

**AFRICAN UNION**  
EXECUTIVE COUNCIL  
Seventh Ordinary Session  
28 June - 2 July 2005  
Sirte, LIBYA

EX.CL/199 (VII)

## **18<sup>TH</sup> ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

### **1. Organization Of Work**

#### **A. Period covered by the Report**

1. The Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) was adopted by the 4<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the African Union Meeting in Abuja, Nigeria in January 2005.
2. The Report covers the 36<sup>th</sup> and 3<sup>rd</sup> Ordinary Sessions of the African Commission held in Dakar, Senegal from 23 November to 7 December 2004 and in Banjul, Gambia from 27 April to 11 May respectively.

#### **B. Status of Ratifications**

3. All the member States of the African Union are parties to the African Charter on Human and Peoples' Rights. The list of these States can be viewed on ACHPR Website: [www.achpr.org](http://www.achpr.org).

#### **C. Sessions and Agenda**

4. Since the adoption of the Seventeenth Annual Activity Report in January 2005, the African Commission held two Ordinary Sessions preceded by two NGO Fora (which took place in Dakar, Senegal from 20 to 22 November 2004 and in Banjul, Gambia from 24 to 26 April 2005 respectively) devoted to prepare the contribution of NGOs to the Sessions of the African Commission.
5. The agenda of the two (2) Sessions was circulated and can be viewed on ACHPR Website: [www.achpr.org](http://www.achpr.org).

#### **D. Composition and Participation**

6. All the under-listed members of the African Commission participated in the deliberations of the 36<sup>th</sup> and 3<sup>rd</sup> Ordinary Sessions:

Commissioner Salamata Sawadogo (Chairperson);  
Commissioner Yassir S.A. El Hassan (Vice Chairperson);  
Commissioner Mohamed A. Ould Babana;

Commissioner Kamel Rezag Bara  
Commissioner Andrew R. Chigovera;  
Commissioner Vera M. Chirwa;  
Commissioner Emmanuel V.O. Dankwa;  
Commissioner Jainaba John;  
Commissioner Angela Melo;  
Commissioner Sanji Mmasenono Monageng;  
Commissioner Baba e TomMukirya Nyanduga.

7. Delegates of the following 29 Member States attended the 36<sup>th</sup> Ordinary Session and made statements: Algeria, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Republic of Congo, Democratic Republic of Congo, Cote d'Ivoire, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Republic of Guinea, Equatorial Guinea, Kenya, Libya, Malawi, Mauritania, Mozambique, Namibia, Nigeria, Senegal, Republic of South Africa, Sudan, Tunisia and Zimbabwe.

8. Delegates of the following 28 Member States attended the 37<sup>th</sup> Ordinary Session and made statements: Algeria, Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, democratic Republic of Congo, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Guinea Bissau, Lesotho, Libya, Mali, Mauritania, Mauritius, Niger, Nigeria, Senegal, Republic of South Africa, Sudan, Tanzania, Tunisia and Zimbabwe.

### **E. Adoption of the Eighteenth Annual Activity Report**

9. The African Commission adopted its Eighteenth Annual Activity Report.

## **II. ACTIVITIES OF THE AFRICAN COMMISSION**

The African Commission held its Third Ordinary Session in Pretoria, South Africa from 18 to 19 September 2004 to adopt the report of its investigation mission to the Sudan in the Darfur region from 8 to 18 July 2004. The adopted report was transmitted to the .Government of the Sudan on 30 September 2004 for its possible comments and observations. The African Commission still awaits the reaction of the Sudan.

### **A. Consideration of the initial/periodic reports of the State Parties**

10. Article 62 of the African Charter on Human and Peoples' Rights stipulates that each State Party undertakes to present every two years, starting from the date of entry of this Charter, a report on the legislative and other measures taken to give effect to the rights and liberties guaranteed under the said Charter.

11. The Table of presentation of the initial and periodic reports were circulated and can be viewed on ACHPR Website: [www.orchpr.org](http://www.orchpr.org).

12. The African Commission examined Rwanda's periodic report at its 36<sup>th</sup> Ordinary Session.

13. The African Commission examined the periodic reports of the Islamic Republic of Mauritania and the Arab Republic of Egypt at its 3ih Ordinary Session.

14. The African Commission is pleased at the dialogue it had with the delegations of the Republic of Rwanda, the Islamic Republic of Mauritania and the Arab Republic of Egypt during the presentation of the above-mentioned reports.

15. The African Commission encouraged these States not to relent in their efforts to honour their obligations in accordance with the provisions of the African Charter.

16. The African Commission adopted conclusive observations on the three reports presented. These observations were transmitted to the States concerned and will be published together with the country reports.

17. The conclusive reports relate to factors conducive to the implementation of the African Charter on Human and People's Rights, the progress made, the concerns noted and the recommendations formulated with a view to a better promotion and protection of human rights within the States Parties concerned.

18. The African Commission urges Member States which have not yet done so to present their initial and periodic reports as soon as possible and reminds them once more that they can compile all the reports due in one single report.

## **B. Promotion Activities**

19. The Members of the African Commission carried out promotion activities during the intersession. .

20. Promotion missions were fielded to South Africa, the Sudan, Seychelles, Central African Republic, Botswana, Burundi, Rwanda, Mauritania, Republic of Congo, Guinea Bissau and Nigeria, where they participated in conferences, seminars and workshops on human rights.

21. The Members of the Commission also sensitized Member States on the need to ratify the international legal instruments on human rights, including the protocols to the African Charter on the Establishment of the African Court of Human Rights and the Rights of Women in Africa. Furthermore, they accorded keen attention to such thematic issues as freedom of expression, prohibition and prevention of torture, the situation of refugees, asylum seekers and displaced persons, human rights advocates, prisons and conditions of detainees in Africa, the situation of indigenous populations/communities in Africa, the situation of women in Africa, death penalty, etc.

22. The Inter-Session Progress Reports of the Commissioners are on the African Commission's Website and available at the Commission's Secretariat.

23. The African Commission adopted the following mission reports at its 36<sup>th</sup> and 37<sup>th</sup> Ordinary Sessions: a) Promotional Mission Reports:

In the Democratic Republic of Congo: 12 -24 January 2004;

In Sierra Leone: 23-27 February 2004;

In Sudan: 26 March - 02 April 2002;

In Nigeria: 07 - 18 February 2005;

In the Republic of Congo: 19 - 24 October 2004.

b) Mission Report of the Special Rapporteur on Prisons and Detention Conditions in Africa:

Cameroon: 2 - 15 September 2002;  
Ethiopia: 15 - 29 March 2004;  
South Africa: 14 - 30 June 2004

c) Mission Report of the Special Rapporteur on Rights of Women in Africa, Angola, 27 September - 02 October 2002.

### **C. Activities of the Special Rapporteurs**

#### **a) Report of the Special Rapporteur on Prisons and Detention**

##### **Conditions in Africa.**

24. Dr. Vera Mlangazuwa Chirwa, Rapporteur Special on Prisons and Detention Conditions in Africa, said that she conducted missions in South Africa and Kenya in the course of the period under consideration.

- Dr. Chirwa deplored the awful detention conditions prevailing in prisons and other detention centres and cited the prevalence of HIV/AIDS, Tuberculosis, poor sanitation, deaths in prison, malnutrition, the unacceptable overpopulation of prisons and acts of violence perpetrated against prisoners by some prison staff;
- Dr. Chirwa expressed her anxiety over the fact that, generally speaking, prison authorities in several countries have been indifferent to such a situation;
- Dr. Chirwa commended the positive response from certain State-Parties like Kenya, which investigated allegations of the death of prisoners and released more than 20,000 prisoners to relieve congestion in the prisons;
- Special Rapporteur Chirwa also followed attentively the debates on the abolition of capital punishment, which were organized in several countries, particularly in Nigeria and Uganda;
- She further noted the stand taken against capital punishment by certain African leaders such as Presidents Levy Mwanawasa of Zambia and Mwai Kibaki of Kenya, as well as the moratorium on the execution of capital punishment in Cote d'Ivoire and the Democratic Republic of Congo, all of which are motives for satisfaction and encouragement.

#### **b) Report of the Special Rapporteur on Women's Rights in Africa**

25. Since the adoption of the Protocol to the African Charter on the Rights of Women in Africa -by the Assembly of Heads of State and Government of the African Union (Maputo, July 2003), Dr. Angela Melo, Special Rapporteur on the Rights of Women in Africa, has been campaigning for a speedy ratification of the said Protocol by the States-Parties to the Charter.

26. In the course of the period covered by this Report, the Special Rapporteur met in July 2004, on the margins of the African Union Summit (Addis Ababa, Ethiopia), with the President of the Pan-African Parliament, 48 Ministers and 45 delegates with responsibilities in the treaty ratification process in their countries. The Special Rapporteur delivered the Gender Declaration adopted by the same Conference to the NGOs which

have observer status at the African Commission. She participated in several fora, seminars workshops and conferences on Women's Rights.

**c) Report of the Special Rapporteur on Human Rights Activists in Africa**

27. Mrs. Jainaba Johm, Special Rapporteur on Human Rights Protectors in Africa, undertook activities for sensitization on her mandate and the establishment of dialogue with the States and members of the Civil Society. In this regard she:

- Participated in the annual coordination meeting of the UN organs monitoring human rights treaties, which was held from 22 to 26 June 2004 in Geneva, Switzerland.
  - Met Mrs Hina Jilani, Special Representative of the Secretary General of the United Nations on the Rights of Human Rights activists and Mrs. Olatokunbo Ige, Coordinator of the African team of the United Nations High Commissioner for Human Rights, on the margins of the Coordination meeting of the monitoring organs of the Geneva treaties. Met partner NGOs of the African Commission, especially Amnesty International and INTERIGHTS, in London;
  - Participated in the consultative workshop on women human rights activists (Dakar, Senegal, 18-19 November 2004) and in NGO fora (20-22 November 2004, Dakar Senegal and 24-26 April 2005, Banjul, Gambia) organized by the African Centre for Democracy and Human Rights Studies and the African Commission, in preparation for the 36<sup>th</sup> and 37<sup>th</sup> Ordinary Sessions of the African Commission;
  - Sent urgent appeals to their Excellencies:
- The President of Zimbabwe (02 appeals) concerning the conformity of the draft bill on NGOs, to the provisions of the African Charter and other international conventions to which Zimbabwe is party, especially the Declaration of the United Nations on human rights activists;
  - Mr. Omar EI Bechi, President of the Republic of Sudan (02 appeals), on behalf of Mr. Sahil Mahmoud Osman (July 2004) and Mrs. Zubaida Rahib Abdallah (October 2004), human rights activists in detention.

