exhausted, and that even though the government of Botswana had promised Commissioner Dankwa that Mr. Modise would be issued with a passport, his application had still not been approved by the competent authorities.
40. On 10th October 1996, the Secretariat acknowledged receipt of Interights' correspondence.
41. At its 20th Session, held in Grand Bay, Mauritius in October 1996, the Commission heard a presentation made by Interights. Following the hearing, it decided to defer a decision on the merits to its next session in order to give more time to explore the avenue of an amicable settlement.
42. On 12th December 1996, the Secretariat addressed a Note Verbale to that effect to the government.
43. On 12th December 1996, the Secretariat addressed a letter to that effect to Interights.
44. At its 21st Session in April 1997, the Commission decided to close the case, by considering that Mr. Modise's naturalisation constituted an amicable settlement of the matter.
45. On 11th June 1997, the Secretariat notified the Complainant, the State Party and Counsel to the Complainant.
46. On 16th June 1997, the Secretariat received a fax message from Interights, indicating that it was not satisfied with the Commission's decision and that it was consequently calling for the matter to be reopened.
47. On 19th June 1997, the Secretariat acknowledged receipt of Interights' letter of 16th June 1997, while also explaining the decision taken by the Commission.

48. On 26th June 1997, a letter was written to Mr. Modise on the subject, with a copy to Interights.
49. On 18th July 1997, the Secretariat received a letter from Interights subtitled “Reopening of Communication 97/93” with a nine-page explanatory note.
50. On 29th July 1997, the Secretariat wrote a letter to Commissioner Dankwa, with Interights’ explanatory note attached, calling for his opinion as rapporteur on the communication.
51. At its 22nd Session, held from 2nd to 11th November 1997, the Commission decided to accede to Interights’ request, to reopen the case and therefore to re-examine the reasons that led its previous decision which considered that the communication had been closed on the basis of an amicable settlement. The Commission further requested Botswana to provide it with information on the terms of the settlement reached between the two parties, the directives regarding its implementation, as well as the type of citizenship granted to Mr. Modise.
52. On 18th November 1997, the Secretariat wrote to the parties to inform them of the Commission’s decision.
53. On 11th February 1998, the Secretariat addressed a reminder Note Verbale to Botswana’s Ministry of Foreign Affairs.
54. By the 23rd Session, the government of Botswana had not yet reacted to the above-mentioned request. The Commission consequently requested the Secretariat to remind the government about the request.
55. On 10th August 1998, the Respondent State responded to the request.
56. At its 24th Ordinary Session held from 22nd to 31st October 1998, the Commission heard Mr. Botsweletse Kingsley Sebele, Secretary General of the Botswana Ministry of Labour and Home Affairs. He stated that the laws of his country could not give Mr. Modise any status other than that which he has already been granted, adding that Mr. Modise had obstinately refused to co-operate with the government of Botswana. The Commission thereafter deferred a decision on the merits to its 25th Session.
57. On 10th November 1998, the Secretariat wrote to the parties concerned informing them of the Commission’s decision.
58. By two Note Verbales dated 6th October 1998 and 9th December 1998, the Government of Botswana reiterated its position as contained in its earlier Note of 27th May 1998.
59. On 16th April 1999, Interights, wrote to the Commission requesting a deferral of the hearing of the case to the 26th ordinary session due to Mr. Odinkalu’s illness.
60. At the 25th ordinary session of the Commission held in Bujumbura, Burundi, the Commission deferred hearing of the communication to its 26th ordinary session.
61. On 6th July 1999, the Secretariat of the Commission wrote letters to the parties informing them of the Commission’s decision.

62. On 29th September 1999, the Government of Botswana replied through fax confirming its position contained in its Note Verbale of 9th December 1998, and requesting that the information therein be brought to the attention of the Commissioners and the Legal representatives of the Complainant.
63. On 1st October 1999, the Secretariat of the Commission replied to the said Note Verbale. A copy of the government's response was forwarded to Interights for information and necessary action.
64. On 20th October 1999, Interights sent to the Secretariat of the Commission its written response to the observations of the government of Botswana.
65. At its 26th ordinary session held in Kigali, Rwanda, the Commission reviewed the case and noted that the government of Botswana had indicated that if it did not hear anything contrary to its position, it would consider the case closed. Since Interights had submitted a brief to the contrary, the Commission, therefore, decided to bring it to the attention of the government of Botswana. A final decision on the merits was deferred to the next ordinary session.
66. The above decision was conveyed to parties on 18th January 2000. A copy of Interights' brief was attached to the letter sent to the government of Botswana. No response has been received from the competent authorities of Botswana.
67. At the 27th ordinary session of the Commission held in Algeria from 27th April to 11th May 2000, the Commission examined the case and deferred its further consideration to the next session.
68. Parties were informed of the said decision on 12th July 2000.

LAW

Admissibility

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

Merits

State Party's Response

70. The Respondent State later responded to the Commission's request on the terms of the settlement reached with the Complainant. It submitted, among others, that Mr. Modise had been naturalised as a Botswana citizen on 28th February 1995. By virtue of that, he enjoyed all the rights inherent to his status as provided in chapter II of the country's constitution. Furthermore, a document attached to the note from the Respondent State contained the relevant constitutional provisions regarding Botswana citizenship as at the time of the country's independence. The document provides explanatory details on the birth

and parentage of the Complainant, who was born in the territory of what was then the Union of South Africa (which became the Republic of South Africa in 1961), of a father who had the status of a protected person of the British crown, though originating from the protectorate of Bechuanaland (present day Botswana). The Respondent State points out that Mr. Modise and his counsel had probably innocently misunderstood and misinterpreted section 20(2) of the Botswana constitution. The Respondent State avers that the place of birth of an individual immediately confers its nationality on that person. This nationality-by-birth may later be rejected or given up by that person, his parents or legal custodian. To avoid a child being born stateless, the law operates in such a way that the place of birth confers its nationality to an individual. It is not necessary to take any legal steps to guarantee that nationality. Section 20(2) of the constitution concerns those individuals born outside the protectorate of Bechuanaland and who were at the time of their birth either subjects of Her Majesty or crown protected persons and whose fathers had acquired Botswana citizenship in compliance with the provisions of section 20(1). John K. Modise could have benefited from the provisions of section 20(1) of the constitution if his father, born in the protectorate territory and having the status of a crown protected person were alive at the time of Botswana's independence. John K. Modise does not meet the conditions of section 20(2) because, having been born in South Africa, he is by that fact a South African citizen by simple application of the law and without him having to take any legal steps to prove his nationality. Hence, in 1966, he was not a subject of Her Britannic Majesty and of her colonies, nor a protected person of the English crown. South Africa was not, in 1966, a British colony. Consequently, he did not meet the conditions required for acquiring Botswana nationality under section 20(2).

71. Section 23(1) concerns the case of those individuals who found themselves in a similar situation to that of Mr. Modise: in the sense that it provided the possibility of acquiring Botswana nationality to those persons whose fathers had acquired that nationality in compliance with section 20(1); but even the children of such persons were excluded in the light of the provisions of section 20(2). Since Mr. Modise, by virtue of the legal provisions, could not lay claim to the nationality of the new State of Botswana either by birth or by parentage [section 20(2)], the law gave him the possibility of choosing that nationality by naturalisation, section 23(1). This text provides that all those who had reached the age of majority should apply for their naturalisation before 1 October 1968. It seems that Mr. Modise who was 33 years old as of that date had not taken advantage of that possibility which was open to him for a period of two years. This explains his present difficulties, for since he had not taken the steps necessary for his naturalisation, in the eyes of the law he was considered as not being interested.
72. The argument of Mr. Modise and his counsel that he was a Botswana citizen by birth and by parentage does indeed seem tenuous. In terms of the legal provisions in force in September 1966, he could not lay claim to the said nationality. He was born in South Africa and not in the protectorate of Bechuanaland. He could not claim Botswana nationality by parentage because he was explicitly excluded therefrom by section 20(2). The proposition that he has never claimed any other nationality is entirely immaterial – for he did not have any reason to do so. Having been born in South Africa, he automatically enjoyed the nationality of that country. That automatically disqualified him from holding

Botswana nationality in compliance with section 20(2). He could, however, by virtue of the provisions of section 23(1), have opted for the said nationality, but he did not. The State of Botswana has offered all and sundry the possibility of making a conscious choice between keeping their nationality-by-birth and naturalisation as citizen of the new State of Botswana. Mr. John Modise could not, in this regard, hide behind the excuse of ignorance, because no one is expected to be ignorant of the law.

73. In reaction to the above claims by the Respondent State, the Complainant's legal representative submitted that such claims contained several adverse claims of facts, law, and of mixed facts and law that were untrue, self-contradictory and contested.
74. He contended the claim that when Mr. Modise was deported to South Africa, the authorities there accepted him as a citizen. He pointed out that Mr. Modise was first deported to South Africa from Botswana on 17 October 1978, pursuant to a directive issued on 16 October 1978 by the Permanent Secretary in the Office of the President of the Respondent State. Upon returning to Botswana four days later on 21 October 1978, he was arrested and charged with re-entering Botswana, while being a prohibited immigrant.
75. The question as to whether or not South Africa accepted Mr. Modise as a national was directly addressed in the decision of Hayfron-Benjamin (Chief Justice) in the appeal of Mr. Modise against his conviction in the case of *John K. Modise v The State*, decided by the High Court of the Republic of Botswana on 20th September 1979. The relevant part of the said decision reads:

The acceptance warrant, Exhibit P2, was issued at the Kopfontein Border Post and was dated 18th December 1978, i.e. two months after the Immigration Officer says he handed the accused over to the South African authorities. Cross-examination of the witness (the Immigration Officer, testifying for the Prosecution) disclosed that he was mistaken as to which document the South African authorities had signed that day.

He said: " the document P2, the acceptance warrant, is not the one which was signed by the Immigration Post in South Africa at the time I handed the accused to the border post..." The prosecution, therefore, closed its case without clearing up a matter, which apart from any other considerations, would be a factor in the assessment of the sentence to be imposed. If the South African authorities were only prepared to accept the appellant in December, the indications are that he was bundled out of the country before the necessary preparation for his acceptance had been completed and before the accused, who had been in the country (Botswana) from infancy had settled his affairs here.

76. From the above therefore, he claims that this decision, which is still uncontested, shows that the government of Botswana has never shown and was unable to show that Mr. Modise had indeed been accepted by the South African authorities as a national of South Africa. On the contrary, he submits that South Africa did not accept Mr. Modise, but that Mr. Modise was then banished to the defunct South

African Homeland of Bophuthatswana, whose then government by a letter to Mr. Modise (Ref. No. 4/6/2/8/818/78) of 6 October 1986 wrote that:

Modise does not appear in the population register of the Citizens of Bophuthatswana. And that the subject of citizenship is a matter between you (Mr. Modise) and the Botswana government.

To validate their point, in the same year, the then government of the defunct Homeland of Bophuthatswana deported Mr. Modise back to Botswana.

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

He submits that it is impossible to reconcile the claim that the Complainant registered as a citizen under special circumstances at the direction of the President of Botswana with the claim by Mr. B. K. Sebele in his letter aforesaid that "There is no citizenship that can be offered or granted to Mr. Modise". He attested that Mr. Modise had reported that sometimes in 1998, immigration officials in Lobatse, Botswana visited him and invited him to sign a document to facilitate the renewal of his residence permit in Botswana that had expired. When he tried to verify the document, he was warned that he risked immediate and prompt deportation unless he signed the document, whereupon he promptly signed. Although he is physically in Botswana, he has not received any documentation or indication on his current nationality status from the Respondent State.

78. He disputes as factually untrue the claim that Mr. Modise is responsible for his failure to enjoy his rights as a citizen of Botswana, by refusing to produce the necessary documents as proof of his citizenship. In any case, he points out that their production would not remedy the violations asserted by him in this case.
79. On the issue that Mr. Modise could not and did not become a citizen by descent under the repealed section 20(2) of the Constitution of Botswana, because he was neither a British Protected Person nor a citizen of the United Kingdom and colonies on 29th September 1966, the counsel submits as follows:

The repealed section 20 of the Constitution of Botswana referred to in the letter of Mr. B. K. Sebele provides:

- (1) ***Every person who, having been in the former Protectorate of Bechuanaland, is on 29th September, 1966, a citizen of the United Kingdom and Colonies or a British Protected Person, shall become a citizen of Botswana on 30th September 1966.***
- (2) ***Every person who having been born outside the former Protectorate of Bechuanaland, is, on 29th September, 1966, a citizen of the United Kingdom and Colonies or a British protected person, and is not a citizen of any other country, shall, if his father becomes, or would, but***

for his death have become a citizen of Botswana in accordance with the provisions of sub-section (1) of this section, become a citizen of Botswana on 30th September, 1966.

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

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

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

A person who was a British subject immediately before the date of the commencement of this Act shall on that date become a citizen of the United Kingdom and Colonies if he possesses any of the following qualification, that is to say:

- (a) That he was born within the territories comprised at the commencement of this Act in the United Kingdom and Colonies, and would have been such a citizen if Section four of this Act had been in force at the time of his birth;*
- (b) That he is a person naturalised in the United Kingdom and Colonies;*
- (c) That he became a British subject by reason of the annexation of any territory included at the commencement of this Act in the United Kingdom and Colonies;*

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

September 1966. The relevant provision of Section 1 of the British Nationality Act provides:

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

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

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

83. While the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards. In order for the Commission to determine whether there have been violations of the Charter as alleged by the Complainant, it is incumbent on it to assess the nationality of the Complainant based on the facts presented before it. The current circumstances of the Complainant are a result of a policy decision taken by the Botswana government.

84. The Complainant argues that he has been unjustly deprived of Botswana citizenship. In the brief submitted by his counsel, it is claimed that the Complainant was born in South Africa of Samuel Remaphoi Modise (father) and Elizabeth Ikaneng Modise (mother) from Goo-Modultwa ward in Kanye of the Bangwaketse in the former Protectorate of Bechuanaland (now Botswana). His father went to work in South Africa as a migrant worker. These facts are not contested by the Respondent State

(see a copy of a document outlining Botswana Citizenship Law attached to the Note Verbale of 27 May 1998). In fact, paragraph 3(a) and (b) of the said document emphatically assert concerning John Modise's father thus: "He was therefore a British Protected person...At all times he remained a British Protected person" (see also paragraph 6 of the said document). Paragraph 3(d) and (e) of the said document assert that John Modise's mother died when he was three months old and his father brought him to the then Bechuanaland Protectorate (Botswana) to ensure that relatives take care of him; while his boyhood days are outlined in paragraph 3(e) to the effect that John subsequently grew up in the Protectorate and regularly travelled in and out of the Protectorate. The attainment of independence by Botswana on 30th September 1966 changed things and a new citizenship law was incorporated into the new Constitution. The State Party reproduced some of the relevant provisions of the said Constitution. They are sections 20(1) and (2) and 23(1).

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

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

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

86. Section 20(1) of the said Constitution is not applicable to this case, for the simple reason that Mr. John Modise was not born in the former Protectorate of Bechuanaland. Section 20(2) of the Constitution is the applicable law in this regard, since Mr. John Modise was born outside the former Protectorate of Bechuanaland of a British Protected person (his father). Had Mr. Samuel Remaphoi Modise lived on 30th September 1966, he would, of course, have been a citizen of Botswana by virtue of the provision of sub-section (1) of this section. The Respondent State does not dispute this fact. Following the clear wordings of the sub-section, Mr. John Modise having been born outside the former Protectorate of Bechuanaland of a British Protected person, would have become a citizen of Botswana but for his father's death. Mr. John Modise would therefore have become a citizen of Botswana by birth by the operation of this sub-section. The government's position, stated in its brief accompanying its Note Verbale of 27th May 1998, and Mr. B. K. Sebele's statement

contained in his letter of 9th December 1998 (Ref: CHA 4/19X(88)PS), that Mr. John Modise is not covered by section 20(2) of the Constitution of Botswana are neither convincing nor satisfactory. The Respondent State's Note Verbale referred to above assigns South African citizenship to Modise as at 30th September 1966 without proof. Nothing is produced about South African law that confers citizenship on Modise. It should not be assumed that it is a universal principle that a person automatically acquires citizenship of the place of birth. It is not Botswana law that determines South African law.