**d) Report of the Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa:**

28. The terms of reference for the Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa were adopted during the 36<sup>th</sup> session of the African Commission. The Special Rapporteur, Commissioner Bahame Tom Mukirya Nyanduga, began to sensitization and carry out an information campaign on his mandate and elaborated his work programme during the period under review;

29. The Special Rapporteur also drafted a contribution to volume 47 of the German Yearly on International law titled "Protection of refugees according to the 1969 OAU Convention governing specific aspects of the problem of refugees in Africa."

30. He further wrote a tribute to the late Judge Laity Kama, first President of the International Criminal Tribunal for Rwanda (ICTR) and, at the request of H.E. Mr.

Adama Dieng, Registrar at ICTR, a document titled “Facing Impunity: The International Justice System, with particular reference to Africa”

31. The Special Rapporteur also wrote an article for “Forced Migration Review”, the magazine of the Refugee Studies Centre of the University of Oxford, to depict the displacement and destruction of communities, their livelihoods and infrastructure on the East Coast of Africa as a result of the tsunami which hit the region on 26 December 2004, particularly in Somalia, Kenya, Tanzania and the Seychelles.

32. The Special Rapporteur discussed plans for these displaced persons in Geneva, together with the Bureau of the United Nations Secretary General’s Special Representative for the Rights of Displaced Persons and with the Brookings Institute, University of Berne.

#### **e) Report of the Special Rapporteur on Freedom of Expression**

33. The office of Special Rapporteur on Freedom of Expression in Africa was instituted by Resolution of the 36<sup>th</sup> Ordinary Session of the African Commission (23/11 - 07/12/2004, Dakar, Senegal), with the fundamental role of increasing the efficiency of the Commission’s actions to promote and protect freedom of expression in Africa.

34. The Commissioner, Andrew R. Chigovera, appointed Special Rapporteur on Freedom of Expression in December 2004, undertook the following activities during the period under review:

- Lectured at the Faculty of Law, George Washington University, Washington, on the African System of Promotion and Protection of Human Rights and on the mandate of the Special Rapporteur on Freedom of Expression;
- Visit to the Special Rapporteur on Freedom of Expression of the Organization of American States, based in Washington, United States, from 28/02 to 04/03/2004;
- Visit to the President and Vice President of the Inter-American Commission, and meeting with the institution’s chief executives.

#### **f) Report on the Situation of Indigenous Populations/Communities**

35. The Working Group on Indigenous Populations/Communities carried out the following activities during the period under consideration:

- Elaboration of an activity programme for the Working Group. Launching of the report of the Working Group, in collaboration with IWGIA (International Working Group for Indigenous Affairs) as a fringe event at the 61<sup>st</sup> Session of the United Nations Human Rights Commission in April 2005 in Geneva, Switzerland.
- Fact-finding visit to Burundi from 27 March to 9 April 2005, led by Mr. Zephirin Kalimba, member of the African Commission’s Working Group on Indigenous Communities/Populations, accompanied by Dr. Albert K. Barume, member of the Consultative Experts’ Network chosen to assist the Working Group, with the technical assistance of UNIPROBA a local NGO.

### **g) Report on the Implementation of the Robben Island Directives**

36. The Commissioner, Sanji Monagen, Chairperson of the Monitoring Committee on the Implementation of Robben Island Directives, underlined in her report that, during the period under review, the Committee met on 19 and 20 February 2005 at the Faculty of Law of the University of Bristol in the United Kingdom.

37. At the end of the meeting organized by the African Commission, in conjunction with the Association for the Prevention of Torture (APT), the Working Group adopted its rules of procedure and work programme.

### **h) Seminars and Conferences**

38. The Commission, in keeping with its Strategic Action Plan, decided to organize a number of seminars and conferences as part of its promotional activities.

39. From 13 to 17 September 2004, the African Commission, in association with its partners, organized a seminar on economic, social and cultural rights in Pretoria, South Africa, Africa. The declaration adopted at the end of the seminar is attached hereto as Annex 2.

40. The African Commission also decided to organize 2 seminars in 2005 on the themes of :

#### **\* Refugees and Displaced Persons in Africa:**

This topic was chosen for the following reasons:

- The fact that the African continent has the largest number of refugees.
- The lack of donor interest in providing speedy assistance to refugees.
- The urgent need for our member States to mobilize adequate resources to provide necessary help to refugees and displaced persons.
- The alarming plight of these refugees.

#### **\* Present-day Forms of Slavery**

- Despite having been abolished by all member States of the African Union, this practice evidently continues in the most abject forms such as trafficking in women and girls, enslavement of certain social groups, etc.
- Broad consultation must be organized around the issue to find ways of combating and eradicating this scourge.

41. The African Commission is grateful to those partners who have offered their contribution and has invited the State parties and other partners to lend it their assistance. The list of seminars was distributed and can be consulted on the ACHPR website: [www.achpr.org](http://www.achpr.org).

**i) Ratification of the Protocol to the African Charter on the Rights of Women in Africa.**

42. The Protocol to the African Charter on the Rights of Women in Africa was adopted by the 2<sup>nd</sup> Ordinary Session of the Conference of Heads of State and Government of the African Union on 11 July 2003 in Maputo, Mozambique.

43: To date, 37 Member States have signed the Protocol and 10 Member States have ratified and deposited the instruments of ratification at the African Union Commission. Five ratifications are still needed for the protocol to come into force. The African Commission is calling upon Member States which have not yet ratified the protocol to do so as quickly as possible.

**j) Creation of an effective African Court of Human and Peoples Rights**

44. The protocol to the African Charter on Human and Peoples Rights dealing with the creation of an African Court of Human and Peoples Rights entered into force on 25 January 2004. To date, 19 Member States have ratified the Protocol signed by 45 Member States of the African Union.

45. In July 2004, the Conference of Heads of State and Government of the African Union decided to fuse the African Court on Human and Peoples Rights with the African Court of Justice.

46. “ In January 2005, the Executive Council of the African Union urged Member States that had not yet done so to ratify this Protocol. The establishment of the EX.CL/199 (VII) Court, and this, notwithstanding the debate initiated of the issue of the merging of the two Courts mentioned above.

47. The African Commission was of the opinion that there was an urgent need to establish the African Court of Human and Peoples’ Rights.

**k) Adoption of Resolutions:**

48. At its 36<sup>th</sup> Ordinary Session, the African Commission adopted three (3) resolutions on:

- the Mandate and Nomination of the Special Rapporteur on Freedom of Expression in Africa;
- the Mandate and Nomination of the Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa;
- Economic, Social and Cultural Rights in Africa.

49. At its 31<sup>st</sup> Ordinary Session, the African Commission adopted four (4) resolutions on:

- the establishment of a Working Group on specific issues concerning its work;
- the human rights situation in Togo;
- the establishment of an efficient African Court of Human and Peoples’ Rights;
- the situation in Darfur, The Sudan.

**Copies of the above-mentioned seven (07) Resolutions are contained in Annex 1.**



### **I) Relations with Observers**

50. At its 36<sup>th</sup> and 31<sup>st</sup> Ordinary Session, the African Commission discussed its cooperation with national human rights institutions and NGOs.

51. At its 36<sup>th</sup> Ordinary Session, the African Commission granted associate status to the following two (2) National Human Rights Institutions:

- the National Human Rights Observatory of the Democratic Republic of Congo;
- the Kenya National Commission on Human Rights.

This brings the total number of National Institutions enjoying Associate Status in the African Commission on Human and Peoples' Rights to seventeen (17). No other request was received.

52. The African Commission reiterated its appeal to State Parties that had not yet done so to establish national human rights institutions and strengthen the capacities of existing ones, in compliance with the Paris Principles and its own resolution on these institutions.

53. At its 36<sup>th</sup> and 37<sup>th</sup> Ordinary Sessions, the African Commission granted observer status to seventeen (17) NGOs.

This brings the total number of NGOs and other organizations enjoying observer status in the African Commission on Human and Peoples' Rights to three hundred and twenty-two (322).

## **III. PROTECTION ACTIVITIES**

54. At its 36<sup>th</sup> Ordinary Session, the African Commission considered forty-five (45) communications. It took decisions to be seized of eight (8) communications, decisions on the admissibility of five (5) communications and three (3) on substance. Furthermore, it considered twenty-nine (29) other communications and decided to refer them to its 37<sup>th</sup> Ordinary Session for additional information. Copies of five (5) final decisions are contained in Annex 2 of the present Report.

55. The African Commission adopted the procedures for notification of its decisions on communications and mission reports as well as the process for the adoption of its mission reports.

In this regard, the Commission decided to inform all parties to communications of its decisions as soon as they had been made while recalling that they should abide by the recommendations of Article 59 of the Charter prohibiting the publication of these decisions as long as it has not yet been authorized by the Assembly of Heads of State and Government.

56. The African Commission decided to adopt its mission reports before sending them for comments to the States Parties to which missions were made. The African Commission decided to give States Parties a three (3) month deadline to submit their comments. This deadline could be extended for three (3) extra months, if need be.

57. At its 31<sup>st</sup> Ordinary Session, the African Commission considered forty-seven (47) communications. It took decisions to be seized of six (6) communications, declared four (4) communications admissible, and three (3) inadmissible. It adopted decisions on

striking out two (2) communications from the roll due to lack of interest of the plaintiffs, and one (01) decision on substance. The African Commission further considered thirty-one (31) other communications and decided to refer them to its 38<sup>th</sup> Ordinary Session for additional information. Copies of six (6) final decisions are contained in Annex 2 of the present Report.

#### **IV. ADMINISTRATIVE AND FINANCIAL MATTERS**

58. Under the provisions of Article 41 of the African Charter, the African Union Commission bears the operating costs of the African Commission, including provision of the necessary staff, means and services. However, the work of the African Commission was compromised due to lack of funding. The African Commission was unable to carry out several promotion missions to Member States. Moreover, it could not organize the 14<sup>th</sup> Extraordinary Session to consider the mission reports which needed to be adopted urgently.

59. In order to supplement the limited resources allocated to it by the African Union, the African Commission continues to seek financial and material assistance from external partners.

60. The African Commission expressed its profound gratitude to all donors and partners, whose financial, material and other contributions enabled it to discharge its mandate during the period under review.

61. During the review period, the African Commission enjoyed financial and material assistance from the following partners:

##### **a) Danish Human Rights Institute**

62. The Secretariat of the African Commission received extra-budgetary resources from the Danish Human Rights Institute (former Danish Human Rights Centre) to finance the post of Technical Assistant and research activities.

##### **b) Swedish International Development Agency (SIDA)**

63. SIDA always finances the human rights promotion and protection activities conducted by the African Commission. This subvention is meant to strengthen the capacities of the Secretariat. SIDA agreed to renew its subvention until 2008.

##### **c) Government of the Netherlands**

64. The Ministry of Foreign Affairs of the Netherlands continues to support the Documentation Centre, the public relations section and the legal section. The renewal of this subvention for a 3 year period is envisaged.

##### **d) Rights and Democracy**

65. Rights and Democracy made a subvention to the African Commission for the following specific activities:

- . Campaign for the ratification of the Protocol to the African Charter dealing with the creation of an African Court of Human and Peoples Rights;

- . Ratification of the Protocol to the African Charter dealing with Women's rights in Africa;

. Meeting on democracy 'and elections in Africa;

. Rights and Democracy also finances the services of an assistant to the Special Rapporteur on Women's rights in Africa.

**e) DANNIDA**

66. DANNIDA financed activities of the Working Group on indigenous populations/communities for two years.

**f) Bureau of the UN Human Rights High Commissioner**

67. The Bureau financed the activities of the Special Rapporteur on the Defence of Human Rights and the recruitment of one assistant to the Rapporteur.

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

**V. ADOPTION OF THE 17<sup>th</sup> ANNUAL ACTIVITY REPORT BY THE  
CONFERENCE OF HEADS OF STATE AND GOVERNMENT  
OF THE AFRICAN UNION**

69. The Conference of the African Union Heads of State and Government adopted, after examination, the 17th annual activity report of the African Commission on Human and Peoples Rights by a decision in which it expressed its satisfaction on the content of the report and authorized its publication.

**VI. ADOPTION OF THE 18<sup>th</sup> ANNUAL ACTIVITY REPORT BY THE  
CONFERENCE OF HEADS OF STATE AND GOVERNMENT OF  
THE AFRICAN UNION**

70. The Conference of the African Union Heads of State and Government adopted, after examination and on recommendation of the Executive Council, the 18th annual activity report of the African Commission on Human and Peoples Rights by a decision in which it expressed its satisfaction on the content of the report and authorized its publication.

71. The African Commission will pursue the mobilization of resources and hopes that the voluntary contributions fund will be established in the near future.

**Annexe I**

**Annexe II**

## **Annexe III - Communications**

### **251/2002 Lawyers for Human Rights/Swaziland**

Rapporteur:

32nd Session: Commissioner Barney Pityana

33rd Session: Commissioner Barney Pityana

34<sup>th</sup> Session: Commissioner Andrew R. Chigovera

35<sup>th</sup> Session: Commissioner Andrew R. Chigovera

36<sup>th</sup> Session: Commissioner Andrew R. Chigovera

37<sup>th</sup> Session: Commissioner Andrew R. Chigovera

### **Summary of Facts**

1. The Complainant is Lawyers for Human Rights, a human rights NGO based in Swaziland.
2. The Complaint was received at the Secretariat of the Commission on 3 June 2002 and is against the Kingdom of Swaziland which is a party to the African Charter on Human and Peoples' Rights.
3. The Complainant states that the Kingdom of Swaziland gained independence on 6 September 1968 under the Swaziland Independence Constitution Order, Act No. 50 of 1968. The 1968 Constitution enshrined several fundamental principles of democratic governance such as the supremacy of the Constitution and separation of powers and clearly laid down procedures for amending the Constitution.
4. The 1968 Constitution also provided for a justiciable Bill of Rights which secured the protection of fundamental human rights and freedoms including the right to freedom of association, expression and assembly
5. The Complainant alleges that on 12 April 1973, King Sobhuza /I issued the King's Proclamation to the Nation No. 12 of 1973 whereby he declared that he had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him. In addition, he repealed the democratic Constitution of Swaziland that was enacted in 1968.
6. It is alleged that the King's Proclamation resulted in the loss of the protections afforded to the Swazi people under the Constitution's Bill of Rights, which effectively incorporated the rights ensured by the African Charter.
7. According to the complaint, the provisions of the Proclamation outlawing political parties violate the Swazi people's freedom of association, expression and assembly, thereby diminishing the rights, duties, and freedoms of the Swazi people that are enshrined in the African Charter on People's and Human Rights.
8. Furthermore, it is alleged that the Swazi people do not possess effective judicial remedies because the King retains the power to overturn all court decisions, thereby removing any meaningful legal avenue for redress.

## **Complaint**

9. The Complainant alleges that the following Articles of the African Charter have been violated: Articles 1, 7, 10, 11, 13, 26

## **Procedure**

10. At its 32<sup>nd</sup> ordinary session, the African Commission decided to be seized of the communication.

11. On 30 October 2002, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility within a period of 3 months.

12. At its 33<sup>rd</sup> Ordinary Session held in Niamey, Niger from 15 to 29 May 2003, the African Commission examined the communication and decided to defer its consideration on admissibility to the 34<sup>th</sup> Ordinary Session.

13. On 10 June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and reminded them to forward their submissions on admissibility within 2 months.

14. During its deliberations at the 34<sup>th</sup> Ordinary Session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission however decided to defer consideration of the communication

15. On 4 December 2003, the parties to the communication were informed of the decision of the African Commission and requested the parties to forward their written submissions on admissibility within 2 months.

16. At the 35<sup>th</sup> Ordinary Session held from 21 May to 4 June 2004 in Banjul, The Gambia, the Complainant made oral submissions before the African Commission. The African Commission considered the communication and declared it admissible.

17. At its 36<sup>th</sup> Ordinary Session held in Dakar, Senegal from 23 November - 7 December 2004, the African Commission deferred consideration on the merits of 33 the communication to give the Respondent State one more chance to make its submissions.

18. At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and took a decision on the merits thereof.

## **LAW**

### **Admissibility**

19. The African Commission was seized with the present communication at its 32<sup>nd</sup> Ordinary Session which was held in Banjul, The Gambia from 17 to 23 October 2002. The Respondent State has since been requested numerous times to forward its submissions on admissibility but to no avail. The African Commission will therefore proceed to deal with this matter on admissibility based on the facts presented by the Complainant.

20. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with Article 55 of the African Charter. All of the conditions of this Article are met by the present communication except Article 56 (5), which merits special attention in determining the admissibility of this communication.

21. Article 56(5) of the African Charter provides:-

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

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

22. The rule requiring the exhaustion of local remedies as a condition of the presentation of a communication before the African Commission is premised on the principle that the Respondent State must first have an opportunity to redress by its own means, within the framework of its own domestic legal system, the wrong alleged to have been done to the individual(s).

23. The Complainant submits that as a result of the King's Proclamation to the Nation No. 12 of 1973, the written and democratic Constitution of the Kingdom of Swaziland enacted in 1968 containing a Bill of Rights was repealed. Furthermore, the Proclamation prohibited the Courts of the Kingdom of Swaziland from enquiring into the validity of the Proclamation or any acts undertaken in accordance with the Proclamation.

24. The Complainant indicates that under the Proclamation, the King assumes supreme power in the Kingdom and judicial power is vested in him and he retains the power to overturn all court decisions, thereby removing any meaningful legal avenue for redress. The Complainant quotes the case of Professor Dlamini v The King to illustrate instances where the King has exercised his power to undermine 34 "decisions of the courts. In that case, the Court of Appeal overturned the Non-Bailable Offences Order of 1993, which ousted the courts' jurisdiction to entertain bail applications. Following the decision of the Court of Appeal, the King issued a Decree - NO.2 of 2001 reinstating the Non Bailable Offences Order. However, due to international pressure, the King later repealed aspects of the reinstated Non Bailable Offences Order by Decree NO.3 of 2001.

25. Therefore the Complainant argues they cannot exhaust domestic remedies because they are unavailable by virtue of the Proclamation and even where a matter could be instituted and won in the courts of Swaziland, it would not constitute a meaningful, durable remedy because the King would nullify such legal victory.

26. The Complainant provides all the Proclamations made by the King and after perusing the Proclamations, the African Commission notes that nowhere in all the Proclamations is there an ouster clause to the effect that the Courts of the Kingdom of Swaziland are prohibited from enquiring into the validity of the Proclamation or any acts undertaken in accordance with the Proclamation.

27. The African Commission has considered this matter and realises that for the past 31 years the Kingdom of Swaziland has had no Constitution. Furthermore, the Complainant has presented the African Commission with information demonstrating that the King is prepared to utilise the judicial power vested in him to overturn court decisions. As such, the African Commission believes that taking into consideration the general context within

which the judiciary in Swaziland is operating and the challenges that they have been faced with especially in the recent past, any remedies that could have been utilised with respect to the present communication would have likely been temporary. In other words, the African Commission is of the view that the likelihood of the Complainant succeeding in obtaining a remedy that would redress the situation complained of in this matter is so minimal as to render it unavailable and therefore ineffective<sup>2</sup>. For the reasons stated herein above, the African Commission declares this communication admissible.

### **Decision on the merits**

#### **Submission from the complainant**

28. The complainant submits that the Kingdom of Swaziland signed the African Charter on Human and Peoples' Rights in 1991. The significance of the signing is that the Kingdom declared an intention to be bound by the Charter.<sup>3</sup> The complainant submits further that on 15 of September 1995, the Kingdom of Swaziland then ratified the Charter and by ratifying the Charter, the Kingdom declared its final formal intention and declaration to be bound by the provisions of the Charter. Formal agreements, particularly unilateral agreements, normally require ratification in addition to the signature. This requires the representative of the state subsequently to endorse the earlier signature. This requires the representative of the state subsequently to endorse the earlier signature. This provides the state with an opportunity to reconsider its decision to be bound by the treaty, and, if necessary, to effect changes to its own law to enable it to fulfil its obligation under the treaty.<sup>4</sup>

29. The complainant notes that the Kingdom of Swaziland had ample time between 1991 and 1995 to consider whether or not to formally agree to be bound by the Charter or to change its laws to fulfil its obligations in 1995.

30. The complainant notes that the Respondent State has violated Article 1 of the African Charter as the latter imposes an obligation on Member States of the African Union to adopt legislative or other measures to give effect to the rights, duties and obligation enshrined therein, noting the African Commission's decision in Communication 147/95 and 149/965 where the African Commission found that:

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

31. The complainant states further that the African Commission found that the obligation under Article 1 commences at ratification and that ratification implies that the State party must also take pre-emptive steps to prevent human rights violations.<sup>6</sup> According to the complainant, it goes without saying that the African Commission must declare the Proclamation to be in violation of Article 1.

32. The complainant also alleges violation of Article 7 of the African Charter noting that the Proclamation vests all powers of State to the King, including Judicial powers and the authority to appoint and remove judges which necessitates the conclusion that Courts are not independent, especially in view of Decree No.3/2001. This Decree clearly ousts the Courts' jurisdiction to grant bail on matters listed in the Schedule, which schedule may

be amended from time to time outside Parliament. The complainant made reference to the African Commission's decision in Communication 60/91,7 where it was stated that:

Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch that passed the Robbery and Firearms Decree, whose members do not necessarily possess any legal expertise. Article 7 1(d) of the African Charter requires Courts or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not lack, of impartiality.

33. According to the complainant, Decree No.3 of 2001 is in violation of Article 7, particularly Article 7 1(d) and the African Commission is urged to find as such.