87. In any event, evidence abounds that the Complainant, Mr. John Modise is not and has never been accepted in South Africa as a citizen. If that had happened, Mr. Modise would not have suffered the fate of being deported four times. The refusal of South Africa to accept him as its citizen forced Mr. Modise to live for eight years in the "homeland" of Bophuthatswana, and then for another seven years in "No Man's Land", a border strip between the former South African Homeland of Bophuthatswana and Botswana. The then government of the defunct Homeland of Bophuthatswana deported Mr. Modise back to Botswana (**see paragraph 75 and 76 above**).
88. John Modise's father was a Tswana at the time of independence, 30th September 1966 and his son, the Complainant not having been shown to have any other citizenship, acquired Botswana citizenship by virtue of section 20(2) of the Constitution of Botswana in force at the time. The denial of this right is in violation of Articles 3 (2) and 5 of the Charter. Article 3(2) provides:

Every individual shall be entitled to equal protection of the law

Article 5 on the other hand provides:

Every individual shall have the right to the respect ...to the recognition of his legal status

Having arrived at this, it is therefore not necessary to consider the other provisions of the Constitution cited by the State Party.

89. The Commission takes notice of the fact that the Complainant, Mr. John Modise as indicated in the above judgement, had lived in the Republic of Botswana from his infancy. Mr. John Modise had also worked in Botswana and until 1978, without being subjected to the rigours of obtaining necessary nationality documents applicable to citizens by registration, whom the government claims he is. The Commission also takes notice that the government of Botswana, without acknowledging any responsibility did take some steps to remedy the Complainant's situation by granting him a certificate of citizenship in June 1995, under section 9(2) of the Citizenship Act of Botswana.
90. Deportation or expulsion has serious implications on other fundamental rights of the victim, and in some instances, the relatives. Having decided on the issue of Modise's citizenship, the Commission would now advert its mind to the other claims made by the Complainant, in order to determine whether his rights guaranteed under the Charter have been violated.

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

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly...torture, cruel, inhuman and degrading punishment and treatment shall be prohibited.

92. The deportation also deprived him of his family, and his family, of his support. The Commission finds this in violation of the Complainant's right to family life enshrined under Article 18(1) of the Charter. Article 18(1) provides:

The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

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

- (1) Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.***
- (2) Every individual shall have the right to leave any country, including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality***

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

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

95. The Complainant alleges that in 1978, he was one of the founders and leaders of an opposition party, the Botswana National Front. He alleges further that it was as a result of his political activities that he was declared an "undesirable immigrant" in Botswana by the government. He contends that citizenship by registration, which the Respondent government granted to him is in several ways inferior to citizenship by birth, which he deserves as of right. One of such consequences is that he cannot vie for the highest elected political office in the country, that is, the presidency of the Republic of Botswana. This fact has been admitted by B. K. Sebele, Permanent Secretary, Ministry of Labour and Home Affairs of the Respondent State to the effect that "Except for being barred to be elected or becoming President of Botswana, he enjoyed all other rights enjoyed by a citizen of Botswana." (see paragraph 2, page 3 of Mr. Sebele's letter of 9 December 1998)
96. While this may not seriously affect most individuals, it is apparent that for Mr. Modise such is a legal disability of grave consequence. Considering the fact that his first deportation came soon after he founded an opposition political party, it suggests a pattern of action designed to hamper his political participation. When taken together with the above action, granting the Complainant citizenship by registration has, therefore, gravely deprived him of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives. It also constitutes a denial of his right of equal access to the public service of his country guaranteed under Article 13(2) of the Charter. Article 13 of the Charter provides:
- (1) *Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law*
 - (2) *Every person shall have the right of equal access to the public service of his country.*

For the above reasons, the Commission

Finds the Republic of Botswana in violation of Articles 3(2), 5, 12(1) and (2), 13(1) and (2), 14 and 18(1) of the African Charter

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

Done at the 28th ordinary session held in Cotonou, Benin

from 23rd October to 6th November 2000

223/98 Forum of Conscience / Sierra Leone

Rapporteur:

25th Session: Commissioner Dankwa
26th Session: Commissioner Dankwa
27th Session: Commissioner Dankwa
28th Session: Commissioner Dankwa

Summary of Facts:

1. The complaint is submitted by the Forum of Conscience, a Sierra Leonian Human Rights NGO on behalf of 24 soldiers who were executed on 19th October 1998 in Freetown, Sierra Leone.
2. The Complainant alleges that the 24 soldiers were tried and sentenced to death by a Court Martial for their alleged roles in the coup that overthrew the elected Government of President Tijan Kabah.
3. The communication alleges further that the trial of the soldiers by the Court Martial was flawed in law and in violation of Sierra Leone's obligation under the African Charter.
4. It is also alleged that the Court Martial which tried and convicted the above mentioned victims allowed no right of appeal against conviction or sentence to a higher tribunal and therefore in breach of Article 7(1) of the African Charter on Human and Peoples' Rights.
5. The Complainant contends that the public execution of the 24 soldiers on 19th October 1998 after being denied right of appeal to a higher tribunal also amounts to an arbitrary deprivation of the right to life contrary to Article 4 of the African Charter.

Complaint:

The Complainant alleges violation of articles 1, 4 and 7 (1) (a) and 7(1)(d) of the African Charter.

Procedure:

6. The communication was received at the Secretariat on 24th October 1998.
7. At its 25th ordinary session held in Bujumbura, Burundi, the Commission postponed consideration of the communication to its 26th ordinary session.
8. On 11th May 1999, the Secretariat of the Commission notified the parties of this decision.
9. At its 26th ordinary session held in Kigali, Rwanda, the Commission decided to be seized of this communication.
10. Between 14th and 19th February 2000 when the Commission's delegation visited Sierra Leone on a promotional mission, the subject of the complaint was taken up with relevant government officials, including the Attorney General of Sierra Leone.
11. On 2nd March 2000, the Secretariat of the Commission informed the parties of the decision taken by the Commission at its 26th ordinary session.

12. At its 27th ordinary session held in Algeria, the Commission examined the case and declared it admissible. It requested the parties to furnish it with arguments on the merits of the case.
13. The above decision was communicated to the parties on 12th July 2000.

LAW
Admissibility

14. The Commission takes note of the fact that the complaint was filed on behalf of people who were already executed. In this regard, the Commission held that there were no local remedies for the Complainant to exhaust. Further that even if such possibility had existed, the execution of the victims had completely foreclosed such a remedy.

Merits:

15. The Complainant alleges that the decision of the court-martial is not subject to appeal and is therefore a violation of the victims' rights to fair trial.
16. The facts as submitted by the Complainant disclose that the 24 soldiers were executed publicly after being deprived of the right of appeal to a higher tribunal. In its Resolution on the Right to Fair Trial and Legal Assistance in Africa, the Commission had, in adopting the Dakar Declaration and Recommendations, noted thus:
- "In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards."***
17. The Commission notes that the trial in issue was that of a purely military nature, i.e. for their alleged roles in the coup which overthrew the elected Government. The Commission is however constrained to hold that the denial of the victim's right of appeal to competent national organs in a serious offence as this falls short of the requirement of the respect for fair trial standards expected of such courts. The execution of the 24 soldiers without the right of appeal is therefore a violation of article 7(1)(a) of the Charter. This is more serious given the fact that the said violation is irreversible.

Article 7(1)(a) of the Charter states:

An individual shall have... the right to appeal to competent national organs against acts violating his fundamental rights...

18. The Complainant alleges a violation of **Article 4** of the African Charter on Human and Peoples' Rights which provides that:

Human beings are inviolable. Every human being shall be entitled to respect for his life... No one may be arbitrarily deprived of this right.

19. The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life. Having found above that the trial of the 24 soldiers constituted a breach of due process of law as guaranteed under Article 7(1)(a) of the Charter, the Commission consequently finds their execution an arbitrary deprivation of their rights to life provided for in Article 4 of the Charter.

Although this process cannot bring the victims back to life, it does not exonerate the government of Sierra Leone from its obligations under the Charter.

20. The Commission notes the failure of the competent authorities of the Republic of Sierra Leone to respond to its request for additional information and arguments on the admissibility and merits of the case. It is noted that the Minister of Justice and Attorney General explained to the Commission's mission referred to above that the regulations of the military did not allow for the right of appeal. However, before the Commission, the African Charter is the yardstick for determining violations. The rules and regulations governing court martial, to the extent that they do not allow the right of appeal offend the Charter. But it is noted with satisfaction that the law has been amended, subsequent to the mission to Sierra Leone, to bring it into conformity with the Charter.

For the above reasons, the Commission:

Finds the Government of Sierra Leone in violation of Articles 4 and 7(1)(a) of the African Charter on Human and Peoples' Rights.

**Done at the 28th Ordinary Session held in Cotonou, Benin
from 23rd October to 6th November 2000**

224/98 Media Rights Agenda / Nigeria

Rapporteur:

25th Ordinary Session: Commissioner Ben-Salem

26th Ordinary Session: Commissioner Ben-Salem

27th Ordinary Session: Commissioner Ben-Salem

28th Ordinary Session: Commissioner Ben-Salem

Summary of Facts:

1. The communication, which was sent through e-mail is dated 25th May 1998, and was received at the Secretariat on 26th May 1998
2. The Complaint is filed by Media Rights Agenda, a Nigerian Human Rights NGO based in Lagos on behalf of Niran Malaolu, Editor of an independent Nigerian daily Newspaper, The Diet.
3. The author complains that Mr. Niran Malaolu was arrested together with three other staff of the Newspaper by armed soldiers at the editorial offices of the Diet Newspaper in Lagos on December 28th, 1997.
4. Neither Niran Malaolu nor his three colleagues were informed of the reasons for their arrest or shown a warrant of arrest.
5. The three other colleagues who were arrested along with Malaolu were later released.
6. Niran Malaolu continued to be held without charges until 14th February 1998 when he was arraigned before a Special Military Tribunal for his alleged involvement in a coup.
7. Throughout the period of his incarceration, Niran Malaolu was not allowed access to his lawyer, doctor or family members.
8. On 28th April 1998, after a secret trial, Niran Malaolu was found guilty by the tribunal of the charge of concealment of treason and sentenced to life imprisonment.
9. The Complainant further alleges that Niran Malaolu's alleged involvement in the coup is connected with the news stories published by his Newspaper on the coup plot involving the then Chief of General Staff, Lt. General Oladipo Diya, as well as other military officers and civilians who have also been convicted by the tribunal and given sentences ranging from prison terms to death by firing squad.
10. One of such stories was an article entitled "The Military Rumbles Again", which was published in the Sunday Diet of 28th December 1997 based upon the announcement by the Military Government of the alleged coup plot it claims to have uncovered.
11. Further, the Complainant alleges that Niran Malaolu was denied the right to be defended by lawyers of his choice, and instead, assigned a military lawyer by the tribunal in contravention of the right to fair hearing.
12. The Special Military Tribunal which tried Niran Malaolu was neither competent, independent nor impartial in that members of the tribunal were hand-picked by the Head of State, General Sani Abacha, and the Provisional Ruling Council (PRC) against whom the alleged offence was committed. Besides, the President of the tribunal, Major-General Victor Malu is also a member of the PRC, which is

empowered by the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, to confirm the death sentences passed by the tribunal. These are alleged to be in violation of the rules of natural justice and, in particular, article 7 (b) of the Charter.

13. The arraignment and trial of Niran Malaolu, a civilian before the Special Military Tribunal using special procedures is a breach of Principle 5 of the United Nations Principles on the Independence of the Judiciary and article 7 of the Charter.
14. The Complainant alleges further that under the provisions of the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, which established the tribunal that tried and convicted the accused, the right of appeal to a higher judicial authority is completely extinguished and those convicted may only appeal to the PRC, which composition and interests are as indicated in paragraph 12 above.
15. The Author also contends that the trial of Niran Malaolu in camera was a violation of recognised international human rights standards, to wit: the right to a fair and public hearing.
16. Finally, that the arrest, detention, arraignment, trial, conviction and sentence of Malaolu were in grave breaches of the norms of fair trial as guaranteed in the Charter.

Complaint

17. The Author alleges that the following articles of the African Charter on Human and Peoples' Rights have been violated:
Articles 6, 7, 9 and 26.

Procedure:

18. At its 25th ordinary session held in Bujumbura, Burundi, the Commission decided to be seized of the communication, and requested the Secretariat to notify the Nigerian Government. It also requested the Secretariat to submit an opinion on the admissibility of the communication, particularly in accordance with Article 56(7) of the Charter, vis-à-vis Nigeria's current political situation.
19. On 19th August 1999, the Secretariat of the Commission notified the parties of this decision.
20. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit written arguments on the merit of the case.
21. On 17th January 2000, the Secretariat notified parties of the above decision.
22. On 17th February 2000, the Secretariat received a Note Verbale from the High Commission of the Federal Republic of Nigeria in Banjul, referring to the above Note Verbale and requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare for appropriate responses to the alleged violations:
 - a) The Draft Agenda for the 27th ordinary session and the letter of invitation to the session from the Secretariat;

- b) A copy of the complaint that was attached to the Secretariat's Note;
 - c) A copy of the Report of the 26th ordinary session
23. Further to the above request, the Secretariat of the Commission on 8th March 2000, forwarded all the documents as requested, except the Report of the 26th ordinary session, together with a copy of the summary and status of all pending communications against Nigeria, a copy each of the three communications (*Nos. 218/98, 224/98 and 225/98*) as submitted by their authors, and a copy of the written response of the Complainant on the merits of this communication.
24. At its 27th ordinary session held in Algeria, the Commission reviewed the case and postponed its further consideration to the next session to enable the government of Nigeria respond to its request for arguments on the merits of the case.
25. On 31st May 2000, the Secretariat received a letter from the Complainant inquiring about the decision of the Commission at the 27th ordinary session.
26. The above decision was communicated to parties on 6th July 2000. The Secretariat also acknowledged receipt of the Complainant's letter of 31st May 2000.
27. On 27th September 2000, the Secretariat received a response from the High Commission of the Respondent State in the Gambia intended to be arguments on the merits of communications 224/98 and 225/98. The facts therein however focused on the former communication.
28. On 3rd October 2000, the Secretariat of the Commission acknowledged receipt of Note Verbale and indicated the discrepancy. Also, a copy of the submission was forwarded to the Complainant for its observations.
29. During the session of the Commission in Benin, the Respondent State submitted additional arguments on the matter.

State Party's Response

30. The Government of Nigeria contends that the trial was conducted under a law which was validly enacted by the competent authority at that time. The Treason and Other Offences (Special Military Tribunal) Act, Cap 444 of the Laws of the Federation of Nigeria, 1990 under which Malaolu was tried arose from the ashes of the Treason and Other Offences (Special Military Tribunal) Decree No.1 of 1986 enacted by the Military government headed by General Ibrahim Babangida (Rtd.). Malaolu was, therefore charged, tried, convicted and sentenced to life imprisonment in accordance with the provisions of a known law.
31. The Government argues that Malaolu was tried along with a number of people accused of involvement in alleged plot to overthrow the late Gen. Sani Abacha. It asserts that without going into the merits or demerits of the trial, it was not an ostensible case of victimisation against Malaolu or his profession. Indeed, one or two other journalists were also sentenced to imprisonment at the same trial.
32. It claims that the whole episode took place during a prolonged military regime. It is well known all over the world that military regimes are abnormal regimes and a

painful aberration. There was no way of controlling any wanton acts of abuse of fundamental rights by a military junta determined to stay in power at all costs, no matter whose ox was gored.

33. In respect of the allegation that the trial was not fair, it argued that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc.
34. The government of Nigeria affirms and reiterates its capacity and determination to defend and promote the rights of its citizens and intends to provide effective and adequate representation at the hearing of the case.

Additional Response by State Party

35. Mr. Malaolu was arrested, detained, tried and convicted under an existing legislation made by a “legitimate” military administration, which was imposed on the people of Nigeria. Be that as it may, the military regime of General Abdulsalami Abubakar, caused Mr. Malaolu to be granted pardon and he can institute an action in the ordinary courts on violation of his rights and also petition the Judicial Commission of Inquiry of Human Rights violations. Meanwhile, the obnoxious enactment has been repealed.