34. The complainant also alleges violation of Article 10 and alleges that Sections 11, 12 and 13 of the Proclamation in very clear terms abolish and prohibit the existence and the formation of political parties or organisations of a similar nature. In this regard, the complainant quotes Communication 225/988 and the African Commission's Resolution on the Right to Freedom of Association which provides that;

. the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard;

. in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;

. 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

35. The Commission then concluded that the Nigerian Government's acts constituted a violation of Article 10 of the African Charter. Accordingly, this Resolution equally applies to the Kingdom of Swaziland, and thus Swaziland is in violation. With regards to allegations of violation of Article 11, the complainant argues that the King's Proclamation does not only prohibit the right to associate but also the right to assemble peacefully and adds that the right to associate cannot be divorced from the right to assembly freely and peacefully. In this regard the complainant cites the African Commission's decision in Communications 147/95 and 149/96 where it stated that

the Commission in its Resolutions on the Right to Freedom of Association had also reiterated that the regulation of the exercise of the right to freedom of association should be consisted with States obligations under the African Charter on Human and Peoples' Rights This principle does not apply to freedom of association alone but also to all other rights and freedoms enshrined in the Charter, including, the right to freedom of assembly

36. The complainant also alleged violation of Article 13 of the African Charter and stated that Section 8 of King's Proclamation of 1981 provides that "The provisions of section 11 and 12 of the King's Proclamation of the 12<sup>th</sup> April, 1973 shall not be applicable to the Tinkundla which are hereby declared and recognised as centres for



meetings of the nation”. According to the complainant the import of this section is that citizens can only participate in issues of governance only within structures of the present system, which does not allow free association and assembly, expression and conscience (the Tinkhundla System of Government). In this regard, the complainant refers to the Commission’s decision in Communication 147/95 and 146/96 Sir Dawda Jawara / The Gambia where it stated that

the imposition of the ban on former Ministers and Members of Parliament is in contravention of their rights to participate freely in the government of their country provided for under Article 13(1) of the Charter ‘Also the ban on political parties is a violation of the complainantso rights to freedom of association guaranteed under Article 10(1) of the Charter

37.And Communication 211/989 which provides that

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

38.The complainant alleges further a violation of Article 26 of the African Charter noting that a violation of Article 7 is relevant to Article 26 and in this regard makes reference to Communication 52/91, Communication 54/91, Communication 61/91

Communication 129/9410 in which the African Commission found that

while Article 7 focuses on the individual’s right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions, the protection of the Courts which have traditionally been the bastion of protection of the individual’s rights against the abuses of state power

39. The complainant noted further that it is beyond doubt that the vesting of judicial powers in the person of the King undermines the authority and independence of the Courts, more so because the King with his legislative powers can easily water down the decision of the Courts as was the case in the judgment of Professor Dlamini v The King, Appeal Case No. 42/2000, where the King by Decree NO.2 of 2001 overturned the Court of Appeal judgment by reinstating the Non-Bailable offences Order which had been declared unconstitutional.

40. The complainant prays the African Commission to:

- finds the King’s Proclamation of 12 April, 1973 to be in violation of the African Charter on Human and Peoples’ Rights; and

- recommend and mandate strongly the Kingdom of Swaziland to take constitutional measures forthwith to give effect to all the provisions of the African Charter, specifically Articles 1, 7, 10, 11, 13 and 26 thereof. .

### **Commission's decision on the merits**

41. In making this decision on the merits, the African Commission would like to point out that it is disappointed with the lack of cooperation from the Respondent State. The decision on the merits was taken without any response from the State. As a matter of fact, since the communication was submitted to the Commission and in spite several correspondences to the State, there hasn't been any response from the latter on the matter. Under such circumstances, the Commission is left with no other option than to take a decision based on the information at its disposal.

42. It must be stated however that, by relying on the information provided by the complainant, the Commission did not rush into making a decision. The Commission analyzed each allegation made and established the veracity thereof.

43. A preliminary matter that has to be addressed by the African Commission is the competence of the commission to entertain allegations of human rights violations that took place before the adoption of the Charter or even its coming into force. In making this determination the Commission has to differentiate between allegations that are no longer being perpetrated and violations that are ongoing.

44. In case of the former, that is, violations that occurred before the coming into force of the Charter but which are no longer or which stopped before the coming into force of the Charter, the Commission has no competence to entertain them. The events which occurred before the date of ratification of the Charter are therefore outside the Commission's competence *rationae temp oris*. The Commission is only competent *ratione temp oris* to consider events which happened after that date or, if they happened before then, constitute a violation continuing after that date.

45. In the present communication, the violations are said to have started in 1973 following the Proclamation by the King, that is, prior to the coming into force of the African Charter and continued after the coming into force of the Charter through when the Respondent State ratified the Charter and is still ongoing to date. The Commission therefore has the competence to deal with the communication.

46. The Commission has competence *ratione loci* to examine the case because the petition alleges violations of rights protected by the African Charter, which have taken place within the territory of a State Party to that Charter. It has competence *ratione materFae* as the petition alleges violations of human rights protected by the Charter, and lastly it has competence *ratione temporis* as the facts alleged in the petition took place when the obligation to respect and guarantee the rights established in the Charter was in force for the Kingdom of Swaziland. Given that Swaziland signed the Charter in 1991 and later ratified on 15 September 1995, it is clear that the alleged events continues to be perpetrated when the State became under the obligation to respect and safeguard all rights enshrined in the Charter, giving the Commission *rationae temporis* competence.

47. The two stages of signature and ratification of an international treaty provides states with the opportunity to take steps to ensure that they make the necessary - domestic arrangements to ensure that by the time they ratify a treaty the latter is in conformity with their domestic law. When ratifying the Charter, the Respondent State was aware of the violation complaint of and had the obligation to take all the necessary steps to comply with its obligations under Article 1 of the Charter - to adopt legislative and other measures to give effect to the rights and freedoms in the Charter.

48. From the above, it is the Commission's opinion that it is competent to deal with the matter before it.

49. Having determined that it is competent to deal with the matter, the Commission will now proceed to examine each of the rights alleged to have been violated by the Respondent State.

50. The complainant argues that by ratifying the African Charter and not adopting legislative and other measures to bring the 1973 Proclamation in conformity with the Charter, the respondent State has violated Article 1 of the African Charter. The use of the terms "other measures" in Article 1 provides State Parties with a wide choice of measures to use to deal with human rights problems. In the present situation when a Decree has been passed by the Head of State abrogating the constitution, it was incumbent on the same Head of State and other relevant institutions in the country to demonstrate good faith and either reinstate the constitution or amend the Decree to bring it in conformity with the Charter provisions during or after ratification.

51. In the opinion of the Commission, by ratifying the Charter without at the same time taking appropriate measures to bring domestic laws in conformity with it, the Respondent State's action defeated the very object and spirit of the Charter and thus violating Article 1 thereof.

52. The complainant also alleges violation of Article 7 of the Charter stating that the Proclamation vests all powers of State to the King, including judicial powers and the authority to appoint and remove judges and Decree No.3/2001 which ousts the Courts' jurisdiction to grant bail on matters listed in the Schedule. According to the complainant this illustrates that Courts are not independent.

53. Article 7 of the African Charter provides for fair trial guarantees - safeguards to ensure that any person accused of an offence is given a fair hearing. In its resolution on Fair Trial adopted at its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992, the African Commission held that the right to fair trial includes, among other things, the right to be heard, the right of an arrested person to be informed at the time of arrest in a language he/she understands, of the reason for the arrest and to be informed promptly of any charges against them, the right of arrested or detained persons to be brought promptly before a judge or other officer authorised by law to exercise judicial power and be tried within a reasonable time or be released, the right to be presumed innocent until proven guilty by a competent court.

54. In the present communication the Proclamation of 1973 and the Decree of 2001 vested judicial power in the King and ousted the jurisdiction of the court on certain matters. The acts of vesting judicial power in the King or ousting the jurisdiction of

the courts on certain matters in themselves do not only constitute a violation of the right to fair trial as guaranteed in Article 7 of the Charter, but also tend to undermine the independence of the judiciary.

55. Article 26 of the Charter provides that States Parties shall have the duty to guarantee the independence of the courts. Article 1 of the UN Basic Principles on the Independence of the Judiciary<sup>11</sup> states that “the independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of judiciary.” Article 11 of the same Principles states that “the term of office of judges, their independence, security ...shall be adequately secured by law.” Article 18 provides that “Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.” Article 30 of the International Bar Association (IBA)’s Minimum Standards of Judicial Independence<sup>12</sup> also guarantees that “A Judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge” and Article 1(b) states that “Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.”

56. By entrusting all judicial powers to the Head of State with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main *raison d’être* of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of power amongst the three organs of government - executive, legislature and judiciary ensure checks and balances against excesses from any of them. By concentrating the powers of all-three government structures into one person, the doctrine of separation of power is undermined and subject to abuse.

57. In its Resolution on the Respect and the Strengthening of the Independence of the Judiciary adopted at its 19<sup>th</sup> Ordinary Session held from 26<sup>th</sup> March to 4<sup>th</sup> April 1996 at Ouagadougou, Burkina Faso, the African Commission “recognised the need for African countries to have a strong and independent judiciary enjoying the confidence of the people for sustainable democracy and development”. The Commission then “urged all State Parties to the Charter to repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges and to refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates”.

58. Clearly, retaining a law which vests all judicial powers in the Head of State with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole. The Proclamation of 1973, to the extent that it allows the Head of State to dismiss judges and exercise judicial power is in violation of Article 26 of the African Charter.

59. With regards allegation of violation of Articles 10 and 11, the complainant submits that the Proclamation of 1973 abolishes and prohibits the existence and the formation of political parties or organisations of a similar nature and that the

Proclamation also violates Article 11 - right to assemble peacefully as the right to associate cannot be divorced from the right to assembly freely and peacefully.

60. Article 10 of the African Charter provides that “every individual shall have the right to free association provided that he abides by the law “And Article 11 provides that every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law...” In Communication 225/9813 the African Commission, quoting its Resolution on the Right to Freedom of Association held that the regulation of the exercise of the right to freedom of association should be consistent with state’s obligations under the African Charter and in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. That the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard. The Commission reiterated this in communications 147/95 and 149/9614 and concluded that This principle does not apply to freedom of association alone but also to all other rights and freedoms enshrined in the Charter, including, the right to freedom of assembly.

61. Admittedly, the Proclamation restricting the enjoyment of these rights was enacted prior to the coming into effect of the Charter. However, the Respondent State had an obligation to ensure that the Proclamation conforms to the Charter when it ratified the latter in 1995. By ratifying the Charter without taking appropriate steps to bring its laws in line with the same, the African Commission is of the opinion that the State has not complied with its obligations under Article 1 of the Charter and in failing to comply with the said duty, the prohibition on the establishment of political parties under the Proclamation remained effective and consequently restricted the enjoyment of the right to freedom of association and assembly of its citizens. The Commission therefore finds the State to have violated these two articles by virtue of the 1973 proclamation.

62. The complainant also alleges violation of Article 13 of the African Charter claiming that the King’s Proclamation of 1973 restricted participation of citizens in governance as according to the complainant the import of sections 11 and 12 of the Proclamation is that citizens can only participate in issues of governance only within structures of the Tinkhundla. In Communications 147/95 and 146/96 Sir Dawda Jawara / The Gambia the Commission held that

the imposition of the ban on former Ministers and Members of Parliament is in contravention of their rights to participate freely in the government of their country provided for under Article 13(1) of the Charter Also the ban on political parties is a violation of the complainants rights to freedom of association guaranteed under Article 10(1) of the Charter

53. In the present communication, the King’s Proclamation clearly outlaws the formation of political parties or any similar structure. Political parties are one means through which citizens can participate in governance either directly or through elected representatives of their choice. By prohibiting the formation of political parties, the King’s Proclamation

seriously undermined the ability of the Swaziland people to participate in the government of their country and thus violated Article 13 of the Charter.

From the above reasoning, the African Commission is of the view that the Kingdom of Swaziland by its Proclamation of 1973 and the subsequent Decree NO.3 of 2001 violated Articles 1, 7, 10, 11, 13 and 26 of the African Charter.

The Commission hereby recommends as follows:

- that the Proclamation and the Decree be brought in conformity with the provisions of the African Charter;
- that the State engages with other stakeholders, including members of civil society in the conception and drafting of the New Constitution; and
- that the Kingdom of Swaziland should inform the African Commission in writing within six months on the measures it has taken to implement the above recommendations.

Adopted by the African Commission on Human and Peoples' Rights at its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 27<sup>th</sup> April to 11<sup>th</sup> May 2005.

### **268/2003 Ilesanmi/Nigeria**

Rapporteur:

33rd Session: Commissioner Jainaba Johm

34<sup>th</sup> Session: Commissioner Jainaba Johm

35<sup>th</sup> Session: Commissioner Jainaba Johm

36<sup>th</sup> Session: Commissioner Jainaba Johm

37<sup>th</sup> Session: Commissioner Jainaba Johm

#### **Summary of Facts**

1. The Complainant is an individual, a consultant with the Economic Help Project based in Abuja, Nigeria.
2. The Complaint was received at the Secretariat of the African Commission on 3 April 2002 and is against the Federal Republic of Nigeria which is a party to the African Charter on Human and Peoples' Rights.
3. The Complainant states that in 1999, he exposed the smuggling activities of several companies and individuals, and officials of the Customs and Excise, Police and various other officials to President Obasanjo of Nigeria and the Inspector General of Police.
4. The Complainant states that the smuggling activities include -: smuggling of narcotics and their modified forms, minerals, illegal arms, carcinogen bearing foods, expired, fake and counterfeit pharmaceuticals, tyres, textiles, steel products, electronic, electrical products, spare parts, foods, cars and other products.

5. The Complainant also claims that the smugglers are responsible for the assassinations of several persons including Chief Bola Ige, Nigeria's Attorney General and the Confidential Secretary to the Chief Justice of Nigeria.
  6. The Complainant alleges that the activities of the smuggling syndicate have resulted into the shutting down of 41 textile mills, 8 auto assembly and other manufacturing plants, resulting into the dismissal of millions of workers and thereby impoverishing them. The smuggling activities have also resulted into the deaths of many people as a result of use of fake or expired drugs.
  7. Through their smuggling activities the said smugglers he claims deprive Nigeria of about 101 trillion Naira, annually.
  8. As a result of his actions to expose the smuggling syndicate, the Complainant claims that his pregnant wife was assassinated on 8<sup>th</sup> July 1999. Furthermore, he was abducted and imprisoned and held at SCID, Panti, Yaba, Lagos under inhuman conditions between 31 August and 4 September 1999.
  9. The Complainant also claims that whilst in detention he was served with poisoned food by Inspector Okoye under the order of CSP Bose Dawodu, who both demanded for 10,000 Naira for bail.
  10. The Complainant further alleges that between 21 and 23 June 2000 he was abducted again by Police Commissioner Aniniru, Sergeant Joseph Akinola and Inspector Paul Ajayi of FCIBs who he claims were acting on behalf of the smugglers. He was imprisoned at the Divisional Police Headquarters in Lagos, Nigeria where he was denied water and food.
- Complaint

11. The Complainant alleges that the following Articles of the African Charter have been violated: Articles 2,3,4,5,12, 15,20,21,27,29 Procedure
12. On 8 April 2002, the Secretariat of the African Commission acknowledged receipt of the complaint and requesting for additional information from the complainant.
13. At its 33<sup>rd</sup> Ordinary Session held from 15 to 29 May in Niamey, Niger, the African Commission considered the complaint and decided to be seized of the matter.
14. On 10 June 2003, the Secretariat of the African Commission wrote informing the parties to the communication that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within '3 months.
15. At its 34<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 6 to 20 November 2003, the African Commission examined this communication and decided to defer further consideration on the admissibility of the matter to the 35<sup>th</sup> Ordinary Session.
16. On 4 December 2003, the Secretariat wrote informing the parties to the communication of the African Commission's decision and requested them to forward their submissions on admissibility within two months.
17. At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission examined the communication, heard submissions

from the State and decided to defer further consideration on admissibility of the matter to its 36<sup>th</sup> Ordinary Session.

18. By Note Verbale dated 15 June 2004 addressed to the State and by letter bearing the same date address to the complainant, both parties were informed of the African Commission's decision.

19. At the 36<sup>th</sup> Ordinary Session of the African Commission held from 23 November to 7 December 2004 in Dakar Senegal, the African Commission considered the communication and deferred its decision to the 37<sup>th</sup> Ordinary Session

20. By Note Verbale of 13 December 2004 and letter of the same date the respondent State and the complainant respectively, were notified of the decision of the African Commission.

21. At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and declared it inadmissible.

## **LAW**

### **Admissibility**

Complainant's submission on admissibility

22. The complainant submits that all legal, legislative and logical local remedies have been exhausted, and without explaining, claims further that the procedure adopted by President Obasanjo and the government has been "unduly prolonged, apparently unfruitful and grossly ineffective". That President Obasanjo is being constantly fooled by false intelligence and security reports. He noted that only those who cannot handsomely bribe "settle" corrupt officials get caught - scape goats! He states that this gives the impression that those indicted are the sacred cows of the Obasanjo's regime, the un-touchable merchants of death, whose activities have crippled the economy of Nigeria, even though they are close to the corridors of power.
23. He noted that this has led to an unprecedented increase in illicit arms smuggling, armed robberies, abduction, drug abuse and smuggling, miscellaneous consumer goods smuggling, petroleum products smuggling, drug money laundering politics, systematic de-industrialization of Nigeria, mass unemployment, a constantly devalued Naira, hyper-inflation, infectious poverty levels, poor healthcare delivery, very poor and dilapidated infrastructure, infectious official and informal corruption levels, low life expectancy, poor per capita income, low GDP, uncertainty, political/religious tension and relative insecurity of life and property in Nigeria.
24. He notes further that efforts of the Customs and the Police are cosmetic. That they advertise very attractive adverts or programmes on TV that deceive Nigerians that they are working. The culprits are not apprehended or prosecuted, so far they "settle" very well. The Police wildly extort money from commercial motorists. Bosses of the Police, Customs, NAFDAC and the NDLEA do this so as to attract more budgetary allocations. The President appears content with very attractive security reports. Officers lobby and bribe to get very lucrative postings and for sure they pay returns.



25. The complainant notes further that the President has “not made good his promise since 1999 that there shall be no sacred cows and that he shall investigate and prosecute all the economic saboteurs, once he was notified”. Apparently, the President is afraid to prosecute smugglers, drug barons and all those indicted.
26. He states that his late wife was assassinated to stop him in 1999 and he sued the suspects at the Lagos High Court in 1999 and he was frustrated out of court by Justice Ashiyanbi and Olugbani who corrupted Judges by suspiciously adjourning the matter for years without the suspects showing up in court. The Police illegally abducted him twice, first between August 31 and September 4, 1999 and served him poisoned food at Panti, Lagos. He was abducted again by the Police between June 21 and 23 2000 and starved for the period.
27. The complainant claims further that the Customs and Police collude with smugglers to defraud Nigeria. This sufficiently explains why they want him dead. In fact, they openly mock the effectiveness of President Obasanjo’s approach to smuggling control. They claim that they “settle all the security chiefs, who they claim, settled the President too”. Settlement day, according to them is every Friday. This gives an impression that Mr. President’s Anti-Corruption and Anti-Smuggling crusades constitute a mere farce! Adding that those in Aso Rock patronize smugglers.
28. He notes further that the security and democracy of Nigeria are undoubtedly seriously undermined by smuggling, which in effect, constitutes an absurd infringement upon the socio-economic and security rights of the peoples of the Federal Republic of Nigeria. This constitutes an infringement on articles 2,3,4,5, 6, 12, 15, 19, 20, 22, 23, 24, 27 and 29 of the African Charter 01] Human and Peoples’ Rights.
29. He concluded by stating that in view of the strategic security and economic importance of Nigeria to Africa and the world, and the urgent need to avert an imminent state of anarchy in Nigeria, to be occasioned by a kind of impromptu anti-democratic chain of fission from aggrieved stakeholders within the federation, the ACHPR should, without delay, “save our souls by taking urgent action, which would force president Obasanjo to prosecute all those indicted”.

#### Respondent, State’s submissions on admissibility

30. The Respondent State submitted its arguments on admissibility at the 35<sup>th</sup> Ordinary Session of the Commission held in Banjul, The Gambia. The State noted that the, author of the communication is seemingly in quest for attention, noting that the communication is an “episodic compilation of issues, lacking focus, depth and substantiation”.
31. The State argued that it would be misleading to attempt to dwell on the issues in the communication as such will convey a wrong and perhaps unintended signal to the author and others of his persuasion and inclination to unduly attempt taking advantage of situations, including the procedural provisions of well-meaning bodies like the African Commission.