LAW

Admissibility

36. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of article 56(7) of the Charter in view of the prevailing political situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well established principle of international law, a new government inherits the previous government’s international obligations, including responsibility for the previous government’s misdeeds (see *Krishna Achutan and Amnesty International / Malawi, communications 62/92, 68/92 and 78/92*).
37. The commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (see *communications 27/89, 46/91 and 99/93*). Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position still remains that the responsibility of the present government of Nigeria would still be engaged for acts of human rights violations which were perpetrated by its predecessors.
38. Furthermore, the Commission noted that although Nigeria is under a democratically elected government, the new constitution provides in its section 6(6)(d) that no legal action can be brought to challenge ‘any existing law made on or after 15 January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law’.

39. For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

40. The Complainant alleges that the arrest and subsequent detention of Malaolu was arbitrary as he was neither shown any warrant of arrest nor informed of the offences for which he was arrested. Further, that Malaolu was arrested by armed soldiers from the Directorate of Military Intelligence at his office on 28 December 1997 and detained incommunicado at a military facility in Lagos until he was moved to Jos, where his trial took place.

41. This, it is contended, is in contravention of Article 6 of the African Charter on Human and Peoples' Rights. The said article provides *inter alia*:

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

42. Further to this, the Complainant alleges that until 14 February 1998 (that is, about two months after his arrest) when he was arraigned before a Special Military Tribunal for his alleged involvement in a coup, Mr. Malaolu was neither informed of the reasons for his arrest nor of any charges against him.

43. In its Resolution on the Right to Recourse Procedure and Fair Trial, the Commission had, in expounding on the guarantees of the right to fair trial under the Charter observed thus:

... the right to fair trial includes, among other things, the following:
(b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;

44. The failure and/or negligence of the security agents who arrested the convicted person to comply with these requirements is therefore a violation of the right to fair trial as guaranteed under Article 7 of the Charter.

45. Complainant alleges a violation of article 7 (1) (a) of the African Charter on Human and Peoples' Rights which states:

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

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

46. Complainant contends that the decision of the Tribunal which tried and convicted Malaolu is not subject to appeal, but confirmation by the Provisional Ruling Council,

the composition of which is clearly partisan. Non-compliance of the competent authorities of Nigeria to this requirement is in breach of the provision of Article 7(1)(a) of the Charter.

47. Complainant alleges a violation of article 7(1) (b) of the Charter which provides that:

Every individual shall have ...the right to be presumed innocent until proven guilty by a competent court or tribunal

The Complainant alleges in this respect that prior to the setting up of the tribunal, the Military Government of Nigeria organised intense pre-trial publicity to persuade members of the public that a coup plot had occurred and that those arrested in connection with it were guilty of treason. In this regard, it alleges further, any possible claim to national security in excluding members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore in breach of the right to fair trial, particularly, the right to presumption of innocence.

48. The Government has not contested the veracity of the Complainant's submissions. In this circumstance, the Commission is obliged to accept this as the facts of the case and therefore finds the Government of Nigeria in violation of Article 7(1)(b) of the Charter.

49. The Complainant alleges that the exclusion of the members of the public and the press from the actual trial by the tribunal was not justified, and therefore in breach of the right to fair trial.

50. The Government argues that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc.

51. Neither the African Charter nor the Commission's Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to public trial. That notwithstanding, the Commission is empowered by Articles 60 and 61 of the Charter to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine. Invoking these provisions, the Commission calls in aid General Comment 13 of the UN Human Rights Committee on the right to fair trial. Paragraph 6 of the said Comment states:

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons...

52. The exceptional circumstances under the International Covenant on Civil and Political Rights, which the above Committee monitors are for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The Commission notes that these circumstances are exhaustive, as indicated by the use of the phrase "apart from such exceptional circumstances"
53. The Government has only presented an omnibus statement in its defence to the effect that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc. It has not specifically indicated which of these circumstances prompted it to exclude the public from such trial. The Commission therefore considers the argument not sufficient enough to avail the Government of Nigeria such defence.
54. Considering the fact that as alleged by the Complainant, prior to the setting up of the tribunal, the Government had organised intense pre-trial publicity to persuade members of the public of the occurrence of a coup and the involvement of those arrested in connection to it, the Commission is constrained to find the exclusion of the same public in the actual trial unjustified and in violation of the victim's right to fair trial guaranteed under Article 7 of the Charter.
55. It is alleged that prior to his arraignment, precisely, for the 49 days he was detained, Mr. Malaolu was not allowed access to his lawyer, neither was he given the opportunity to be represented and defended by a Lawyer of his own choice at the trial. Rather, he was assigned a military Lawyer by the Tribunal. The Complainant submits that by refusing Mr. Malaolu access to his lawyer, the government of Nigerian was in contravention of Article 7(1) (c) of the Charter which provides:

Every individual shall have the right to defence, including the right to be defended by counsel of his choice.

56. In its Resolution on the Right to Recourse and Fair Trial, the Commission in re-enforcing this guarantee observed in paragraph 2 (e) (i) thus:

In the determination of charges against individuals, the individual shall be entitled in particular to:

(i) ... communicate in confidence with counsel of their choice

The denial of this right therefore is a violation of these basic guarantees.

57. The Complainant alleged that the Special Military Tribunal which tried the convicted person was neither competent, independent nor impartial because members of the Tribunal were selected by the Head of State, General Sani Abacha, and the Provisional Ruling Council (PRC), against whom the alleged offence was committed. Some members of the Tribunal are also serving army officers. For instance, the President of the Tribunal, Major-General Victor Malu is also a member of the Provisional Ruling Council, which is empowered by the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, to confirm the sentences passed by

the Tribunal. This is a breach of the right to a fair trial as stipulated in article 7(1) (d) of the Charter.

Article 7 (1) (d) states:

Every individual shall have... the right to be tried... by an impartial court or tribunal

58. The Government has not refuted this specific claim. It only states that the Treason and Other Offences (Special Military Tribunal) Act, Cap 444 of the Laws of the Federation of Nigeria, 1990 under which Malaolu was tried arose from the ashes of the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986 enacted by the then Military Government headed by General Ibrahim Babangida (Rtd.). Further, it asserts that its submission would not address the merits or demerits of the trial.
59. The Commission is not taking an issue with the history and origin of the laws nor the intention why they were promulgated. What is of concern here to the Commission is whether the said trial conforms to the fair hearing standards under the Charter. The Commission is of the opinion that to answer this question, it must necessarily consider the merits or demerits of the trial, an issue the Government does not want to be involved in.
60. Consequently, the Commission finds the selection of serving military officers, with little or no knowledge of law as members of the Tribunal in contravention of Principle 10 of the Basic Principles on the Independence of Judges. The said Principle states:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.

61. In the same vein, the Commission considers the arraignment, trial and conviction of Malaolu, a civilian by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, prejudicial to the basic principles of fair hearing guaranteed by Article 7 of the Charter.
62. It is fitting, in this regard, to cite the Commission's general position on the issue of trials of civilians by Military Tribunals. In its Resolution on the Right to Fair Trial and Legal Assistance in Africa, the Commission had, while adopting the Dakar Declaration and Recommendations noted thus:
- "In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards."***
- They should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts.
63. The Commission considers the said trial, which has not been refuted by the Respondent State, save to the extent that it was done under a law validly enacted by

the competent authority at the time, in contravention of the right to fair trial guaranteed under Article 7 of the Charter. The Commission also finds the setting up of the said tribunal for the trial of treason and other related offences as impinging on the independence of the judiciary, in as much as such offences are being recognised in Nigeria as falling within the jurisdiction of the regular courts.

64. The Commission also finds the trial in contravention of the basic principle of fair hearing contained in Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary (The UN Basic Principles) and article 7 (1) (d) of the African Charter. Principle 5 of the UN Basic Principles stipulates:

Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals..

65. Furthermore, in its General Comment on a similar provision of Article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee observed:

The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialise. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned... While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.

(See also its Comment on the Report of Egypt - UN Doc. CCPR/79/Add. 3, paragraph a of August 1993)

66. It could not be said that the trial and conviction of Malaolu by a Special Military tribunal presided over by a serving military officer, who is also a member of the PRC, a body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in Article 7 of the Charter. This is also in contravention of Article 26 of the Charter which states:

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.

67. It is also contended by the Complainant that Malaolu is being punished by Nigeria's Military Government over news stories published by his Newspaper relating to an alleged coup plot involving Nigeria's Chief of Staff and Second -in- Command, Lt. General Oladipo Diya and other military officers and civilians. This is alleged to be in

contravention of his right to freedom of expression enshrined in Article 9 of the Charter.

68. The Government argues that Malaolu was tried along with a number of people accused of involvement in alleged plot to overthrow the late Gen. Sani Abacha. It contends that the trial was not an ostensible case of victimisation against Malaolu or his profession, but rather that one or two other journalists were also sentenced to imprisonment at the same trial.
69. Considering the facts at the disposal of the Commission and the response of the Government, the Commission takes the view that it was only Mr. Malaolu's publication which led to his arrest, trial and conviction and therefore finds that in violation of Article 9 of the Charter as alleged.
70. The Complainant avers that while Mr. Malaolu was in detention, he was subjected to such cruel, inhuman or degrading treatment, as having his legs and hands chained to the floor day and night. From the day he was arrested and detained, until the day he was sentenced by the tribunal, a total period of 147 days, he was not allowed to take his bath. He was given food twice a day, and while in detention, both in Lagos and Jos before he faced the Special Investigation Panel that preceded the trial at the Special Military Tribunal, he was kept in solitary confinement in a cell meant for criminals. The Complainant submits further that the treatment meted out to Mr. Malaolu contravened Article 5 of the Charter. Article 5 provides:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides:

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Further, Principle 6 states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

71. It is worth noting that the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental.

72. The Government has not denied these allegations. Indeed, it has made it clear that it is not contesting the merits or demerits of the case. In the absence of any information to the contrary from the Government, the Commission finds the various forms of treatments meted to Mr. Malaolu while in detention, in violation of the victims right to respect and dignity and right to freedom from inhuman or degrading treatment guaranteed under Article 5 of the Charter and reinforced by the above Basic Principles. (See *communications 64/92, 68/92 and 78/92 (Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf Orton and Vera Chirwa) / Malawi*, *communications 27/89, 46/91, 49/91 and 99/93 (Organisation Mondiale Contre La Torture and Association Internationale des Juristes Démocrates, Commission Internationale des Juristes (C.I.J), Organisation Mondiale Contre La Torture and Union Interafricaine des Droits de l'Homme / Rwanda*), respectively.
73. Although not an issue, the Commission notes that the alleged violations took place during a prolonged military rule and that such regimes, as rightly pointed out by the Government are abnormal (see *the Commission's Resolution on the Military, adopted at the 16th ordinary session in Banjul, the Gambia*). The Commission sympathises with the Government of Nigeria over this awkward situation but however asserts that this does not in any way diminish its obligations under the Charter, nor the violations committed prior to its coming into office.
74. Finally, the Commission finds it necessary to clarify the position regarding the claim of the Government of Nigeria to the effect that the trial was conducted under a law validly enacted by the competent authority at the time. Also that the victim was charged, tried, convicted and sentenced in accordance with the provisions of such a law.
75. In this regard, the Commission recalls its decision in *communication 147/95 and 149/96, Sir Dawda Jawara / The Gambia*, wherein it stated thus: "*For a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter*". It is therefore not enough for a State to plead the existence of a law, it has to go further to show that such a law falls within the permissible restrictions under the Charter and therefore in conformity with its Charter obligation. No such reasons have been adduced in the instant case. The Commission therefore rejects this argument.

For these reasons, the Commission

Finds the Republic of Nigeria in violation of Articles 3(2), 5, 6, 7 (1) (a), (b), (c), (d), 9 and 26 of the African Charter and Principle 5 of the UN Basic Principles on the Independence of the Judiciary.

Urges the Republic of Nigeria to bring its laws in conformity with the provisions of the Charter.

**Done at the 28th session held in Cotonou, Benin
from 23rd October to 6th November 2000.**

225/98 Huri-Laws / Nigeria

Rapporteur:

25th Ordinary Session: Commissioner Ben-Salem
26th Ordinary Session: Commissioner Ben-Salem
27th Ordinary Session: Commissioner Ben-Salem
28th Ordinary Session: Commissioner Ben-Salem

Summary of Facts:

1. The communication is submitted by Huri-Laws, a Non-Governmental Organisation (NGO) registered in Nigeria on behalf of the Civil Liberties Organisation (CLO), another Nigerian human rights NGO based in Lagos.
2. This communication was received at the Secretariat on 24th October 1998, during the 24th ordinary session.
3. It alleges that since the formation of Civil Liberties Organisation on 15th October 1987, it has experienced all forms of harassment and persecutions from the Nigerian Government.
4. These harassment and persecutions have always been carried out in the form of arrests and detention of key members and staff of the Organisation and by way of raids and searches without warrants in the Organisation's offices by its Security Agency, the State Security Services (SSS).
5. One of such acts occurred on 7th November 1997, when Mr. Ogaga Ifowodo. A Lawyer with the Organisation was arrested at the Nigeria - Benin border while returning from the Commonwealth Summit in Edinburg, Scotland.
6. It is alleged that officers of the National Drug Law Enforcement Agency initially arrested Mr. Ogaga.
7. He was first detained at 15 Awolowo Road, Ikoyi, Headquarters of the State Security Service (SSS) for a few weeks before being transferred to Ikoyi Prisons, where he was held until April 1998.
8. The Complainant alleges that the victim was detained in a sordid and dirty cell under inhuman and degrading conditions. He was denied medical attention and access to his family and lawyer. He was also denied access to journals, newspapers and books.
9. It is further alleged that he was tortured and rigorously interrogated, and that at no time during his detention was he informed of any charges against him, nor were any charges ever brought against him.
10. In another incident which the Complainant contends adds up to the policy of persecutions on the part of the Respondent State, it is alleged that the Federal Military Government of Nigeria and its agents, in exercise of the powers under the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended in

1990), arrested and detained Mr. Olisa Agbakoba without charge or trial between 8 May and 26 June 1998.

11. It is alleged that Agbakoba, founder and board member of Civil Liberties Organisation was arrested at Lagos airport on his return from Europe and detained at the SSS detention centre at Awolowo Road, Ikoyi, Lagos for 5 weeks.
12. On 10th May 1998, Mr. Agbakoba accompanied by officers of the SSS was brought to the offices of Civil Liberties Organisation for a search of the premises. Finding few employees present, because it was a non-working day, they departed.
13. On 11th May 1998, at about 10.30 a.m. Mr. Agbakoba was again brought by about 30 agents of the SSS, who raided Civil Liberties Organisation's headquarters in Lagos, apparently in search of incriminating materials on the activities of the United Action for Democracy (UAD) and CLO's involvement in its activities and rallies against the military dictatorship of Late General Sani Abacha and his self-succession bid.
14. It is further alleged that for about 7 hours, the agents of SSS carried out a thorough search on the offices of CLO from room to room, breaking down doors and ripping open drawers and cabinets in search of documents. During this time, all the staff present were kept confined to the library, only one at a time being summoned to assist with the searching of their desks.
15. At the end of the search, thirteen computers, official files and diskettes were carted away by the SSS operatives. Most of files and documents were copied and photocopied.
16. Despite various protests by the staff, no warrant of arrest was presented to justify the search.
17. Furthermore, 5 staff of CLO were arrested and detained at the Awolowo Road office of the SSS. Three were released the same night, while Mr. Okezie Ugochukwu and Ibrahim Ismail were detained for 2 days and nights and made to pass through very horrendous interrogation proceedings.
18. After their release, they were mandated to report on a daily basis to the SSS office, where they underwent continuing interrogations.
19. The Complainant alleges further that all but one computer were released.
20. It is also alleged that Mr. Agbakoba was later removed to Enugu Prison, 600 km east of Lagos.
21. The Complainant alleges further that throughout his period of detention, Mr. Agbakoba was neither charged with any crime, nor allowed access to his family, friends, doctors, or lawyers. He was later released on 26 May 1998.
22. It is alleged that lawsuits were filed at the Federal High Court by Huri-laws challenging the arrest and detention of Mr. Agbakoba, and by CLO challenging the arrest and detention of Mr. Ifowodo, but these suits were unsuccessful since

the State Security (Detention of Persons) Decree No. 2 of 1984 oust the jurisdiction of the regular courts.

Complaint

23. The Complainant alleges violations of articles 5, 6, 7, 9, 10, 14 and 26 of the Charter.

Procedure:

24. At its 25th ordinary session held in Bujumbura, Burundi, the Commission decided to be seized of the communication, and requested the Secretariat to notify the Nigerian Government. It also requested the Secretariat to submit an opinion on the admissibility of the communication, particularly in accordance with Article 56(7) of the Charter, vis-à-vis Nigeria's current political situation.
25. On 19th August 1999, the Secretariat of the Commission notified the parties of this decision.
26. On 21st October 1999, the Secretariat received a letter from the Complainant informing it that they would not attend the 26th ordinary session due to lack of funds, but authorised Ms Julia Harrington of the Institute for Human Rights and Development to represent them.
27. During the 26th ordinary session held in Kigali, Rwanda, the Secretariat received a submission from Ms Julia Harrington on Additional Information relating to the Admissibility of the communication.
28. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit written arguments on the merit of the case.
29. On 17th January 2000, the Secretariat notified parties of the above decision.
30. On 17th February 2000, the Secretariat received a Note Verbale from the High Commission of the Federal Republic of Nigeria in Banjul, referring to the above Note Verbale and requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare for appropriate responses to the alleged violations:
- (a) The Draft Agenda for the 27th ordinary session and the letter of invitation to the session from the Secretariat;
 - (b) A copy of the complaint that was attached to the Secretariat's Note;
 - (c) A copy of the Report of the 26th ordinary session.
31. Further to the above request, the Secretariat of the Commission on 8th March 2000, forwarded all the documents as requested, except the Report of the 26th ordinary session, together with a copy of the summary and status of all pending communications against Nigeria, as well as a copy each of the three communications (Nos. 218/98, 224/98 and 225/98) as submitted by their authors.

32. On 21st March 2000, the legal representative of the Complainant sent a letter to the Secretariat informing it that she would present oral arguments on the merits of the case and requested for likely dates of such presentation.
33. By letter of 22nd March 2000, the Secretariat informed her of the possible date and drew her attention to the necessity of submitting a copy of the address to it before presentation.
34. At its 27th ordinary session held in Algeria, the Commission deferred taking a decision on the merits of the case to the 28th ordinary session scheduled for Republic of Benin.
35. The above decision was communicated to parties on 6th July 2000.

LAW

Admissibility

36. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of article 56(7) of the Charter in view of the prevailing political situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well established principle of international law, a new government inherits the previous government's international obligations, including responsibility for the previous government's misdeeds (see *Krishna Achutan and Amnesty International/Malawi, communications 62/92, 68/92 and 78/92*).
37. The commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (see *communications 27/89, 46/91 and 99/93*). Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position still remains that the responsibility of the present government of Nigeria would still be engaged for acts of human rights violations which were perpetrated by its predecessors.
38. Furthermore, it submitted that the Commission should not be swayed by the political situation in the country as that is capable of foreclosing the Complainants' right to fair hearing, especially where they may be desirous of remedying the alleged violations. In any case, it noted that although Nigeria is now under a democratically elected government, the new constitution provides by its section 6(6)(d) that no legal action can be brought to challenge 'any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law'.
39. For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

40. The Complainant alleges a violation of article 5 of the Charter with respect to Mr. Ogaga Ifowodo only. Article 5 states:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

It is alleged that Mr. Ogaga Ifowodo was detained in a sordid and dirty cell under inhuman and degrading conditions. Also that being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma. Moreover, added to this deprivation of contact with the outside world and health threatening conditions, it amounts to cruel, inhuman and degrading treatment.

Principle 1 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides:

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Further, Principle 6 states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

It is worth noting that the term ‘cruel, inhuman or degrading treatment or punishment’ is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental (See UN Body of Principles).

41. The prohibition of torture, cruel, inhuman or degrading treatment or punishment is absolute. However, as observed by the European Court of Human Rights in ***Ireland v. United Kingdom*** when called upon to decide on similar provision of the European Convention on Human Rights “...the treatment prohibited under Article 3 of the Convention is that which attains a minimum level of severity and...the assessment of this minimum is, in the nature of things, relative.... It depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc.” (Judgement of 18th January 1987, series A no. 25 para. 162; see also the European Commission on Human Rights decision in ***Jose Antonio URRUTIKOETXEA v. France***, Decision of 5th December 1996, p. 157). The treatment meted out to the victim in this case constitutes a breach of the provision of Article 5 of the Charter and the relevant international human rights instruments cited above. Also the denial of medical attention under health threatening conditions and access with the outside world do not fall into the province of ‘the respect of the dignity inherent in a human being and to the recognition of his legal status’, nor is it in line with the requirement of Principles 1 and 6 of the UN Body of Principles for the Protection of All Persons under

Any Form of Detention or Imprisonment. This, therefore, is a breach of article 5 of the Charter.

42. The Complainant alleges that the detention of Ogaga Ifowodo and Olisa Agbakoba under the State Security (Detention of Persons) Decree No. 2 1984 (as amended in 1990) is a violation of their guaranteed right to freedom from arbitrary detention under Article 6 of the Charter. This is a violation of Article 6 of the Charter which provides:

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

43. Closely related to the above violation of Article 6 provision is the violation of the victims' right to fair hearing. The Complainant states that up to the date of filing this communication no reason has been given for the victims' arrest and detention, nor has any charges been pressed against them.

In expounding on the guarantees of the right to fair trial under the Charter, the Commission observed in its Resolution thus:

...the right to fair trial includes, among other things, the following:

(b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;

44. The failure and/or negligence of the security agents of the Respondent Government to scrupulously comply with these requirements is therefore a violation of the right to fair trial as guaranteed under the African Charter.
45. The Complainant alleges violation of Article 7 (1) (a) and (d) of the Charter in that Mr. Ifowodo and Agbakoba had no legal remedies available with which they could challenge their detentions. Further, that the absolute ouster of the jurisdiction of the court to adjudicate on the legality or otherwise of acts done under the Decree is a violation of the above provision, and also a contravention of Article 26 of the Charter.

Article 7(1) of the African Charter states:

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

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

Article 7 (1) (d) states:

Every individual shall have... the right to be tried within reasonable time by an impartial court or tribunal .

This is reinforced by Paragraph 2 (c) of the Commission's Resolution on Fair trial, which provides:

Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released.

46. The refusal and/or negligence on the part of the Respondent Government to bring Messrs. Ifowodo and Agbakoba promptly before a judge or other judicial officer for trial is therefore a violation of Article 7 (1) (d) of the Charter. This is also in violation of Article 26 which stipulates:

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

47. The Complainant contends that CLO is human rights organisation, permitting its employees the opportunity to work together towards respect for human rights through organised programmes. Such programmes are aimed at enlightening the people of their rights. The persecution of its employees and raids of its offices in an attempt to undermine its ability to function in this regard, amount to an infringement of Articles 9 and 10 of the Charter providing for the rights to freedom of expression and association respectively.

Article 9 of the Charter provides:

(1) Every individual shall have the right to receive information.

(2) Every individual shall have the right to express and disseminate his opinions within the law.

48. The complaint above is therefore a violation of this provision. On the other hand, Article 10 states:

(1) Every individual shall have the right to free association provided that he abides by the law.

In its Resolution on the Right to Freedom of Association, the Commission observed thus:

(1) The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard;

- (2) *In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;*
- (3) *The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights.*

49. The above acts of the Respondent State constitute a violation of Article 10 of the Charter.

50. The Complainant alleges that the arrest and detention of Messrs Ifowodo and Agbakoba while returning from trips abroad is a violation of Article 12 (2) of the Charter. In this regard, it is contended that when re-entry points become sites of frequent harassment and arrest, freedom of movement is infringed. Further that the Charter provides for restrictions on the right to freedom of movement only by law for the protection of national security, law and order, public health or morality. The arrest and subsequent detentions of the two men is unjustified by any appeal to these restrictions.

Articles 12 (1) and (2) state:

- (1) *Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.*
- (2) *Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.*

51. The said encroachment, not being in consonance with the above restrictions is, therefore a violation of the victims' right to freedom of movement under Article 12 (1) and (2) of the African Charter.

52. The Complainant alleges that the search without warrant of CLO's premises and the seizure of its property is a violation of Article 14 of the Charter. It is contended that Article 14 implies that owners have the right to undisturbed possession, use and control of their property however they deem fit.

Article 14 of the African Charter provides:

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

53. The Complainant further contends that no evidence was ever offered of public need or community interest to justify the search and seizure. The said encroachment therefore is a violation of Article 14 of the Charter.
54. Unfortunately, to date, the government of the Federal Republic of Nigeria has neither responded to the Commission's request for additional information/observations nor for the arguments on the merits of the case. In these circumstances, the Commission is therefore compelled to accept the facts of the Complainant as the facts of this case.

For the above reasons, the African Commission

Finds the Federal Government of Nigeria in violation of Articles 5, 6, 7(1)(a) and (d), 9, 10(1), 12(1) and (2), and 14 of the African Charter.

**Done at the 28th Ordinary Session held in Cotonou, Benin
from 23rd October to 6th November 2000**

231/99 - Avocats Sans Frontières (on behalf of Gaëtan Bwampamye)/ Burundi

Rapporteur:

26th Session: Commissioner Rezag-Bara

27th Session: Commissioner Rezag-Bara

28th Session: Commissioner Rezag-Bara

Summary of Facts:

1. Lawyers Fabien Sagatwa, Moussa Coulibaly and Cédric Vergauwen, respectively called to the bars of Burundi, Niger and Brussels and members of “Avocats Sans Frontières” in Burundi and acting on behalf of Mr. Gaetan Bwampamye, currently detained at the Mpimba Prison (Bujumbura) present the facts of the case as follows:
2. On 25th September 1997, Mr. Gaëtan Bwampamye was sentenced to death by the Criminal Chamber of the Appeal Court of Ngozi after being convicted for having in Ruhoro on 21 October 1993, as author, co-author or accomplice, incited the population to commit crimes and for having under the same circumstance, organised as attack geared towards provoking massacres, set up barricades with a view to hindering the enforcement of public order; all offences under Articles 212, 417 and 425 of the Penal Code of Burundi.
3. On 2nd October 1997, he filed an appeal with the Supreme Court of Burundi. In support of his appeal, he invoked six grounds, including the violation of article 75 of the Penal Procedure Code of Burundi, Article 14 paragraph 3(d) of the International Covenant on Civil and Political Rights, as well as Article 51 of Decree No. 100/103 of 29 August 1979, defining the status of the profession of Lawyers. According to the Complainants, the latter argument was invoked by the accused to denounce the fact that he was denied the services of his counsel during the public prosecution’s closing address and that, in spite of his request for assistance, he was compelled to prepare his own defence.
4. The Complainants assert that on 3rd June 1997, the Criminal Chamber of the Court of Appeal closed the hearing of the witnesses, and on account of the volume of the case, decided to adjourn the hearing to 20th August 1997.
5. During the hearing of 20th August 1997, the prosecution refused to make its closing address, arguing that it needed more time to study the contents of the statement of the defence counsel. The Criminal Chamber therefore decided to adjourn the case to 25th September 1997. On that day, the counsel for the defence was unable to attend the hearing due to ill-health. In spite of the repeated request of Mr. Bwampamye for the case to be adjourned to another date, the Chamber decided to hear the prosecution, and compelled the accused to defend himself, without the assistance of his lawyer. The verdict sentencing him to death was rendered that same day at the end of the submissions.

6. The Complainants point out that the Supreme Court had rejected this argument invoked before it by the accused, who wanted the ruling of the Ngozi Court of Appeal quashed on the grounds that for the Court, the law does not obligate the judge to designate a lawyer, but he may do so.
7. The Supreme Court continues in the following terms “further whereas for the specific case in question, the accused has always been assisted by a lawyer, the evidence being, that his lawyer had already submitted his 19 page written arguments on 20th August 1997, that furthermore they had already pleaded together in the public hearing, whereas in the face of such situation, the plaintiff has no justification in saying that the judge should have designated a lawyer for him whereas he already had one who had already accomplished all the essential duties expected of a lawyer; that consequently, this argument is also to be rejected”.
8. This line of argument of the Supreme Court is challenged by the Complainants who raise a certain number of points of law, including inter alia, the ignorance according to them by the said Court of the principles of the right of defence and judicial assistance. They claim that, this ruling of the Supreme Court is not only contrary to the provisions of article 73 of Burundi’s Criminal Procedure Code which unequivocally establishes the right to judicial assistance but also the general principle of oral submissions in criminal proceedings.
9. They assert on the one hand that “whilst it is customary for a lawyer to communicate his pleas to the prosecution before the closing address of the latter, no written rule requires him to do so”. On the other hand, the Complainants assert that “the lawyer is obviously never bound by the contents of a statement of defence deposited before the hearing. Such a statement therefore is not exhaustive and may only be confined to certain aspects of the case and not focus on issues that the defence intends to elaborate on later at the bar. Counsel for the defence may also renounce certain arguments contained in his note, depending on for instance the issues raised by the prosecution. This freedom is at the very core of the rights of the defence. Before any decision, they assert, there is the unconditional right to oral submissions and freedom of speech”.
10. The Complainants assert that this same freedom of speech was accorded to the prosecution, and recall that the “ prosecutor is never bound by the written closing speeches of his office.” The principle is furthermore established by the old saying that “the written word is not, as free as the spoken word”. They vehemently assert, that in indicating in its judgement that the lawyer had already submitted a 19-page statement of defence and that in this respect, he had accomplished all the fundamental duties of a lawyer” the Court ignores all the principles that have just been set forth and, consequently, authorises a blatant violation of the rights of the defence in general and the rights of judicial assistance in particular”.
11. On the basis of the foregoing, the Complainant whilst stressing that the aim of the present complaint is to highlight the above-mentioned violations, call on the Commission to rule that:
 - (a) By refusing Mr. Gaetan Bwampamye the assistance of his legal Counsel to plead his case, the Criminal Chamber of the Ngozi Court of Appeal held a hearing which was not equitable under the African Charter on Human and People’s Rights and all the relevant international instruments.

- (b) To establish the violation by the Republic of Burundi of the rights enshrined in the Charter more specifically, the violation of article 7, paragraph (c) of the Charter and the general principles on the rights of the defence;
- (c) To report its findings to the parties concerned and to the Assembly of Heads of State and Government of the OAU.

Procedure:

- 12. The communication is dated 11th April 1999. It was sent to the Secretariat by E-mail.
- 13. On account of the fact that the judgement of the Ngozi Court of Appeal (a major piece written in Kirundi) was still being translated, the communication could not be brought before the Commission during its 25th Ordinary Session held in Bujumbura in May 1999. Towards the end of the said Session however, the plaintiffs forwarded to the Secretariat the outstanding documents, thus enabling it to complete the file on the communication and bring the matter before the 26th Session of the Commission.
- 14. At its 26th session, the Commission heard from the representatives of Mr. Bwampamye who had come to present their position on the matter. After a long debate, the Commission reached a decision to be seized of the communication. Mr. Bwampamye was represented by:

Lawyers:

- Segatwa Fabien;
- A. Moctar;
- Seydou Doumbia and
- Boubine Touré.

All members of *Avocats Sans Frontières*.