32. The State noted that for a communication to pass the admissibility test under Article 56 of the African Charter it must meet the specific conditions, failure which the communication should be declared inadmissible. The State argues further that it is clear from the communication that the author has not exhausted local remedies as required under Article 56 (5). That the author merely asserts without evidence that he has availed himself of all available remedies.
33. The State notes that the communication lacks evidence of the involvement of the legal institutions as there is no indication that the courts of appellate jurisdiction in Nigeria have been seized of the matter, adding that to come to equity, the author must be clean. The State also notes that the author fails to demonstrate whether the “so called” human rights matters have gone before the Nigeria National Human Rights Commission. The State noted further that the Independent Corruption Practices Commission (ICPC), the Economic and Financial Crimes Commission were also not seized by the author, stating that the author should be encouraged to take the “right and adequate steps for intervention in Nigeria”. 34. The Respondent State argues that the author’s penchant to malign the Nigerian criminal justice system is a deliberate ploy to mislead the African Commission and take undue advantage of the procedures, noting that to say individuals are above the law is self-serving but totally unrealistic and unfounded. The State also argues that the communication is derogatory and insulting, noting that the State takes strong exception to the characterization of the Nigerian public functionaries and institutions as immoral, duplicitous, inept and corrupt and provocative that the author would be uncharitable and discourteous to claim the President was bribed.
35. The Respondent State finally requested the African Commission not to waste its valuable time on the communication, that it is unworthy of the efforts nor does it justify the resources that is invested in determining which human rights are in contention. That the author fails to invoke any provision of the Charter alleged to have been violated. The State submitted that the communication is seriously flawed and glaringly incompatible with the admissibility criteria in the African Charter

#### African Commission’s decision on admissibility

36. In the present communication, the complainant submits that he has complied with Article 56 of the African Charter that prescribes conditions dealing with admissibility. The Responding State however argues that the complaint does not meet two of the conditions set out in Article 56 of the African Charter, namely:

Article 56(3) and Article 56(5).

37. Article 56 (3) provides that communications relating to human and peoples’ rights referred to in Article 55 received by the Commission shall be considered if:

“they not written is disparaging or insulting  
language directed against the State concerned and  
its institutions or to the [African Union]”

38. The author submitted in his complaint that the police and customs officials are corrupt, that they deal with drug smugglers, that they extort money from motorists and added that the President himself was corrupt and had been bribed by the drug smugglers. The Respondent State claims such language is insulting to the institutions of the State including the presidency ~nd provocative, and questions whether the African Commission would allow itself to be used by authors like this to use “unbecoming language to unjustly and baselessly vilify leaders”?
39. The operative words in sub paragraph 3 in Article 56 are “disparaging” and “insulting” and these words must be directed against the State Party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, disparaging means to speak slightly of... or to belittle and insulting means to abuse scornfully or to offend the self respect or modesty of... The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.
40. To say an institution or person is corrupt or that he/she has received bribes from drug dealers, every reasonable person would lose respect for that institution or person. In an open and democratic society individuals must be allowed to express their views freely. However, in expressing these views due regard should be taken not to injure the reputation of others or impair the enjoyment of the rights of others. While the Commission strives to protect the rights of individuals it must strike a balance to ensure that those institutions established within States Parties to facilitate the enjoyment of these rights are also respected by the individuals. To expose vital state institutions to insults and disparaging comments like those expressed in the communication brings the institution to disrepute and renders its 50 effectiveness wanting. In the light of the above, the African Commission finds that the language used in the communication as intended to bring the institution of the president into ridicule and disrepute and thus insulting.
41. The Respondent State also argues that the complainant has not exhausted local remedies as required under Article 56 (5) of the African Charter. The State submits that apart from not seizing the local courts, the complainant has not indicated that it brought the complaint to the National Human Rights Commission or to the Independent Corruption Practices Commission. Article 56 (5) provides that communications relating to human and peoples’ rights referred to in Article 55 received by the Commission shall. be considered if they”... are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged”.
42. The African Commission would like to deal with the submission of communications to bodies such as a National human rights Commission or the Independent Corruption Practices Commission as indicated by the State. The two institutions mentioned by the Respondent State are non-judicial institutions even though they can grant remedies. They are not part of the judicial structure of the Respondent State. While the African Commission would encourage complainants to seek redress from non-judicial bodies as

well, they are not obliged to do so. The remedies required under article 56 (5) are legal remedies and not administrative or executive remedies.

43. Regarding the non-exhaustion of legal remedies the complainant simply states that he has exhausted “local, legislative and logical remedies” without informing the African Commission how. The only time he mentioned having gone to court is when he said his wife was killed and the case was adjourned several times. The Respondent State argues that the matters raised in the communication have never been brought before the local courts.
44. The principle that a person who has suffered a human rights violation must first exhaust his or her domestic remedies can be found in most international human rights treaties. International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the State was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of human rights violations.
45. The international bodies do recognize however, that in many countries, remedies may be non-existent or illusory. They have therefore developed rules about the characteristics which remedies should have, the way in which the remedies have to be exhausted and special circumstances where it might not be necessary to exhaust them. The African Commission has held that the local remedies to be exhausted must be available, effective and sufficient. If the existing domestic remedies do not fulfil these criteria, a victim may not have to exhaust them before complaining to an international body. However, the complainant needs to be able to show that the remedies do not fulfil these criteria in practice, not merely in the opinion of the victim or that of his or her legal representative. 46.If a complainant wishes to argue that a particular remedy did not have to be exhausted because it is unavailable, ineffective or insufficient, the procedure is as follows: (a) the complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or insufficient) - this does not yet have to be proven; (b) the Respondent State must then show that the remedy is available, effective and sufficient; and © if the Respondent State is able to establish this, then the complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective in the specific case, even if it may be effective in general. 47.In the present communication, the complainant has failed to demonstrate that he attempted local remedies or that he was prevented from doing so by the Respondent State or that the local remedies are not available or are ineffective or have been unduly prolonged. The exceptions under Article 56(5) can therefore not apply to this communication.

For the above reasons, the African Commission declared the communication inadmissible.

Adopted by the African Commission on Human and Peoples' Rights at its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 27 April to 11 May 2005.

## **269/2003 -Interights on behalf of Safia Yakubu Husaini and et al/Nigeria**

Rapporteur:

33<sup>rd</sup> Session: Commissioner Johm

34<sup>th</sup> Session: Commissioner Johm

35<sup>th</sup> Session: Commissioner Johm

36<sup>th</sup> Session: Commissioner Johm

37<sup>th</sup> Session: Commissioner Johm

Summary of Facts

1. The complaint is filed by Interights on behalf of Safiya Yakubu Husaini and others who have been allegedly subjected to gross and systematic violations of fair trial and due process rights in the Sharia Courts in Nigeria.
2. The Complainant alleges that Ms Safiya Hussaini, a Nigerian woman and nursing mother was sentenced to death by stoning by a Sharia Court in Gwadabawa, Sokoto State Nigeria, for an alleged crime of adultery, which sentence was the latest in a series of serious and massive violations of the right to fair trial and associated guarantees.
3. The Complainant alleges that Safiya's case is only one of the many cases to be decided under the recently introduced pieces of Sharia penal legislation in northern Nigerian States. All laws in Nigeria, at both Federal and State levels, ought to be compatible with both the constitution of 1999 and international (including regional) treaties ratified by Nigeria, and are required to particularly comply with the. African Charter on Human and Peoples' Rights which is domestic law in the country.
4. In its complaints, the complainant also enumerates other similar instances of alleged violations of fair trial, personal dignity and the right to life. It alleged that in December 2002, a Ms Hafsat Abubakar from Sokoto State was charged with "Zina," which is either voluntary premarital sexual intercourse or, if the person is married, to adultery.
5. On 19 January 2001, an unmarried woman called Bariya Magazu received 100 lashes in Zamfara State for having committed the offence of Zina. Ms. Magazu was also initially convicted of false accusation for failing to prove her declaration that three particular men had coerced her into having sexual intercourse, which men were not prosecuted. By an order of an Islamic Court in the same State, a Mr. Umaru Bube received 80 strokes of the cane on 9 March 2001 for drinking alcohol. On 4 May 2001, a Mr. Lawal Incitara's hand was amputated after a Sharia Court in same State found him guilty of stealing bicycles.
6. In Sokoto State, Sani Shehu and Garga Dandare were sentenced to have their right hands and left feet amputated after being convicted by a Sharia Court in Sokoto State on 20 December 2001. On 27 December 2001, the Upper Sharia

Court in the same State convicted a Mr. Aminu Bello of theft and sentenced him to have his right hand amputated.

7. The Complainant alleges that in none of these case did the victims/accused persons receive nor were they offered competent or any legal representation. The rights of legal representation in the Sharia Courts are very limited and, even where they allow legal representation, only lawyers who are muslims can practice in them.
8. It is further alleged that the new Sharia penal legislations that are adopted in the various Nigeria States contain specifications that limit their application to people of Muslim faith but they dispense with all the fair trial safeguards recognised in the African Charter. Moreover, unlike in other criminal cases where accused persons are able to appeal to the Nigerian Supreme Court, which is the highest court in the country, appeals in the Sharia criminal cases end before the special Sharia Courts of Appeal. In effect, the Sharia penal legislation subject persons of Muslim faith to lower standards of fair trial merely by reason of their faith. In all the cases regarding the application of Sharia law for criminal cases, there is discrimination on grounds of the faith of the accused.
9. The Complaint also alleges that the rights of those tried under Sharia law are protected to a lesser extent than in the Penal Code for Northern Nigeria, valid for non-Muslim people, particularly concerning the right of representation, the right of appeal and the lack of knowledge of criminal procedure by the court. Under Sharia law, the death penalty is applied for offences that are not punishable with the death penalty under the Penal Code for Northern Nigeria. The criteria for appointing judges to the same court also fails short of international standards of training judicial personnel, and there is no requirement for judges to be legally qualified in law.
10. Together with its Complaint, the Complainant submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission

#### Complaint

11. The Complainant alleges serious and massive violations of Articles 2, 3, 4, 5, 6, 7, and 26 of the African Charter on Human and Peoples' Rights.

#### Procedure

12. The Complaint was dated 30 January 2002 and received at the Secretariat on 31 January 2002.
13. On 5<sup>th</sup> February 2002, the Secretariat of the African Commission wrote to the Complainant acknowledging receipt of the complaint, and requesting the latter to forward the relevant information and evidentiary materials on the developments surrounding the application of the Penal Provisions of Sharia religious law before Nigerian Sharia Courts, and to forward to it complete and specific cases of alleged irregularities supported by relevant documentations. The Complainant was also asked to indicate to the Commission which of the specific decisions of the Sharia Courts had been executed, and which were pending.
14. On 6<sup>th</sup> February 2002, the Chairman of the African Commission addressed an Urgent Appeal to His Excellency, President Olusegun Obasanjo of the

Federal Republic of Nigeria, respectfully urging Him to suspend further implementation of the Sharia Penal Statutes and decisions as well as convictions thereof, including the case of Ms. Safiya Yakubu, pending the outcome of the consideration of the complaints before the African Commission.

15. On the same date, the Chairman of the African Commission addressed a similar Urgent Appeal to His Excellency Amara Essy of the African Union, respectfully urging Him to draw the attention of the President of the Federal Republic of Nigeria to the Commission's requests and to and to positively respond thereof.
16. On 8 February 2002, the Secretariat of the African Commission faxed a copy of the Chairman's Urgent Appeal to the High Commission of the Federal Republic of Nigeria in Banjul, The Gambia for onward transmission of the same to His Excellency, President Olusegun Obasanjo of the Federal Republic of Nigeria.
17. On 3 March 2002, the Complainant wrote to the Secretariat informing the latter that it will assemble as many of the documents as exist and would get back to the Secretariat on its progress.
18. On 7 March 2002, the Secretariat of the African Commission wrote to the Complainant confirming receipt of the same and reminding the latter that it would be awaiting for the relevant information.
19. On 19 March 2002, the Director of the Political Affairs Department of the African Union wrote to the Chairman of the African Commission that the Secretary General of the AU had formally taken up the matter at the level of H.E. Chief Olusegun Obasanjo, President of the Federal Republic of Nigeria. The Secretariat of the African Commission brought the same to the attention of the Chairman.
20. On 21 March 2002, the Chief of Staff to the President of the Federal Republic of Nigeria wrote, on behalf of His Excellency President Olusegun Obasanjo, to the Chairman of the African Commission acknowledging receipt of the Urgent Appeal and assuring him that the administration and many Nigerians equally shared his concern. The letter further expressed his optimism that, in the long run, justice would be done and Safiya's life would be spared. While noting that the Federal Government could not unilaterally suspend the Sharia Penal Statutes and decisions which were within the prerogative of the State government in accordance with the Nigerian Constitution, the letter assured the Chairman that the Administration would leave no stone unturned in ensuring that the right to life and human dignity of Safiya, and that of all other Nigerians that may be affected in future were adequately protected.
21. On 2 April 2002, the Secretariat of the African Commission wrote to the Complainant reminding it of the need for further information on Ms. Amina Lawal who was alleged to have been sentenced to a similar punishment by a Sharia Court in Katsina State. While informing the same of the pledge by the Nigerian Administration regarding the case of Safiya and the follow up by the AU Secretary General, the Secretariat reminded the Complainant that it still awaited for the submission of the documentation and information as requested in its previous letters.
22. On 19 April 2002, the Political Affairs

Department of the AU wrote to the Secretariat of the African Commission informing the latter of the decision by the Federal Court of Appeal in Nigeria overturning the death sentence imposed on Safiya by a lower Court in Sokoto State thereby making the need to make further Presidential intervention unnecessary.

23. During the 31 Ordinary Session held in Pretoria, South Africa in May 2002, the Complainant orally informed the Secretariat that it was trying to compile the relevant information on the complaint and that it would be best if the Secretariat waited for the same before further action on complaint.

24. On 27 August 2002, the Secretariat received a letter from the International Commission of Jurists expressing its concern in the fate of Ms. Amina Lawal and her child.

25. By a letter of 27 August 2002, the Secretariat informed the ICJ that the African Commission was following the developments in Nigeria regarding the application of Sharia Penal Statutes in the country, including and particularly, the case of Ms. Lawal, through the appropriate channels.

26. During the 32<sup>nd</sup> Ordinary Session held in Banjul, The Gambia in October 2002, the complainant orally informed the Secretariat that it was unable to compile the requested information in time, that it was in touch with its local partners in Nigeria on the case and suggested the Commission went ahead in dealing with the complaint. 27. During the intersession period before the 33<sup>rd</sup> Ordinary Session, the Secretariat called the complainant to inquire about the progress it made and on the status of the cases pending before national courts.

28. At its 33<sup>rd</sup> Ordinary Session held in Niamey, Niger from 15 to 29 May 2003, the African Commission examined the complaint and decided to be seized thereof. 29. On 12 June 2003, the Secretariat wrote to the complainants and Respondent State informing them of this decision and requested them to forward their written submissions on admissibility before the 34<sup>th</sup> Ordinary Session of the Commission. 30. A similar letter of reminder was sent out to the parties on 6 August 2003 and on 17 October 2003.

31. At its 34<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 6<sup>th</sup> to 20<sup>th</sup> November 2003, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 35<sup>th</sup> Ordinary Session.

32. On 9<sup>th</sup> December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the African Commission their written submissions on the admissibility of the communication before the 35<sup>th</sup> Ordinary Session. The same was copied to the Respondent State's High Commission in Banjul, The Gambia.

33. The Secretariat sent a similar reminder to both parties on 29<sup>th</sup> April 2004 to send their written submissions on the admissibility of the communication before the 35<sup>th</sup> Ordinary Session.



34. At its 35th Ordinary Session held in Banjul, The Gambia from 21<sup>st</sup> May to 4<sup>th</sup> June 2004, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 36<sup>th</sup> Ordinary Session.

35. At the same Ordinary Session, a copy of the complaint was handed over the Nigerian Delegation.

36. On 17th June 2004, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the African Commission their written submissions on the admissibility of the communication before the 36<sup>th</sup> Ordinary Session. The same was copied to the Respondent State's High Commission in Banjul, The Gambia.

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37. The Secretariat sent a similar reminder to both parties on 7<sup>th</sup> September 2004 to send their written submissions on the admissibility of the communication before the 36<sup>th</sup> Ordinary Session.

38. During the 36<sup>th</sup> Ordinary Session held in Dakar Senegal from 23<sup>rd</sup> November to 7 December 2004, the complainant orally informed the Rapporteur of the Communication of his wish to withdraw the case.

39. At the same Ordinary Session, the African Commission decided to defer its decision on the request for withdrawal to the 3ih Ordinary Session, pending a written confirmation of the same by the complainant.

40. On 23<sup>rd</sup> December 2004, the Secretariat wrote to the complainant and Respondent State informing them of this decision and requesting the former to forward its written request for withdrawal before the 3ih Ordinary Session of the Commission.

41. A similar reminder was sent to the complainant on 2<sup>nd</sup> February and 4<sup>th</sup> April 2005.

42. During its 37<sup>th</sup> Ordinary Session held from 2ih April to 11<sup>th</sup> May 2005 in Banjul, The Gambia, the African Commission received a written request for withdrawal, dated 2<sup>nd</sup> May 2005, from the complainant.

For the abovementioned reason the African Commission on Human and Peoples' Rights, Takes note of the withdrawal of the communication by the Complainant and decides to close the file.

**Adopted by the African Commission on Human and Peoples' Rights at its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005.**

## **COMMUNICATION 264/2002: Association Que Choisir Benin/Benin**

Rapporteur:

33<sup>rd</sup> Ordinary Session: Commissioner Salamata Sawadogo

34<sup>th</sup> Ordinary Session: Commissioner Salamata Sawadogo

35<sup>th</sup> Ordinary Session: Commissioner Salamata Sawadogo

36<sup>th</sup> Ordinary Session: Commissioner Salamata Sawadogo

37<sup>th</sup> Ordinary Session: Commissioner Salamata Sawadogo

**Summary of facts:**

1. On the 6th November 2002, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr. Dossou Dossa Bernard, Chairperson of the NGO Que Choisir Benin, a Communication submitted on behalf of Beninese magistrates, in accordance with the provisions of Articles 55 and 56 of the African Charter on Human and Peoples' Rights (the African Charter).
2. The Communication was instituted against the Republic of Benin (State party to the African Charter and hereinafter referred to as Benin) and in it the NGO Que Choisir Benin alleges that the report prepared by a Commission of Inquiry of the Ministry of Finance of Benin set up to investigate disbursements effected between 1996 and 2000 concluded that « all sorts of irregularities and fraudulent dealings in the collection and issue of taxes and memoranda falling under the jurisdiction of magistrates », had been committed and as a result several magistrates, court clerks and tax collectors of the Beninese Treasury were brought before the judicial chamber of the Supreme Court accused of falsification of public accounts, complicity in embezzlement, fraud, ...
3. Que Choisir Benin furthermore declares that the Constitutional Court of Benin, by its Ruling DCC 02-097, dismissed, on unconstitutional grounds, the appeal lodged by the magistrates imprisoned since December 2001.  
(Que Choisir Benin is an NGO based in Benin and has had Observer Status with the African Commission On Human and Peoples' Rights since May 2001 (29<sup>th</sup> Ordinary Session).  
(Benin ratified the African Charter on 20<sup>th</sup> January 1986).

**The Complaint:**

4. The NGO Que Choisir Benin contends that the provisions of Articles 547, 548 and 549 of the Ruling No 25/PR/MJL of 07/08/67 governing the criminal procedure code in Benin and by virtue of which the proceedings were brought (against those accused), violate the principles of equality and the right to defense provided for under the provisions of Article 26 of the Constitution of Benin and Article 7-1 © of the African Charter on Human and Peoples' Rights.
  5. Que Choisir Benin consequently requests the African Commission to « consider this Communication at one of its future sessions ».
- Procedure:**
6. The Secretariat of the African Commission, by letter ref ACHPR/COMM/2 of 11<sup>th</sup> February 2003 addressed to Que Choisir Benin, acknowledged receipt of the Communication, specifying the reference of the Communication and further informing it that the Communication would be registered on the African Commission's roll for examination on seizure at its 33<sup>rd</sup> Ordinary Session scheduled from 15 to 19 May 2003 in Niamey, Niger.

7. At the 33<sup>rd</sup> Session, the African Commission considered the Complaint, decided to be seized of it and deferred consideration on its admissibility to the 34<sup>th</sup> Ordinary Session of the Commission.
8. The Secretariat of the African Commission, by Note Verbale and letter dated 23<sup>rd</sup> June informed the parties of the decision on seizure taken by the African Commission with regard to the Communication and requested them to convey, as early as possible, their submissions on admissibility of the Communication.
9. The plaintiff transmitted by electronic mail its submission on the admissibility of the Communication to the Secretariat on the 18<sup>th</sup> August 2003.
10. The Secretariat of the African Commission, by letter dated 19<sup>th</sup> September 2003, acknowledged receipt of the plaintiff's letters requesting some documents mentioned but which were absent from the file.
11. The Secretariat of the African Commission, by Note Verbale dated 24<sup>th</sup> September 2003 transmitted the Complaint's submission and attachments to the Respondent State reminding it that the African Commission still awaited its submission.
12. The African Commission considered the case during its 34<sup>th</sup> Ordinary Session and deferred consideration on its admissibility to the 35<sup>th</sup> Session. During the meetings of the 34<sup>th</sup> Ordinary Session, the Respondent State delivered its submission on the admissibility of the Communication to the Secretariat of the African Commission.
13. The Secretariat of the African Commission, by Note Verbale and letter dated 15<sup>th</sup> December 2003 informed the Parties of developments on the file, forwarding to the Complainant a copy of the Respondent State's statement of case.
14. The Respondent State was also notified that its delegation to the 34<sup>th</sup> Session had pledged to provide the African Commission with copies of the Constitution and the Criminal procedure Code of Benin.
15. Following a reminder by Note Verbale dated 05 March 2004, the Ministry of Foreign Affairs of the Republic of the Benin forwarded the above-mentioned documents under cover of a letter dated 19<sup>th</sup> March 2004 to the Secretariat of the African Commission.
16. The Secretariat of the Commission, by letter dated 12 May 2004 also reminded it to forward its response to the Complainant.
17. During the 35<sup>th</sup> Ordinary Session which was held in May/June 2004 in Banjul, The Gambia, the African Commission considered the Complaint and heard the delegate from the Respondent State.
18. During the 36<sup>th</sup> Session, the Commission decided to defer its decision on admissibility to its 37<sup>th</sup> Ordinary Session and notified the State accordingly by Note Verbale dated 20<sup>th</sup> December 2004.
19. The Secretariat also notified the Complainant of the decision taken by Commission at its 36<sup>th</sup> Session and reminded him, by letter dated 20/12/04, to

convey his conclusions on the admissibility of the Communication as early as possible.