- 15. On 13th December 1999, the Secretariat informed the parties of this decision and a letter signed by the Chairman of the Commission, requesting a stay of execution was addressed to the Burundian Head of State.
- 16. On 15th February 2000, the Burundi office of *Avocats Sans Frontière* acknowledged receipt of the letter of 13th December 1999, addressed to it by the Secretariat without, however communicating its observations as regards the admissibility of the communication.
- 17. At its 27th ordinary session held in Algiers, Algeria, the Commission examined the case and declared it admissible and requested parties to furnish it with arguments on its merits. It also requested the Chairman of the Commission to repeat its earlier appeal for stay of execution pending the determination of the communication.
- 18. The above decision was communicated to parties on 1st August 2000.
- 19. During its 28th Session, the Respondent State and Counsel for the Complainant presented their written and oral submissions before the Commission

LAW

Admissibility

20. Article 56(5) of the Charter stipulates that “communications relating to Human and Peoples’ Rights...received by the Commission shall be considered if they...are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...”
21. It is apparent from an examination of the documents appended to the dossier that the verdict handed down on 25th September 1997, by the Ngozi Court of Appeal, sentencing Mr Gaëtan Bwampamye to death was confirmed on 5th October of the same year by the Supreme Court of Burundi. The Commission notes, consequently, that the domestic remedies had been duly exhausted. For these reasons, it declares the communication admissible.
22. In its oral submission, the Respondent State argued that the Complainant had not exhausted other local remedies which include "*le recours dans l'interet de la loi*", revision and the plea for pardon.
23. The Commission however holds the view that the Complainant could only benefit from the first two remedies at the initiative of the Ministry of Justice and also as a result of discovery of new facts that may lead to reopening the file. With regard to the plea for pardon, it is not a judicial remedy but serves to affect the execution of a sentence. For these reasons the Commission maintains its decision on admissibility.

Merits:

24. Article 7,1(c) of the Charter states that “every individual shall have the right to have his cause heard. This comprises:
...the right to defence, including the right to be defended by counsel of his choice...”
25. In its verdict of 5th October 1997, the Supreme Court of Burundi adjudged and stated:
“Whereas this Court is of the view that the law implies no obligation on the part of the judge to nominate a lawyer, though he may do so;

Whereas in the case under consideration, the accused had always been assisted by a lawyer, proof being that his 19 page written plea of 20th August was filed by his lawyer; and that they had appeared together at the public sitting;

Whereas, in view of such situation, the appellant has no reason to claim that the judge should appoint a lawyer for him, since he already had one who had performed all essential functions of a lawyer for him; this procedure is, therefore, also hereby rejected...”
26. The Commission recalls that the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of Justice, as well as the obligation on the part of Courts and Tribunals to conform to international standards in order to guarantee a fair trial to all. The Commission shall examine the verdict of

the Ngozi Court of Appeal, as well as that of the Supreme Court in light of the above criteria.

27. The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner. In the case under consideration, it is expected of the Commission to attend to the first aspect, that is, observation of the rule of equality of the means utilised by the defence and the prosecution.
28. The right to defence also implies that at each stage of the criminal proceedings, the accused and his counsel be able to reply to the indictment of the public prosecutor and in any case, to be the last to intervene before the court retires for deliberations.
29. The Ngozi Court of Appeal had on 25th September 1997, handed down a verdict sentencing Mr. Bwampamye to death, thereby following the prayer of the public prosecutor, paying no heed to the accused's prayer for adjournment of the case, pleading the absence of his lawyer. The Commission holds the view that the judge should have upheld the prayer of the accused, in view of the irreversible character of the penalty involved. This was all the more imperative considering that during the 20th August 1997 hearing, he had upheld the arguments of the prosecutor who had refused to proceed with his pleading claiming that he needed time to study the written plea presented by counsel for the accused. The criminal court then decided to adjourn the case to 25th September 1997. The Commission holds that by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial.
30. The Supreme Court, in its verdict, upholds the position of the lower court judge in refusing to designate a defence lawyer as follows: "... this Court is of the view that the law implies no obligation on the part of the judge to nominate a lawyer, though he may do so". The Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial. Moreso where the interests of Justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of Justice for him to have the benefit of the assistance of a lawyer at each stage of the case.
31. In its consideration of what appears to be the liberty allowed the judge under Burundian law to designate or not to designate a defence lawyer for the accused, the Commission recalls the fundamental principle enshrined in Article 1 of the Charter, that not only do the States Parties recognise the rights, obligations and freedoms proclaimed in the Charter, they also commit themselves to respect them and take measures to give effect to them. In other words, if a State Party fails to ensure respect for the rights contained in the African Charter, this constitutes a violation of the said Charter. (*See communication 74/92, para. 35*). It is apparent, consequently, that

Burundian legislation, in this regard, does not comply with the country's treaty obligations emanating from its status as a State party to the African Charter. The Court's argument flies in the face of a well-known general legal principle, which states that "no one may profit from his own turpitude". The argument should furthermore be rejected because by considering the various instruments cited in his opening statement by counsel for the accused, the Court, though admittedly it does not state a position on them, had become aware of the country's obligations as regards human rights, especially the provisions of the International Covenant on Civil and Political Rights and, subsequently, those of the African Charter on Human and Peoples' Rights. By upholding the position of the appellate judge, the Court ignored the obligation of Courts and Tribunals to conform to international standards of ensuring fair trial to all.

For these Reasons, the Commission:

Finds the Republic of Burundi in violation of Article 7(1)(c) of the African Charter;

Requests Burundi to draw all the legal consequences of this decision; and to take appropriate measures to allow the reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and the pertinent provision of the African Charter on Human and People's Rights;

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

**Done at the 28th ordinary session held in Cotonou, Benin
from 23rd October to 6th November 2000**

232/99 - John D. Ouko / Kenya

Rapporteur:

**26th Session: Commissioner Ben Salem
27th Session: Commissioner Ben Salem
28th Session: Commissioner Ben Salem**

Summary of Facts:

1. The Complainant claims to be a Student's Union leader at the University of Nairobi, Kenya.
2. He alleges that he was forced to flee the country due to his political opinions.
3. He mentions the following as issues which led to his strained relations with the government and to his arrest and detention and eventually to his fleeing the country:
 - (a) The demand for the setting up of a Judicial Commission of Inquiry into the murder of his late uncle and former Kenyan Minister of Foreign Affairs, Mr. Robert Ouko;
 - (b) His condemnation of the seeming government involvement in the murder of his predecessor at the Students' Union, Mr. Solomon Muruli;
 - (c) His condemnation of corruption, nepotism and tribalism in government;
 - (d) His condemnation of the frequent closure of public universities.
4. Prior to his fleeing the country, he was arrested and detained without trial for 10 months at the notorious basement cells of the Secret Service Department headquarters in Nairobi.
5. The detention facility was a two by three metre basement cell with a 250 watts electric bulb, which was left on throughout his ten months detention.
6. The Complainant alleges that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.
7. The Complainant claims that he fled the country on 10th November 1997 to Uganda, where he initially sought political asylum but was denied.
8. The Complainant alleges that since he could not obtain any protection in Uganda, he had to leave to the Democratic Republic of Congo (DRC) in March 1998, and has been residing there to date.

9. The Complainant claims to be living presently in Aru, North-East of the Democratic Republic of Congo.
10. The Complainant further alleges that until August 1998, when the war broke out in the DRC, he was under the United Nations High Commissioner for Refugees' (UNHCR) assistance programme.
11. Since the said war started, leading to the evacuation of UNHCR staff, he has been living in a very desperate and despicable situation.

Complaint:

The Complainant alleges violations of Articles 5, 6, 9, 10 and 12 of the African Charter.

Procedure

12. At its 26th ordinary session held in Kigali, Rwanda, the Commission decided to be seized of the communication and requested the Secretariat to notify the parties.
13. On 18th January 2000, letters were dispatched to the parties notifying them of the Commission's decision.
14. On 23rd May 2000, during the 27th ordinary session held in Algeria, the Secretariat of the Commission received a letter from the Complainant stating, among other things, that he has been in Kampala for medical reasons since November 1999. In addition, he informed the Commission of his ordeals in the Democratic Republic of Congo, including his being kidnapped and forced to work as a computer operator for the rebels in Kisangani.
15. At its 27th ordinary session held in Algeria, the Commission examined the case and declared it admissible and requested parties to furnish it with arguments on the merits of the case.
16. On 12th July 2000, the Secretariat communicated the Commission's decision to the parties.

LAW

Admissibility

17. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by Article 56 of the Charter. The applicable provision in this particular case is Article 56(5) of the Charter, which provides *inter alia* "communications relating to Human and Peoples' Rights...received by the Commission shall be considered if they...are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged..."
18. The facts of this case reveal the following:
 - The Complainant is no longer in the Republic of Kenya;

- The above condition is not based on his voluntary will - he has been forced to flee the country because of his political opinions and Student Union activities;
- An attestation dated 30th October 1999, issued by one Mr. Tane Bamba, Head of Sub Office of the United Nations High Commissioner for Refugees, indicates that the Complainant "is recognised as a refugee Under UNCHR mandate in accordance with the provisions of the OAU Convention of September 10th, 1969 to which he satisfied."

19. Relying on its case law (see *communication 215/98 - Rights International/Nigeria*), the Commission finds that the Complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugee. The Commission therefore declared the communication admissible based on the principle of constructive exhaustion of local remedies.

Merits:

20. The Complainant alleges that prior to his fleeing the country, he was arrested and detained for 10 months without trial at the notorious basement cells of the Secret Service Department headquarters in Nairobi.
21. The Respondent State Party has not contested this claim. In fact, it has not responded to the many requests made by the Secretariat of the Commission. In this circumstance and following its well laid down precedent on this, the Commission accepts the facts of the Complainant as the facts of the case and finds the Respondent State in violation of Article 6 of the Charter.

Article 6 provides:

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

22. The Complainant claims that the detention facility had a 250 watts electric bulb, which was left on throughout his ten months detention. Furthermore, that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.
23. The Commission finds the above condition, which the Complainant was subjected to in contravention of the Respondent State Party's obligation to guarantee to the Complainant the right to the respect of his dignity and freedom from inhuman and degrading treatment under Article 5 of the Charter.

Article 5 provides:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

24. Such condition and treatment also runs contrary to the minimum standards contained in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly, Principles 1 and 6.

25. Principle 1 provides:

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 6 on the other hand states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

26. Although the Complainant has claimed a violation of his right to freedom from torture, he has not substantiated on this claim. In the absence of such information, the Commission cannot find a violation as alleged.

27. The Complainant alleges that he was forced to flee his country because of his political opinions. He details some of the events that led to his strained relationship with the government. Article 9 of the African Charter provides:

(1) ***Every individual shall have the right to receive information.***

(2) ***Every individual shall have the right to express and disseminate his opinions within the law.***

28. The above provision guarantees to every individual the right to free expression, within the confines of the law. Implicit in this is that if such opinions are contrary to laid down laws, the affected individual or government, has the right to seek redress in a court of law. Herein lies the essence of the law of defamation. This procedure has not been followed in this particular instance. Rather the government has opted to arrest and detain the Complainant without trial and to subject him to series of inhuman and degrading treatments. The Commission finds this in violation of Article 9 of the Charter.

29. The Complainant claims that being a victim of political persecution, he has been deprived of his right to freedom of association guaranteed by Article 10 of the Charter. The Commission notes that the Complainant was a Student Union leader before fleeing the country.

30. The Respondent State Party has not refuted this fact. The Commission therefore finds the persecution of the Complainant and his subsequent flight to the Democratic Republic of the Congo to have greatly jeopardised his chances of

enjoying his right to freedom of association guaranteed under Article 10 of the Charter. Article 10 states:

(2) Every individual shall have the right to free association provided that he abides by the law

31. The Complainant claims that his rights to freedom of movement and to egress and ingress have been violated. Taking the circumstances of the case into consideration, the Commission finds this claim to have been substantiated and therefore finds the Respondent State in violation of Article 12 of the Charter. Article 12 provides:

(1) Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.

(2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

For these reasons, the Commission

Finds the Republic of Kenya in violation of Articles 5, 6, 9, 10 and 12 (1) and (2) of the African Charter on Human and Peoples' Rights.

Urges the Government of the Republic of Kenya to facilitate the safe return of the Complainant to the Republic of Kenya, if he so wishes.

**Done at the 28th Ordinary Session held in Cotonou, Benin
from 23rd October to 6th November 2000.**

**204/97 - Mouvement Burkinabé des Droits de l'Homme et des Peuples /
Burkina Faso**

Rapporteur:

23rd Session: Commissioner Ben Salem
24th Session: Commissioner Ben Salem
25th Session: Commissioner Ben Salem
26th Session: Commissioner Ben Salem
27th Session: Commissioner Ben Salem
28th Session: Commissioner Ben Salem
29th Session: Commissioner Ben Salem

Summary of Facts

1. The Complainant is the Chairman of the Mouvement Burkinabé des Droits de l'Homme et des Peuples (MBDHP), an NGO that enjoys observer status with the Commission. He cites a series of human rights violations reported to have been committed in Burkina Faso from the days of the revolutionary government to date. He therefore requests the Commission to strive to reveal the truth with regard to each of the cases reported not to have been reacted to by the competent bodies in his country.
2. According to the Complainant, Burkina Faso, on 11th December 1991, re-established the rule of law by adopting a new constitution. This rekindled the hope that all human rights violations committed between 1983 and 1991 would be treated for the common good of the citizens of that country. Unfortunately, this was not the case. Furthermore acts prejudicial to civil and political liberties have been recorded.
3. The Complainant alleges that since the creation of the Mouvement Burkinabé des Droits de l'Homme et des Peuples in 1991, the latter has recorded several cases of human rights violations in the country after having been informed on several occasions by the victims and has unsuccessfully requested the Judiciary to investigate the said cases. The most important case to be brought to the notice of this NGO was that of the suspension, discharge and removal of magistrates which took place on 10th June 1987. It is reported that the state afterwards granted amnesty as part of the reinstatement of workers wrongly laid off under the regime called the National Revolutionary Council that ruled Burkina Faso from 1983 to 1987. Many workers are reported to have been reinstated while many others were not.

4. The Chairman of MBDHP Mr. Halidou Ouedraogo, a Magistrate by profession belongs to this second category as well as another magistrate, Mr. Compaore Christophe. Both of them are claiming damages in kind. Their claim has remained in vain to date. The Supreme Court, which is reported to have been informed about the case fifteen years ago, has never taken a decision on the case.
5. According to the Complainant, although the situation has slightly improved, the Magistrates concerned continue to suffer from harassment ranging from arbitrary postings to manipulations by the Supreme Council of Judges and Magistrates and irregularities in the promotion of some Magistrates. The two unions of Judges and Magistrates are reported therefore to have, in a joint communiqué, denounced the subordination of their profession, corruption of judges and irregularities observed in the deliberations of the Supreme Council of Judges and Magistrates.
6. The Complainant alleges that many cases brought by him before Criminal Courts in 1990, 1991, 1994 and 1996 have not been examined.
7. In October 1991, the Organisation Pour la Democratie, Mouvement du Travail (ODP/MT), the ruling party, is reported to have put on fire, through its militants, a Peugeot 505 vehicle of the Chairman of MBDHP. This incident is reported to have taken place in front of the headquarters of another political party now dissolved. La Convention pour le Peuple (CNPP/PS) whose militants, fearing to see their headquarters burnt down, are reported to have called on Mr. Halidou Ouedraogo to prevent the crime. The Complainant maintains that the authors of this act of hooliganism are known and that some of them are reported to have been active again with the task of intimidating any person, especially workers and students, suspected of being against the powers that be.
8. Following the above-mentioned destruction of his vehicle, the complaint filed at the Ouagadougou Criminal Court by Mr. Ouedraogo in October 1991 is said to have no effect.
9. In June 1994, after closing from work, Mr. Ouedraogo is reported to have been a victim of an assassination attempt. When he put his car on, it is reported to have exploded and he survived only by a miracle. A complaint filed against X at the Ouagadougou Criminal Court for assassination attempt and destruction of personal property is reported to have no effect.
10. The Complainant claims that in May 1995 a student demonstration took a dramatic turn for the worse in a locality called Garango, two hundred kilometres from Ouagadougou. A gendarme identified by MBDHP is reported to have shot dead at close range two students. The enquiry speedily launched by the said Movement which led to the submission of the case to the Criminal Court of the said locality is reported not to have been examined. On the other hand, one Ouya Bertin, a Member of Parliament representing his state, is reported to have accused the Chairman of MBDHP of manipulating the pupils and students. The former is reported to have declared at a gathering that Mr. Halidou Ouedraogo should be got rid of and that in any case “measures have been taken to liquidate him” MBDHP filed a complaint of libel and death threats against its Chairman. This complaint is also reported to have remained without effect to date.

11. The Complainant also alleges several human rights violations as well as threats reported to have been made against his movement and person during successive Burkina students' strikes in February, March and April 1997.
12. Referring to the turbulent political situation that prevailed in Burkina Faso between 1989 and 1990, the claimant alleges that there were many kidnapping cases followed by executions. He cited the disappearance of persons suspected or accused of plotting against the State among them Mr. Guillaume Sessouma who, at the time he was kidnapped/arrested, was a lecturer at the University of Ouagadougou and who has not been seen since 1989. Similarly, Dabo Boukary, a medical student arrested in May 1990 by the Presidential Guard has not reappeared to this day. According to the claimant, the authorities are reported to have said that the latter might have fled.
13. As for assassinations, he cited those of Mr. Clement Oumarou Ouedraogo, a University Professor and erstwhile representative of Burkina Faso at UNESCO, gunned down in the middle of a street in Ouagadougou on 9th December 1991, two farmers killed in 1996 at 120 kilometres from Ouagadougou during a so-called police routine check, as well as the 1994/95 assassinations of people in the locality of Kaya (Nahouri). He claims that commandos of the Po Military garrison are reported to have a hand in the latter assassinations.
14. The Complainant alleges that his organisation has submitted all these cases of human rights violations, but without response to this day, to the following Burkinabe institutions:
 - competent jurisdictions;
 - the Ministries concerned (Justice, Interior and Defence);
 - the Prime Minister; and
 - the President of the Republic of Burkina Faso.

The Complaint:

15. The Complainant claims that Burkina Faso has violated Articles 3,4,5,6,7,8,9(2), 10,11,12 and 13(2) of the African Charter on Human and Peoples' Rights. He requests the Commission to investigate the said violations and get the Respondent State to:
 - explain the fate of the student Dabo Boukary;
 - disclose the conclusions of the inquiry on the assassination of Mr. Clement Oumarou Ouedraogo;
 - take measures that can help find a legal solution to all these human rights violation cases; and
 - compensate the victims of such violations.
16. In support of his petition, the Complainant provided abundant documentation on most of the alleged human rights violation cases.

Procedure

17. The communication is dated 25th April 1997. It was received by the Secretariat of the Commission by fax on 25th May 1997. However, the Complainant observed that there were annexes to the communication and the Secretariat had to wait to receive them.
18. On 20th August 1997, the Secretariat acknowledged receipt of the communication and asked the Complainant to indicate precisely the points contained in the communication on which he wanted the Commission to look into and to attach the documents mentioned.
19. On the same day, a Note Verbale was faxed to the Burkinabe Ministry of External Relations and Co-operation forwarding a copy of the communication and requesting for the Ministry's reaction within three months in accordance with the relevant provisions of the Rules of Procedure. There was no reaction to this Note Verbale.
20. On 5th December 1997, the Secretariat received correspondence from the Complainant reiterating the grievances in his earlier complaint instead of providing the clarifications requested.
21. At its 23rd Session, the Commission decided to be seized of the communication and deferred examination of the issue of admissibility to the 24th Session.
22. On 1st June 1998, a Note Verbale was sent to the Burkinabe Government informing it of this decision and calling for its reaction as to the admissibility of the communication was sent. A similar letter was also addressed to the Complainant.
23. On 13th July the Secretariat received a fax from the Burkinabé Minister of Justice and Guardian of the Seals stating that the Ministry of Foreign Affairs had informed him of a complaint submitted against Burkina Faso by Mouvement Burkinabé des Droits de l'Homme. He stated that the complaint was written in English and requested that the Secretariat provide him with the French version of the complaint since the working language of the country is French.
24. On the same day, the Secretariat reacted to the above-mentioned fax. The Minister was informed that the Commission had been seized of the communication and that the Respondent State was required to forward its submissions on the issue of admissibility for examination at the 24th Session scheduled to be held in October 1998.
25. At its 24th Ordinary Session, the Commission heard the parties. Both parties expressed the desire to settle the dispute amicably and requested the Commission's assistance to that effect.
26. The Commission declared the communication admissible. However, in view of the desire of the parties to settle the dispute amicably, it offered its good services for that purpose.

27. On 10th November 1998, the parties were informed by the Secretariat of the Commission's decision.
28. At its 25th Session, the Commission requested for information on the progress of the settlement between the parties.
29. During the 26th Session, the Commission learnt that there had been no reaction from the parties with regard to the progress of the settlement. The Commission therefore decided to defer examination on the merits of the communication to the 29th Session.
30. On 10th December 1999, the Secretariat informed the parties of the Commission's decision.
31. At the 27th Ordinary Session held in Algiers, Algeria, the Commission heard parties to the complaint and decided that the Respondent State should take the initiative in inviting the Complainant for an amicable settlement of the case, failing which, the Commission would proceed to consider the case on its merits.
32. On 20th July 2000, the Secretariat of the Commission conveyed the above decision to the parties.
33. On 17th August 2000, the Secretariat of the Commission received a Note Verbale from the Respondent State informing the Commission that they had complied with its decision and invited the Complainant for a meeting on 14th August 2000.
34. At the 28th Ordinary Session, the Commission heard both parties. The Respondent State informed the Commission that the case of the victims of massacres committed by police officers had been settled but that the other cases were pending. The Complainant confirmed that a meeting had been held but that there had been no progress in so far as settling the matter was concerned.

Law:

Admissibility

35. Article 56(5) of the African Charter on Human and Peoples' rights requires, prior to any recourse being addressed to the Commission that communications received in accordance with article 55, should be "...sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged".
36. In this particular case, the Complainant had approached the competent national authorities with a view to obtaining redress for the alleged violations and to clarify the cases of disappearances and assassinations that had remained unpunished. At its 24th Ordinary Session, the Commission heard both parties. They expressed their desire to reach an amicable solution and requested its assistance to this end. The Commission informed the parties that it was at their disposal for purposes of reaching an amicable settlement but the parties did not utilise this avenue. The communication was declared admissible.

Merits:

37. Article 3 of the Charter, stipulates that:

- (1) Every individual shall be equal before the law.
- (2) Every individual shall be entitled to equal protection of the law.

38. In order to redress the effects of the suspensions, dismissals and retirements of magistrates which took place on 10th June 1987, the Burkinabé State introduced an amnesty, aimed at rehabilitating workers abusively removed under the so-called “*Conseil National de la Révolution*” regime, which ruled over Burkina Faso from 1983 to 1987. As part of the said measure, many workers were restored to their posts, while many others, according to information available to the Commission, remained unaffected by the measure. The Complainant, Mr. Halidou Ouédraogo and Mr. Compaoré Christophe, both magistrates, fall in the latter category. They both demanded to be compensated in kind. The request made by Mr. Compaore has not been met to date. The Supreme Court, before which the case was filed over fifteen years ago has passed no verdict on it. The Commission further notes that no reason with a basis in law was given to justify this delay in considering the case. Nor does the Respondent State give any legal reasons to justify the retention of the punishment meted out to these two magistrates. The Commission considers therefore that this is a violation of Articles 18 and 19 of the Fundamental Principles on the Independence of the Judiciary, adopted by the seventh United Nations Congress on Crime Prevention and the Treatment of Offenders, held from 26th August to 6th September 1985, and confirmed by the General Assembly in its Resolutions 40/32 of 29 November 1985 and 40/146 of 13th December 1985.

39. In *communication 39/90, A. Pagnoule (for A. Mazou) /Cameroon, para. 17*, the Commission stated:

“Considering that the case under examination concerns the possibility of Mr. Mazou exercising his profession and that there are undoubtedly some people who depend on him for their survival, two years without any action on a case... constitutes a violation... of the Charter”.

40. It is abundantly clear, as the Commission has already noted that the Respondent State has shown reasons as to why the rehabilitation measure was applied in a selective manner. The Commission also wonders at the reasons behind the Supreme Court’s failure to proceed with the case. Fifteen years without any action being taken on the case, or any decision being made either on the fate of the concerned persons or on the relief sought, constitutes a denial of justice and a violation of the equality of all citizens before the law. It is also a violation of Article 7(1)(d) of the African Charter, which proclaims the right to be tried within a reasonable time by an impartial court or tribunal.

41. Article 4 of the Charter states that:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.

42. The communication contains the names of various people who were victims of assassinations, forced disappearances, attacks or attempted attacks against their physical integrity, and acts of intimidation. The Respondent State did not deny these facts. Also, the State has never published the results of the commission of enquiry set up following the assassination of Mr. Clement Oumarou Ouédraogo, nor did it identify the perpetrators of the offences or take any measures against them. In conformity with its own jurisprudence which states that “whenever allegations of human rights abuses are not contested by the accused State, ... the Commission shall decide on the basis of the facts provided by the plaintiff and treat such facts as they are presented to it” (*See communications 25/89, 47/90, 56/93 and 100/93, para. 49*). The Commission therefore applies the same reasoning to the facts related in the present communication. The Commission would also like to reiterate a fundamental principle proclaimed in Article 1 of the Charter 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. 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 Charter. Even if the State or its agents were not the perpetrators of the violation. (*See communication 74/92, para. 35*).
43. The communication points to a series of human rights violations linked to certain events that occurred in Burkina Faso in 1995 and additional elements attached to the dossier describe the human rights violations perpetrated at Garango, Kaya Navio, as well as the murder of a young peasant at Réo. The communication also mentions the deaths of citizens who were shot or tortured to death, as well as the deaths of two young students who had gone onto the streets with their colleagues to express certain demands and to support those of the secondary school and higher institution teachers. The Commission deplores the abusive use of means of State violence against demonstrators even when the demonstrations are not authorised by the competent administrative authorities. It believes that the public authorities possess adequate means to disperse crowds, and that those responsible for public order must make an effort in these types of operations to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life.
44. Article 5 of the Charter guarantees respect for the dignity inherent in the human person and the recognition of his legal status. This text further prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment. The guarantee of the physical integrity and security of the person is also enshrined in Article 6 of the African Charter, as well as in the Declaration on the Protection of all Persons against Forced Disappearances, adopted by the General Assembly of the United Nations in Resolution 47/133 of 18th December 1992, which stipulates in article 1(2) that “*any act leading to forced disappearance excludes the victim from the protection of the law and causes grave suffering to the victim and his family. It constitutes a violation of the rules of international law, especially those that guarantee to all the right to the recognition of their legal status, the right to freedom and security of their person and the right not be subjected to torture or any other inhuman or degrading punishment or treatment. It also violates the right to life or seriously imperils it*”. The disappearances of persons suspected or accused of plotting against the instituted authorities, including Mr. Guillaume Sessouma and a medical student, Dabo Boukary, arrested in May 1990 by the presidential guard and who

have not been seen since then constitute a violation of the above-cited texts and principles. In this last case, the Commission notes the submission of a complaint on 16th October 2000.

45. Article 8 of the Charter provides for the guarantee of the freedom of conscience, the profession and the free practice of religion. While the Complainant claims violation of these treaty provisions, the communication does not contain any elements that could reasonably lead to such a conclusion. Information before the Commission provides no indication that the Complainant or that any other person cited in the communication had tried to express or exercise their freedom of conscience or to profess their faith. The Commission is of the view, therefore, that violation Article 8 has not been established. It adopts the same position as regards the allegations of violation of Articles 9(2), 10 and 11 of the Charter.

46. Article 12(2) stipulates that:

“Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality”.

47. The communication alleges that on 6th August 1995, Mr. Nongma Ernest Ouédraogo, Secretary General of the political party known as ‘*Bloc Socialiste Burkinabé*’ was prevented from leaving the national territory, following the publication by the said party of a statement on the situation in the country. Information available to the Commission does not point to any threat to public security or morality that either the journey or even the person of the said Mr. Ouédraogo could have represented. Therefore, it agrees that there was violation of Article 12(2).

48. The Complainant claims that there was dismissal of many workers at Poura on account of a strike. Unfortunately, the information provided to the Commission do not allow it to establish in any certain manner that there was violation of article 13(2).

For these reasons:

The Commission finds the Republic of Burkina Faso in violation of Articles 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter.

Recommends that the Republic of Burkina Faso draws all the legal consequences of this decision, in particular by:

- Identifying and taking to court those responsible for the human rights violations cited above;
- Accelerating the judicial process of the cases pending before the courts;
- Compensating the victims of the human rights violations stated in the complaint.

Done at the 29th Ordinary Session held in Tripoli, Libya

from 23rd April to 7th May 2001

211/98 - Legal Resources Foundation v/ Zambia

Rapporteur:

23rd Session: Commissioner Nyameko Pityana
24th Session: Commissioner Nyameko Pityana
25th Session: Commissioner Nyameko Pityana
26th Session: Commissioner Nyameko Pityana
27th Session: Commissioner Nyameko Pityana
28th Session: Commissioner Nyameko Pityana
29th Session: Commissioner Nyameko Pityana

Summary of Facts:

1. The Complainant, an NGO that has Observer Status with the African Commission and is based in Zambia, is bringing this complaint against a State Party to the Charter, Zambia.
2. The Complainant alleges that the Zambian Government has enacted into law, a constitution which is discriminatory, divisive and violates the human rights of 35 percent of the entire population. The Constitution (Amendment) Act of 1996, it is alleged, has not only violated the rights of its citizens, but has also taken away the accrued rights of other citizens, including the first President, Dr. Kenneth Kaunda.
3. The Complainant alleges that the said Constitution of Zambia Amendment Act of 1996 provides *inter- alia*, that anyone who wants to contest the office of the president has to prove that both parents are/were Zambians by birth or descent.
4. Article 35 of the said Constitution Amendment Act further provides that nobody who has served two five-year terms as President shall be eligible for re-election to that office.
5. Complainant alleges that the amended constitutional provisions are in contravention of international human rights instruments in general and the African Charter on Human and Peoples' Rights in particular.
6. Complainant has taken the case to the Supreme Court of Zambia between May and August 1996 seeking:

- A declaration that Articles 34 and 35 of the amended Constitution are discriminatory.
 - A declaration that Parliament lacks the power to adopt a new constitution; and
 - An injunction restraining the President from assenting to the constitution.
7. Complainant alleges that while the case was pending in court, the ruling party dominated parliament went ahead to adopt and enact the controversial constitution which the President assented to one week later.
 8. The Complainant's case was therefore thrown out of court.
 9. The Supreme Court of Zambia is the highest Court of jurisdiction in the land, thus all local remedies have been exhausted.

Complaint:

10. The Complainant alleges that the following provisions of the African Charter have been violated;
 - Article 2 - which prohibits discrimination of any kind including place of birth, social origin and other status;
 - Article 3 - which provides for the equality of all individuals before the law;
 - Article 13 - which guarantees every citizen the right to participate freely in the government of his or her country;
 - Article 19 - which provides for the equality of all peoples, irrespective of their place of origin etc.

Procedure:

11. The communication is dated 12th February 1998.
12. On the 10th March 1998, the Secretariat sent a letter acknowledging receipt of the complaint.
13. At its 23rd ordinary session held in Banjul, The Gambia from 20th to 29th April 1998, the Commission decided to be seized of this case and requested further information in order to decide on admissibility at the next session.
14. On 25th June 1998, the Secretariat sent letters to the parties notifying them of the Commission's decision.
15. At its 24th ordinary session held in Banjul, The Gambia from 22nd to 31st October 1998, the Commission postponed consideration of admissibility of the communication to the 25th ordinary session and instructed the Secretariat to request more information from the Parties.
16. On 26th November 1998, the Secretariat informed the Parties of the decision accordingly.