20. On the 15<sup>th</sup> February 2005, the Complainant finally submitted his memorandum on admissibility and a letter acknowledging receipt was sent to him on the 22/03/05. The Complainant's memo was also sent to the Respondent State by Note Verbale dated 22<sup>nd</sup> March 2005.

Law:

Admissibility:

21. The African Charter on Human and Peoples' Rights provides under its Article 56 that for Communications covered by the provisions of article 55, to be considered, they should necessarily have exhausted all local remedies, if any unless it is obvious that this procedure is unduly prolonged.

22. In the case at hand, the numerous letters from the Secretariat requesting the Complainant for evidence that the said requirement had been satisfied remained, for a long time, without response. In fact, the Secretariat of the Commission lost contact with the Complainant from October 2003.

23. However, on the 15<sup>th</sup> February 2005, the Complainant finally re-established contact with the Secretariat and conveyed his memorandum on admissibility through electronic mail. In this memorandum the Complainant contends that the State of Benin has violated two fundamental principles of human rights, namely: the principle of equality of all citizens before the law and in consequence before justice and the principle of the legality of the criminal act.

24. The Complainant recalls that Articles 547, 548 and 549 of the Benin Criminal Code which form the basis of the procedure thus submitted before the Supreme Court blatantly violate the Magistrates' right to defense as they eliminate the right to appeal in refusing to allow any appeal against the rulings of the reporting judge acting as examining judge.

25. The Complainant argues that to defend themselves against the abuse of power and arbitrary rulings by the examining judge, the magistrates found no other means than to bring the said Articles before the Constitutional Court which, evidently, are contrary to the provisions of Article 26 of the Benin Constitution which stipulates that "the State guarantees the equality of all citizens before the law without discrimination ..of social position" and that of Article 3 of the African Charter on Human and Peoples' Rights which stipulates:

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"1. All individuals enjoy total equality before the law;

2. All persons have right to equal protection by the law"

26. The Complainant contends that the Complaint should be declared admissible by the African Commission in conformity with Article 50 of the African Charter.

27. The Respondent State for its part, argues that the Complaint should be declared inadmissible since the matter at issue is still pending before the Courts in Benin and if need be, the concerned parties shall have the possibility of appealing after the Court of Appeal's ruling to which the Supreme Court's judicial chamber had referred the case in April 2003.

28. This argument, posited by the Respondent State in its statement of case of the 13/11/2003, was reaffirmed by its delegate at the hearing granted by the African Commission during its 35<sup>th</sup> Ordinary Session (May/June 2004).
29. Whilst the Respondent State contends that the Complaint is still pending before the local Courts, the Complainant has not answered the fundamental question which is whether local remedies have been exhausted in this particular case.
30. Since the Complainant has not proven, contrary to the claims of the Respondent State, that the case has been settled by the Benin Courts and that local remedies have been exhausted, the African Commission is compelled to accept the position of the Respondent State which contends that the case is still pending before the local Courts.
31. Whereas the established jurisprudence of the African Commission, which is in conformity with the provisions of Article 56 (5) of the African Charter, requires that the Communications governed by Article 55 of the said Charter can only be examined after local remedies, if they exist, are exhausted, “unless it is clear to the Commission that the recourse to these remedies is unduly prolonged”.
32. Such a position which is also contained in the established precedents of other human rights institutions is based on the principle that the Respondent State should first of all have the means of rectifying, through its own means and within the framework of its own national legal system, the alleged violation by future Complainants.

**33. On these grounds, the African Commission declares the Communication inadmissible for non exhaustion of all local remedies.**

**Communication 273/2003: Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare/Nigeria  
Rapporteur:**

- 33<sup>rd</sup> Ordinary Session: Commissioner Jainaba Johm  
34<sup>th</sup> Ordinary Session: Commissioner Jainaba Johm  
35<sup>th</sup> Ordinary Session: Commissioner Jainaba Johm  
36<sup>th</sup> Ordinary Session: Commissioner Jainaba Johm  
37<sup>th</sup> Ordinary Session: Commissioner Jainaba Johm

**Summary of facts:**

1. On 17 March 2003, the Secretariat of the African Commission on Human and Peoples’ Rights (the African Commission) received a communication from the Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare, an NGO based in Nigeria, relative to Article 55 of the African Charter on Human and Peoples’ Rights (the African Charter).
2. The Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare submitted the communication for and on behalf of Mr.

Abuoma Excellence Emmanuel, 30 years old and Member of the Movement for the Actualisation of the Sovereign State of Biafra (MASSOB).

3. The communication was submitted against Nigeria (a State party<sup>17</sup> to the African Charter). The communication alleged that in December 2000, the Nigerian Police Force (NPF) arrested Mr. Abuoma Excellence Emmanuel during a raid at the MASSOS Headquarters at Okigwe, Imo-State, Nigeria.
4. The communication further alleged that since the arrest of Mr. Abuoma Excellence Emmanuel (more than two years now), no charges had been brought against him and attempts to have him released on bail had failed.

#### **The complaint:**

5. The Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare contends that the above-described facts constitute a violation by Nigeria of Articles 2, 3, 4, 5, 6, 7, 8, 10 and 20 (1) of the African Charter on Human and Peoples' Rights and therefore, prays that the African Commission addresses the violations.

(Nigeria ratified the African Charter on 22/06/1983).

#### **The Procedure:**

6. By a letter referenced ACHPR/COMM/274/2003 and dated 17 April 2003, the Secretariat of the African Commission acknowledged receipt of the communication to the author (Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare) and indicated that the communication would be considered on seizure at the 33<sup>rd</sup> Ordinary Session of the Commission scheduled for the 15<sup>th</sup> to 29<sup>th</sup> May 2003 in Niamey, Niger.
7. During its 33<sup>rd</sup> Session held from the 15<sup>th</sup> to 29<sup>th</sup> May 2003, in Niamey, Niger, the African Commission considered the communication and decided to be seized thereof.
8. By a Note Verbale referenced ACHPR/COMM/273/2002 and dated 12 June 2003, the Secretariat of the African Commission notified the republic of Nigeria of the decision on seizure and requested it to furnish the Commission with its arguments on the admissibility on the case within three months from the date of notification for possible consideration during its 34<sup>th</sup> Ordinary Session.
9. By a letter referenced ACHPR/COMM/273/2002 and dated 12 June 2003, the Secretariat of the Commission also notified the Complainant of the decision on seizure and requested for arguments on admissibility within three months from the date of notification for possible consideration during its 34<sup>th</sup> Ordinary Session
10. Both parties to the Communication neither responded to the notifications nor submitted arguments on admissibility. During its 34<sup>th</sup> Ordinary Session held in November 2004 in Banjul, the Gambia, the African Commission, requested the Secretariat to give the parties more time to submit their submissions.
11. The Secretariat of the African Commission tried to contact the Complainant by telephone and by fax for more information, but in vain, since the contact details provided by the latter at the time of depositing the communication, were invalid.
12. On the 2 December 2003, the Secretariat of the Commission sent by fax a Note Verbale referenced (ACHPR/COMM 273/2002/RK) to the Respondent State

through its Embassy in Banjul, informing it that the African Commission awaited its comments on the admissibility of the complaint, attaching a new copy of the communication to the Note for ease of reference.

13. The Secretariat also sent a letter referenced ACHPR/COMM 273/2002 by electronic mail and by post on the 3<sup>rd</sup> December 2003 reminding the complainant to submit his arguments on admissibility. The Secretariat further informed the Complainant of the difficulties encountered in contacting him and requested information as to whether the victim was still detained and about the conditions of his detention.
14. On 19 April 2004, the Secretariat of the Commission sent a letter to the complainant again by post informing him that since it had not received any information despite constant reminders, African Commission had decided to postpone the case for consideration to its 36<sup>th</sup> Session. The letter further pointed out that if by the end July 2004 it did not receive any information enabling it to rule on the admissibility of the complaint it would be compelled to strike the complaint from its register for lack of interest by the Complainant.
15. On 20 April 2004, a copy of the letter to the complainant was sent to the Complainant through the Nigerian National Human Rights Commission, which, some weeks later, informed the Secretariat of its inability to trace the Complainant at the indicated address.
16. On 25 May 2004, the Secretariat of the African Commission received an electronic message from the Complainant, through a one Mr. Gerald Abonyi, informing the African Commission that the organization was withdrawing. its Complaint. He specified that his organization would, from henceforth, stop all correspondence on the subject.
17. At its 35<sup>th</sup> Ordinary Session, which was held in May/June 2004 in Banjul, The Gambia, the African Commission realized that the request for withdrawal of the Complaint came from the email address of the Complainant but not from the usual correspondent in this case (Mr. Ekene Chukwu, Secretary General of CADSJCRHW). The Commission requested the Secretariat to send him a note for confirmation on whether the request for withdrawal was genuine.
18. On the 21/06/2004, the Secretariat sent a letter requesting clarifications and confirmation of the request for withdrawal of the Complaint from the CADSJCRHW. However, no response was received from the Complainant.
19. During its 36<sup>th</sup> Ordinary Session held in Dakar, Senegal from 22 November to 7 December 2004 the African Commission decided to give the complainant one last chance to confirm withdrawal of his complaint.
20. The Secretariat vide a letter dated 23 December 2004 requested-the complainant to confirm withdrawal of the complaint. However to date no response to the request has been received by the Secretariat.

**The Law:**

**Admissibility:**

21. Article 56 of the African Charter on Human and Peoples' Rights provides that communications referred to in Article 55, in order for them to be considered, must necessarily be sent to the African Commission after exhaustion of local remedies if any, unless it is obvious that this procedure is unduly prolonged.

22. It is worth noting in the case under study, that from the date the Complaint was submitted to the Secretariat of the African Commission (17 March 2003) and in spite of several letters sent to request the Complainant and the Respondent State to submit on admissibility, there were no responses.

23. The Complainant in May 2004 requested the withdrawal of the complaint via email and again despite various efforts to get a written confirmation of the withdrawal the same was not forthcoming to date.

24. Consequently, the African Commission decides to close the file for lack of further interest in the communication by the complainant.

**Adopted at the 37<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, held from 27<sup>th</sup> April to 11<sup>th</sup> May 2005 in Banjul, The Gambia.**