17. At its 25th ordinary session held in Bujumbura, Burundi, the Commission declared the communication admissible and postponed its consideration on the merit to the 26th ordinary session.
18. On 13th May 1999, the Secretariat of the Commission notified the parties of this decision.
19. At the 26th ordinary session of the Commission held in Kigali, Rwanda, the Commission considered the communication and invited parties to present oral arguments on the merits of the case.
20. Letters conveying this decision were dispatched to the parties by the Secretariat on 18th January 2000.
21. Reminders to this effect were sent on 14th March 2000, with a copy to the Embassy of the Republic of Zambia in Addis Ababa.
22. On 30th March 2000, the State Party responded to the above request.
23. On 31st March 2000, the Secretariat of the Commission acknowledged receipt of the document, but reminded it of the necessity of it sending the relevant sections of the Constitution together with the Supreme Court's decision on the case, as soon as possible. A copy of this Note was forwarded to its Embassy in Addis Ababa. A copy of the State Party's submission was also forwarded to the Complainant in Lusaka.
24. On 7th April 2000, the State Party sent a fax to the Secretariat requesting for a copy of the report of the 26th ordinary session.
25. In view of the requirements of Article 59 of the Charter, the Secretariat instead sent to the State Party a copy of the Final Communiqué of the said session. It also intimated it of the decision of the Commission during that session.
26. On 30th April 2000, the Respondent State submitted additional arguments to its initial response of 30th March 2000.
27. On 2nd May 2000 while at the session, the Secretariat received a letter from the Complainant expressing its desire to continue with the case.
28. At the 27th ordinary session held in Algeria, the Commission heard representatives of the Respondent State. It decided that parties should address it on specific issues, particularly on whether or not the provisions of the amended Constitution were in conformity with the Republic of Zambia's obligations under the Charter. In addition, the Secretariat was requested to seek an independent legal expert opinion on the issues raised for determination.
29. Parties were informed of the above decision on 7th July 2000.
30. On 31st August 2000, the Secretariat of the Commission wrote reminders to the parties and emphasised the necessity for them to furnish it with their submissions

as soon as possible for use in the preparation of the draft decision for the 28th session.

31. On 26th September 2000, the Secretariat received a response from the Respondent State on the issues raised by the Commission during the 27th ordinary session.
32. On 2nd October 2000, the Secretariat of the Commission acknowledged receipt of the submission and also forwarded a copy of it to the Complainant for its comments
33. At the 28th Ordinary session in Cotonou, Benin the communication was considered and further consideration of the merits was deferred until the 29th Ordinary session.
34. The parties were informed of this decision on the 14th November 2000.
35. A Note Verbale was sent to the Government of Zambia requesting a copy of the Commission of Inquiry report on the 5th April 2001.

State Party's Response

36. The matter concerns the Republican Constitution of Zambia and is therefore an open matter for discussion. The background to the Constitution of Zambia (Amendment) Act of 1996 is attributable to the desire of the Zambian people to save and preserve the Office of the President for Zambians with traceable descent.
37. The position was arrived at in the Mwanakatwe Commission of Inquiry Report commissioned to gather views on the content of the Republican Constitution. The amendment to the Constitution was not targeted at any person in the country.
38. Zambia welcomes views expressed on its Republican Constitution as a way of building a strong democracy. It is open to expert opinions on the issue, and will continue to listen to views expressed on it.
39. Zambia views the complaint filed by the Legal Resources Foundation as an opinion on the Constitution. The variance of opinion of the Complainant from that of the majority therefore is in accordance with democratic principle of freedom of opinion. Despite this difference, democracy entails the rule of the majority. Hence the amendment to the Republican Constitution incorporating the views expressed in the Mwanakatwe Commission of inquiry Report for an indigenous Zambian to hold Office of President.
40. Zambia is prepared to co-operate with the Commission and to elaborate further on the issues, if necessary.

Additional Arguments from the Respondent State to its Initial Response

41. The Government avers that although the communication is vague as to the details of the judicial process that was exhausted, Zambia would however assume that the issues raised by the Complainant were finally settled by the Supreme Court in Zambia Democratic Congress and the Attorney General SCZ Appeal No. 135/96, SCZ Judgement No. 37/99.
42. The Zambian Parliament has the power to adopt an alteration to the Constitution and the President may assent to a Constitution that has been altered. However, if Parliament had amended the entire Constitution, there would have been a mandatory need for a national referendum in respect of Article 79 and Part III of the Constitution, which contains the Bill of Rights.
43. The Government contends that the powers, jurisdiction and competence of Parliament to alter the Constitution of Zambia are extensive provided that Parliament adheres to the provisions of Article 79 of the Constitution. The constitutional history of Zambia has shown that the alteration of the Constitution has depended on who controls the majority in Parliament. The ruling Party dominated Parliament could therefore adopt the altered Constitution.
44. All individuals in Zambia are equal before the law and everyone enjoys the protection of his/her human rights and fundamental freedoms as provided for by the law.
45. Zambia abhors any type of discrimination. Article 23(1) of the Republican Constitution provides that:

Subject to clauses (4), (5) and (7) a law shall not make any provision that is discriminatory either of itself or in its effect.

This Article, however, needs to be read and understood with the provision of Article 23(5), which states that:

Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer.

46. The Government points out that it is in this context that Zambian people were of the view that it was reasonable for the Office of the President to be subject to other qualifications i.e. an indigenous Zambian candidate of traceable descent. Therefore there was no contravention of Article 2 of the Charter.
47. To ensure Zambia's policy of non-discrimination, Article 11 of the Constitution provides that:

It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to limitations...

The limitations being reasonable within the law, the Government avers further that there has therefore been no violation of Article 2 of the Charter as the limitations provided for by Article 34 of the Republican Constitution are within the law. Zambia also submits that there is no violation of Article 13 of the Charter, which guarantees every citizen the right to participate in government. If anything, there is a proviso that such should be "in accordance with the provisions of the law."

48. It underscores the fact that Articles 34 and 35 of the Constitution are within Zambia's laws and therefore there is no violation of Article 13 of the Charter.
49. It stated that Zambia considers the inclusion of a violation of Article 19 of the Charter by the Complainant as not being within the purview of the present communication. It is of the opinion that Article 19 of the Charter relates to the principle of "self-determination" by the mere mention of the term "peoples". This position notwithstanding, the peoples of Zambia are equal. It urges the Commission not to entertain this ground, as it is inappropriate to the issues raised in the communication.
50. It argues that the discrimination alleged in Articles 34 and 35 of the Constitution is not unlawful and it reflects the popular desire of the majority of the Zambian people to save and preserve the "Office of the President" for Zambians. The Constitution of Zambia (Amendment) Act, 1996, therefore, seeks to give effect to the will of the people.

THE LAW

Admissibility

51. Having considered that the communication satisfied the provisions of Article 56 of the Charter, the communication was declared admissible.

Merits

52. The allegation before the Commission is that Respondent State has violated Articles 2, 3 and 19 of the Charter in that the Constitution of Zambia Amendment Act of 1996 is discriminatory. Article 34 provides that anyone who wishes to contest the office of President of Zambia had to prove that both parents were Zambian citizens by birth or descent. The effect of this amendment was to prohibit a Zambian citizen, former President Dr Kenneth David Kaunda from contesting the elections having been duly nominated by a legitimate political party. It is alleged that the effect of the amendment was to disenfranchise some 35% of the electorate of Zambia from standing as candidate Presidents in any future elections for the highest office in the land.
53. The enactment of the amendment to the Constitution is not in dispute. Neither is it denied that Dr Kenneth Kaunda was thus denied the right to contest the elections for the office of President. Respondent State, however, denies that some 35% of Zambian citizens would be constitutionally denied the right to stand as President and alleges that in any event such facts have no relevance to

the matter at hand. It nevertheless argues that the said amendment was constitutional, justifiable and not in violation of the Charter.

54. In the matter of *Zambia Democratic Congress v The Attorney General* (SCZ Appeal No: 135/1996), the Zambia Supreme Court was petitioned to declare the then proposed amendments to the Constitution unconstitutional in that the amendments contained in Articles 34(3)(b) and 35(2) of the Constitution (Amendment) Act bar persons qualified to stand for election as President of the Republic under the 1991 Constitution and deny them the right to participate fully without hindrance in the affairs of government and shaping the destiny of the country and undermine democracy and free and fair elections which are the basic features of the Constitution of 1991.
55. It is alleged that the matter was rushed through parliament by the ruling party and enacted into law while the legal and constitutional principles were before the courts for adjudication. In the event, the court dismissed the appeal for the reason that the petition was “attacking an Act of Parliament on the ground that it violated Part III of the Constitution relating to Fundamental Rights. We are satisfied that the application was commenced by a wrong procedure and that in our jurisdiction the application was untenable” (per Sakala JS at 292).
56. The following provisions of the African Charter have relevance:

Article 1:

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

Article 2:

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

Article 3:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 13:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

57. The African Commission on Human and Peoples’ Rights is a creature of the Charter (Article 30). It was established “to promote human and peoples’ rights and ensure their protection in Africa.” The functions of the Charter are spelt out in Article 45 of the Charter, *inter alia*, as follows:

- Give its views or make recommendations to Governments;
 - Formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation;
 - Ensure the protection of human and peoples' rights under the conditions laid down by the present Charter;
 - Interpret all the provisions of the present Charter at the request of a State Party...;
58. In the task of interpretation and application of the Charter, the Commission is enjoined by Articles 60 and 61 to “draw inspiration from international law on human and peoples' rights” as reflected in the instruments of the OAU and the UN as well as other international standard setting principles (Article 60). The Commission is also required to take into consideration other international conventions and African practices consistent with international norms etc.
59. Although international agreements are not self-executing in Zambia, the government of Zambia does not seek to avoid its international responsibilities in terms of the treaties it is party to (*vide Communication 212/98 Amnesty International / Zambia*). This is just as well because international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations (Article 27, Vienna Convention on the Law of Treaties)¹. Likewise an international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead a body like the Commission may examine a State's compliance with the treaty in this case the African Charter. In other words the point of the exercise is to interpret and apply the African Charter rather than to test the validity of domestic law for its own sake. (*vide* cases of the Inter American Commission against *Uruguay* (Nos 10.029, 10.036, 10.145, 10.10.372, 10.373, 10.374, 10.375 in Report 29/92, October 2, 1992).²

¹ *Vide* General Comment No 9 (XIX/1998) on The Duty to Give Effect to the Covenant in the Domestic Order. The UN Committee on Economic and Social Rights has established that “legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.” The Committee argues that States have an obligation to promote interpretations of domestic laws which give effect to their Covenant obligations” (*COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES*; HR1/GEN/Rev.4; February 2000; pp48-52.

Although directed at the application of international law in domestic courts, Benedetto Confortu's note of caution is appropriate::

In our view, it is necessary to take a cautious approach in accepting the existence of an exceptional category of international norms that owe their non-executing nature to their substantive content. Such an exception must not lead to political manoeuvring in the form of non-implementation of rules found to be ‘undesirable’, either because they are considered contrary to national interest, or because they entrench progressive values, or finally, because they are viewed suspiciously by an internal judge purely by reason of their origins.

With F Francioni (Eds) in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS*; 1997: The Hague; Martinus Nijhoff; 8.

² The Commission held in respect to the amnesty laws promulgated by the Government of Uruguay: where it had been argued that these were valid and legitimate in terms of domestic law and the constitution and that they had approval by the democratic majority in a referendum:

60. What this does mean, however, is that international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties. It is noticeable that the application of the Charter was not part of the argument before the national courts.
61. Conscious of the ramifications of any decision on this matter, the Commission had invited the parties to address the question of the extent of the jurisdiction of the Commission when it comes to domestic law including as is the case in this instance the Constitution. Counsel for the Respondent State argued that the Commission had no *locus standi* to adjudicate on the validity of domestic law. That position is correct. What must be asserted, however, is that the Commission has the duty to “give its views or make recommendations to Governments.../ to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation / and interpret all the provisions of the present Charter...”(Article 45).
62. In addition, the Commission is mindful of the positive obligations incumbent on State Parties to the Charter in terms of Article 1 not only to “recognise” the rights under the Charter but to go on to “undertake to adopt legislative or other measures to give effect to them” The obligation is peremptory, States “*shall* undertake” Indeed, it is only if the States take their obligations seriously that the rights of citizens can be protected. In addition, it is only to the extent that the Commission is prepared to interpret and apply the Charter that Governments would appreciate the extent of its obligations and citizens understand the scope of the rights they have under the Charter.
63. Article 2 of the Charter abjures 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 rights³. 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 and equal and proud citizen. He may vote for others but has limitations when it comes to standing for office. In other words the country may be deprived of the leadership and resourcefulness such a person may bring to national life. Finally, the Commission should take note of the fact that in a growing number of African States, these forms of discrimination have caused violence and social and economic instability which

... it should be noted that it is not up to the Commission to rule on the domestic legality or the constitutionality of national laws. However, the application of the Convention and the examination of the legal effects of a legislative measure, either judicial or of any nature, insofar as it has effects compatible with the rights and guarantees embodied in the Convention or the American Declaration, are within the Commission’s competence.

³ *Vide* UN Committee on Human Rights General Comment No 18 (XXXVII/1989), pp103-106) for a fuller discussion on non-discrimination in the ICCPR.

has benefited no one. It has cast doubt on the legitimacy of national elections and the democratic credentials of States.

64. All parties are agreed that any measure which seeks to exclude a section of the citizenry from participating in the democratic processes as the amendment in question has managed to do, is discriminatory and falls foul of the Charter. Article 11 of the Constitution of Zambia provides that there shall be no discrimination on the grounds of “race, place of origin, political opinions, colour, creed, sex or marital status...” The African Charter has “national or social origin...” which could be encompassed within the expression “place of origin” in the Zambian Constitution. Article 23(1) of the Zambian Constitution says that parliament shall not make any law that “is discriminatory of itself or in its effect...”
65. The Respondent State, however, seeks to rely on some exceptions as justification in Zambian law for the exception. It is held that the right to equality has limitations which are justifiable and that the justifications are based on Zambian law and the Charter.
66. Article 11 of the Zambian Constitution states clearly that the right to non-discrimination is “subject to limitations...” Among the limitations reference is made to Article 23(5) which provides that:
 - ... nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer...” It is argued that following a consultative process, the Zambian people were of the view that the Office of President be subject to the additional qualification that the President be “an indigenous Zambian candidate of traceable descent.”
67. There has been some persistent confusion in arguments before us between “limitations” and “justification”. Limitations refer to what may be referred to as the statute of limitations which gives a lower threshold of enjoyment of the right. Such limitations are allowed by law or provided for in the Constitution itself. In the African Charter these would typically be referred to as the ‘claw-back’ clauses. “Justification” however applies in those cases where justification is sought setting perimeters on the enjoyment of a right. In other words, there has to be a two-stage process. First, the recognition of the right and the fact that such a right has been violated but that, secondly, such a violation is justifiable in law. The Vienna Declaration and Programme of Action (1993) has affirmed that “all human rights are universal, interrelated, interdependent...” and as such they must be interpreted and applied as mutually reinforcing. It is interesting to note for example, that Article 2 does not have a ‘claw-back’ clause while Article 13 limits the right to “every citizen” but goes on to state that “in accordance with the law.”
68. In the matter before us therefore the Government of Zambia concedes that the measures were discriminatory but then goes on to argue (1) a limitation of the right, and (2) justification of the violation. It is argued that the measure was within the law and Constitution of Zambia. It was stated before the Commission that Zambia has a constitutional system of parliamentary sovereignty hence even the Supreme Court could not “attack” an Act of Parliament (as Sakala JS put it).

The task of the Commission, however, is not to seek to do that which even the Zambian courts could not do. The responsibility of the Commission is to examine the compatibility of domestic law and practice with the Charter. Consistent with decisions in the European and Inter-American jurisdictions, the Commission's jurisdiction does not extend to adjudicating on the legality or constitutionality or otherwise of national laws. Where the Commission finds a legislative measure to be incompatible with the Charter, this obliges the State to restore conformity in accordance with the provisions of Article 1 (*cf Zanghi v Italy*, 194 Eur Ct HR (Ser A) 48 (1991)).

69. It is stated further that the limitation of the right is provided for in the Zambian Constitution and that it is justifiable by popular will in that, following the work of the Mwanakatwe Commission on the Constitution, it was recommended that the Zambian people desired “to save and preserve the Office of the President for Zambians with traceable descent...” Regarding the claim that the measure deprived some 35% of Zambians of their rights under the previous Constitution, counsel for Respondent State dismisses this as mere speculation.
70. The Commission has argued forcefully that no State Party to the Charter should avoid its responsibilities by recourse to the limitations and “claw-back” clauses in the Charter. It was stated following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections of it. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as such cannot be used to limit the responsibilities of State Parties in terms of the Charter. Having arrived at this conclusion, it does not matter whether one or 35% of Zambians are disenfranchised by the measure, that anyone is, is not disputed and it constitutes a violation of the right⁴.
71. The Commission has arrived at a decision regarding allegations of violation of Article 13 by examining closely the nature and content of the right to equality (Article 2). It cannot be denied that there are Zambian citizens born in Zambia but whose parents were not born in what has become known as the Republic of Zambia following independence in 1964. This is a particularly vexing matter as the movement of people in what had been the Central African Federation (now the States of Malawi, Zambia and Zimbabwe) was free and that by Zambia's own admission, all such residents were, upon application, granted the citizenship of Zambia at independence. Rights which have been enjoyed for over 30 years cannot be lightly taken away. To suggest that an indigenous Zambian is one who was born and whose parents were born in what came (later) to be known as the sovereign territory of the State of Zambia may be arbitrary and its application of retrospectivity cannot be justifiable according to the Charter.
72. The Charter makes it clear that citizens should have the right to participate in the government of their country “directly or through freely chosen

⁴ *Vide* UN Human Rights Committee General Comment No 25 (XXXVII/1996) where it says that “Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence, or descent, or by reason of political affiliation...” (para 15 @ p.127).

representatives...” The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin but that the rights of the citizens of Zambia to “freely choose” political representatives of their choice, is violated. The purpose of the expression “in accordance with the provisions of the law” is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right.

73. The Commission believes that recourse to Article 19 of the Charter was mistaken. The section dealing with “peoples” cannot apply in this instance. To do so would require evidence that the effect of the measure was to affect adversely an identifiable group of Zambian citizens by reason of their common ancestry, ethnic origin, language or cultural habits. The allegedly offensive provisions in the Zambia Constitution (Amendment) Act, 1996 do not seek to do that.

For the above reasons, the Commission,

Finds that the Republic of Zambia is in violation of Articles 2, 3(1) and 13 of the African Charter;

Strongly urges the Republic of Zambia to take the necessary steps to bring its laws and Constitution into conformity with the African charter; and

Requests the Republic of Zambia to report back to the Commission when it submits its next country report in terms of Article 62 on measures taken to comply with this recommendation.

*Done at the 29th Ordinary Session, held in Tripoli, Libya
from 23rd April to 7th May 2001.*

218/98 - Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project / Nigeria

Rapporteur:

24th Session: Commissioner Pityana

25th Session: Commissioner Pityana

26th Session: Commissioner Pityana

27th Session: Commissioner Pityana

28th Session: Commissioner Pityana

29th Session: Commissioner Pityana

SUMMARY OF FACTS:

1. The authors of the communication are three NGOs based in Nigeria with observer status with the African Commission. Nigeria is a State Party to the African Charter on Human and Peoples' Rights.
2. The Communication was received on 3rd August 1998.
3. The authors allege a violation of the African Charter in that
 - i) An unfair trial in respect of the trial and conviction of Lt. Gen. Oladipo Diya and four other soldiers and a civilian;
 - ii) The above mentioned victims were convicted and sentenced to death by a Special Military Tribunal for an alleged coup plot to overthrow the Nigerian Military Government under Gen. Sani Abacha;
4. It is alleged that on December 21st 1997, the Nigerian Military Government announced that it had uncovered a coup plot. Following this, 26 persons were arrested including Lt. Gen. Oladipo Diya, Major General Abdukadir Adisa, Lt. Gen. Olarenwaju, Col. Akintonde and Professor Odekunle.
5. It is also alleged that in January 1998, the Nigerian Military government set up a Military Panel of Inquiry to investigate the alleged coup plot. Before the trial, the government displayed to a selected audience, videotapes of supposed confessions by the suspects.
6. On 14th February 1998, a Special Military Tribunal was constituted. Members of the tribunal included serving judges, but the Chairman is a member of the Provisional Ruling Council (PRC).
7. The decision of the tribunal is not subject to appeal, but confirmation by the PRC, the members of which are exclusively members of the armed forces.
8. The Tribunal concluded its proceedings in early April 1998 and on 28th April 1998, announced the conviction and sentencing to death of six of the accused, including the five persons mentioned above.

9. The authors contend that the arrest, detention, arraignment and trial of the convicted and sentenced persons was unlawful, unfair and unjust and as such a violation of the provisions of the African Charter on Human and Peoples' Rights.
10. The communication alleges that the following Articles of the African Charter on Human and Peoples' Rights have been violated: **Articles 4, 5, 6, 7, and 26.**

PROCEDURE:

11. At the 24th ordinary session, the Commission considered the communication and decided to be seized of it.
12. On 26th November 1998, letters were sent to the parties involved informing them of the Commission's decision.
13. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of article 56(7) of the Charter in view of the political developments in Nigeria, and postponed consideration on admissibility to the 26th ordinary session.
14. On 13th May 1999, the Secretariat of the Commission dispatched letters to all the parties notifying them of this decision.
15. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible in line with the recommendation of the Secretariat and requested parties to submit arguments on the merits of the case.
16. By separate letters dated 17th January 2000, all the parties were informed of the decision.
17. On 17th February 2000, the Secretariat received a Note Verbale from the High Commission of the Federal Republic of Nigeria in Banjul, requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare appropriate responses to the alleged violations:
 - (a) The Draft Agenda for the 27th ordinary session and the letter of invitation to the said session;
 - (b) A copy of the complaint that was attached to the Secretariat's Note; and
 - (c) A copy of the Report of the 26th ordinary session
18. Further to the above request, the Secretariat of the Commission on 8th March 2000, forwarded all the documents requested, except the Report of the 26th ordinary session, together with a copy of the summary and status of all communications filed against Nigeria which were pending before the Commission during the 26th ordinary session, a copy each of the three communications (**Nos. 218/98, 224/98 and 225/98**) as submitted by their authors, and a copy of the written response of Media Rights Agenda on the merits of **communication 224/98.**

19. At its 27th Ordinary Session held in Algiers, Algeria, the Commission found a violation of Article 7 of the Charter and requested the Government of Nigeria to compensate the victims accordingly.
20. At its 28th Ordinary Session held in Cotonou, Benin, the rapporteur noted that although a decision had been taken at the 27th Ordinary Session, some amendments were necessary in order to reflect the peculiar nature of trials of soldiers by military tribunals. He undertook to continue working on the case and the matter was deferred to the 29th Ordinary Session.

THE LAW:

Admissibility

21. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give an opinion on the effect of Article 56(7) of the Charter in view of the changing political and constitutional situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well established principle of international law, a new government inherits its predecessor's obligations, including responsibility for the previous government's misdeeds (*see Krishna Achutan and Amnesty International / Malawi, communications 62/92, 68/92 and 78/92*).
22. The Commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (*see communications 27/89, 46/91 and 99/93*). Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position still remains that the responsibility of the present government of Nigeria would still be engaged for acts of human rights violations which were perpetrated by its predecessors.
23. It was noted that although Nigeria was under a democratically elected government, section 6(6)(d) of the Constitution provides that no legal action can be brought to challenge 'any existing law made on or after 15th January 1966 for determining any issue or question as to the competence of any authority or person to make any such law'. This means that there is no recourse within the Nigerian legal system for challenging the legality of any unjust laws.

For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

24. In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. The Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the UN treaty bodies (Article 60). It may also have regard to principles of law laid down by State Parties to the Charter and African practices consistent with international

human rights norms and standards (Article 61). In this matter, the Charter is silent on its application to military courts or tribunals.

25. The issues brought before the Commission have to be judged in the environment of a military junta and serving military officers accused of offences punishable in terms of military discipline in any jurisdiction. This caution has to be applied especially as pertaining to serving military officers. The civilian accused is part of the common conspiracy and as such it is reasonable that he be charged with his military co-accused in the same judicial process⁵. We are making this decision conscious of the fact that Africa continues to have military regimes who are inclined to suspend the constitution, govern by decree and seek to oust the application of international obligations. Such was the case in Nigeria under Military strongman Sani Abacha.
26. We believe that this decision must indicate the durability of the norms prescribed by the Charter and the duties on whatever system of governance may be in place, to abide by the international norms as well as duties established in international human rights law. It must be clearly understood that the military tribunal here is one under an undemocratic military regime. In other words, the authority of the executive and the legislature has been subsumed under the military rule. Far from this suggesting that military rulers have *carte blanche* to govern at the whim of a gun, we wish to underscore the fact that the laws of human rights, justice and fairness must still prevail⁶.
27. It is our view that the provisions of Article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime. The Human Rights Committee in its General Comment No 13 states that Article 14 of the ICCPR applies to all courts and tribunals whether specialised or ordinary. The Committee went on to note the existence of military or special courts in many jurisdictions which, nonetheless, try civilians. It is noted that this could present serious problems as far as equitable, impartial and independent administration of justice is concerned. Such courts are resorted to in order to justify recourse to exceptional measures which do not comply with normal procedures. The European Commission has ruled that the purpose of requiring that courts be “established by law” is that the organisation of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament. The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.

⁵ In General Comment No 13 (XXI/1984) para.4 the UN Human Rights Committee argues that “While the Covenant does not prohibit such categories of courts (military or special courts which try civilians), nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”

⁶ In Communications No: 137/94, 139/94, 154/96 and 161/97 International PEN, Constitutional Rights Project, and Civil Liberties Organisation, Interights on behalf of Ken Saro-Wiwa, Jr/Nigeria, the Commission found that trials held under the Civil Disturbances (Special Tribunals) Decree No 2 of 1987 were in violation of the Charter in that the judgements of the tribunals were not subject to appeal but had to be confirmed by the Provisional Ruling Council, the members of which were military officers. The decree effectively ousts the jurisdiction of the ordinary courts and as such they had no access to a competent, independent, fair and impartial court (*vide Compilation*; *ibid*; paras 89-101).

28. It is alleged that in contravention of Article 7(1)(c) of the Charter, the convicted persons were not given the opportunity to be represented and defended by counsel of their choice, but rather that junior military lawyers were assigned to them and their objections were overruled. The fairness of the trial is critical if justice is to be done. For that especially in serious cases, which carry the death penalty, the accused should be represented by a lawyer of his choice. The purpose of this provision is to ensure that the accused has confidence in his legal counsel. Failure to provide for this may expose the accused to a situation where they will not be able to give full instructions to their counsel for lack of confidence.
29. Besides, it is desirable that in cases where the accused are unable to afford legal counsel, that they be represented by counsel at state expense. Even in such cases, the accused should be able to choose out of a list the preferred independent counsel “not acting under the instructions of government but responsible only to the accused”. The Human Rights Committee also prescribes that the accused person must be able to consult with his lawyer in conditions which ensure confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with established professional standards without any restrictions, influences, pressures or undue interference from any quarter (*Burgos v Uruguay* and *Estrella v Uruguay*).
30. The right to fair trial is essential for the protection of all other fundamental rights and freedoms. In its Resolution on the Right to Recourse Procedure and Fair Trial, the Commission has observed that the right to fair trial includes, among other things, that:
- a) In the determination of charges against individuals, the individual shall be entitled in particular to: (i) have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice.
31. The assignment of military lawyers to accused persons is capable of exposing the victims to a situation of not being able to communicate, in confidence, with counsel of their choice. The Commission therefore finds the assignment of military counsel to the accused persons, despite their objections, and especially in a criminal proceeding which carries the ultimate punishment a breach of Article 7(1)(c) of the Charter (*vide* the Ken Saro-Wiwa decision cited above).
32. The communication alleges that under the military rule, the decision of the military tribunal is not subject to appeal, but may be confirmed by the Provisional Ruling Council. The PRC in this instance arrogates to itself the role of Complainant, prosecutor and judge in its own cause. This, it alleged, is a violation of Article 7(1)(a) of the Charter.

Article 7 (1)(a) of the Charter provides:

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

33. The foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates the said Article. It also falls short of the standard stipulated in paragraph 6 of the

UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, to wit:

Any one sentenced to death shall have the right to appeal to the court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

34. Article 6(4) of the ICCPR also makes provision for this protection. In a case against Nicaragua in 1986, the Inter-American Commission of Human Rights (IACHR) stated that “the existence of a higher tribunal necessarily implies a re-examination of the facts presented in the lower court” and that the omission of the opportunity for such an appeal deprives defendants of due process. In other words, a higher threshold of rights is intended for those who are charged with crimes the sentence of which might be the death penalty (**vide: ACHPR Communications 60/91 and 87/93 Constitutional Rights Project/Nigeria**).
35. The communication further alleges that except for the opening and closing ceremonies, the trial was conducted in camera in contravention of Article 7 of the Charter. The Charter does not specifically mention the right to public trials; neither does its Resolution on the Right to Recourse Procedure and Fair Trial. Mindful of developments in international human rights law and practice, and drawing especially from General Comment of the Human Rights Committee to the effect that “the publicity of the hearings is an important safeguard in the interest of the individual and of society at large..., apart from exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons...”⁷
36. The publicity of hearings is an important safeguard in the interest of the individual and the society at large. At the same time article 14, paragraph 1 acknowledges that courts have the power to exclude all or parts of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the UN Human Rights Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons.
37. In *Le Compte, van Leuven & de Meyere v Belgium*, the European Commission held that there is no public hearing unless the court dealing with the matter holds its proceedings in public both when considering the facts and when deciding on the law. While it may be acceptable in certain circumstances for the hearing to be held *in camera*, the proceedings should remain fair and in the interests of the parties. While there may be circumstances where a trial in camera may be held, for example, where the identity of the accused or the safety of witnesses need to be protected, this does not prescribe a right but is subject to the discretion of the judicial officer.
38. Article 14 of ICCPR explains that the trial should also guarantee the right of the accused “to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” Where the trial is held in camera, there can be no independent demonstration that these requirements have been met.

⁷ UN Human Rights Committee General Comment No 13 (XXI/1984) para 6.

39. The State party has not shown that the holding of the proceedings in secret was within the parameters of the exceptional circumstances contemplated above. The Commission therefore finds this a violation of the victims' right to fair hearing guaranteed under Article 7 of the Charter.

40. Article 7(1)(b) stipulates that

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

(b) the right to be presumed innocent until proven guilty by a competent court or tribunal.

The presumption of innocence is universally recognised. With it is also the right to silence. This means that no accused should be required to testify against himself or to incriminate himself or be required to make a confession under duress (Article 6(2) and 14(3)(g) of ICCPR).

41. In ***Krause v Switzerland*** the European Commission noted that this principle constituted a fundamental principle, which protects everybody against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court. It has been alleged that videotapes show the accused making confession before other military officials. It is suggested that the officials affirmed the guilt of the accused on the basis of the "confessions". No evidence was led showing that these were the same officials who presided or participated in the Military Tribunal that tried them. The alleged tapes were not presented to the Commission as evidence. In the circumstances, the Commission cannot make a finding on hearsay evidence. We cannot therefore find that the right to presumption of innocence has been violated.

42. The communication alleges that the trial, conviction and sentence of civilians (as at the time of filing of the complaint, one civilian was convicted and sentenced to death) by the tribunal, composed of military personnel as judges, was a breach of Article 7 of the Charter. The Commission is not convinced that in the circumstances of this case, it was possible to have a separation of trials nor has it been alleged that the civilian accused applied for such separation. It may well be that the cause of justice would not have been served by such a separation. In the circumstances and in this respect, we are not in a position to find a violation Article 7(1)(d) of the Charter.

43. The communication alleges that the composition of the tribunal which was presided over by a serving military officer did not meet the requirement of an independent and impartial judicial panel to try the accused, and therefore a violation of Article 7(1)(d) of the Charter.

Article 7(1)(d) of the Charter provides:

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

(d) The right to be tried within a reasonable time by an impartial court or tribunal.

44. It has been stated elsewhere in this decision, that a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. We make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic or fundamental

standards that would ensure fairness. As that matter has been dealt with above, it is not necessary to find that a tribunal presided over by a military officer is a violation of the Charter. It has already been pointed out that the military tribunal fails the independence test.

45. The Complainant alleges a violation of Articles 5 and 6 of the Charter. No details of the specific elements which constitute such claims are made in the complaint. In the absence of such information, the Commission cannot find a violation as alleged.

For the above reasons, the Commission

Finds violation of Articles 7(1)(a), (c) of the Charter

Urges the Government of the Federal Republic of Nigeria to bring its laws in conformity with the Charter by repealing the offending Decree.

Requests the Government of the Federal Republic of Nigeria to compensate the victims as appropriate.

**Done at the 29th Ordinary Session held in Tripoli, Libya,
from 23rd April to 7th May 2001.**