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

Summary of Facts

1. The complainant is the Chairman of the Mouvement Burkinabé des Droits de l'Homme et des Peuples (MBDHP), an NGO that enjoys observer status with the Commission. He cites a series of human rights violations reported to have been committed in Burkina Faso from the days of the revolutionary government to date. He therefore requests the Commission to strive to reveal the truth with regard to each of the cases reportedly not reacted to by the competent bodies in his country.

2. According to the complainant, Burkina Faso, on 11 December 1991, re-established the rule of law by adopting a new constitution. This rekindled the hope that the issue of the human rights violations committed between 1983 and 1991 would be addressed for the common good of the citizens of that country. Unfortunately, this was not the case. Furthermore, acts prejudicial to civil and political liberties have been recorded.

3. The complainant alleges that since the creation of the Mouvement Burkinabé des Droits de l'Homme et des Peuples in 1991, the latter has recorded several cases of human rights violations in the country after having been informed on several occasions by the victims, and has unsuccessfully requested the judiciary to investigate the said cases. The most important case to be brought to the notice of this NGO was that of the suspension, discharge and removal of magistrates that took place on 10 June 1987. It is reported that the state afterwards granted an amnesty, as part of the reinstatement of workers wrongly laid off under the regime called the National Revolutionary Council that ruled Burkina Faso from 1983 to 1987. Many workers were reportedly reinstated, while many others were not.

4. The Chairman of MBDHP, Mr. Halidou Ouedraogo, a Magistrate by profession, belongs to this second category as well as another magistrate, Mr. Compaore Christophe. Both of them are claiming damages in kind. Their claim is unsuccessful to date. The Supreme Court, which was reportedly informed about the case fifteen years ago, has never taken a decision on the case.

5. According to the complainant, although the situation has slightly improved, the magistrates concerned continue to suffer from harassment ranging from arbitrary postings to manipulations by the Supreme Council of Judges and Magistrates and irregularities in the promotion of some magistrates. The two unions of judges and magistrates are reported therefore to have, in a joint communiqué, denounced the subordination of their profession, corruption of judges and irregularities observed in the deliberations of the Supreme Council of Judges and Magistrates.

6. The complainant alleges that many cases brought by him before criminal courts in 1990, 1991, 1994 and 1996 have not been examined.

7. In October 1991, the Organisation Pour la Democratie, Mouvement du Travail (ODP/MT), the ruling party, is reported to have put on fire, through its militants, a Peugeot 505 vehicle of the Chairman of MBDHP. This incident is reported to have taken place in front of the headquarters of another political party now dissolved. La Convention pour le Peuple (CNPP/PS) whose militants, fearing to see their headquarters burnt down, are reported to have called on Mr. Halidou Ouedraogo to prevent the crime. The complainant maintains that the authors of this act of hooliganism are known and that some of them are reported to have been active again with the task of intimidating any person, especially workers and students, suspected of being against the powers that be.

8. Following the above-mentioned destruction of his vehicle, the complaint filed at the Ouagadougou Criminal Court by Mr. Ouedraogo in October 1991 is said to have no effect.

9. In June 1994, after closing from work, Mr. Ouedraogo is reported to have been a victim of an assassination attempt. When he put the engine of his car on, it reportedly exploded and he survived only by a miracle. A complaint was filed against X at the Ouagadougou Criminal Court for attempted assassination and destruction of personal property, but it was unsuccessful.

10. The complainant claims that in May 1995 a student demonstration took a dramatic turn for the worse in a locality called Garango, two hundred kilometres from Ouagadougou. A gendarme identified by MBDHP is reported to have shot dead at close range two students. The enquiry speedily launched by the said Movement which led to the submission of the case to the Criminal Court of the said locality is reported not to have been examined. On the other hand, one Ouya Bertin, a Member of Parliament representing his state, is reported to have accused the Chairman of MBDHP of manipulating the pupils and students. The former is reported to have declared at a gathering that Mr. Halidou Ouedraogo should be got rid of and that in any case "measures have been taken to liquidate him". MBDHP filed a complaint of libel and death threats against its Chairman. This complaint is reportedly unsuccessful to date.

11. The complainant also alleges several human rights violations as well as threats reportedly made against his person and restrictions placed on his movement during successive Burkina students' strikes in February, March and April 1997.

12. Referring to the turbulent political situation that prevailed in Burkina Faso between 1989 and 1990, the claimant alleges that there were many kidnapping cases followed by executions. He cited the disappearance of persons suspected or accused of plotting against the state, among them, Mr. Guillaume Sessouma, who, at the time he was kidnapped/arrested, was a lecturer at the University of Ouagadougou and has not been seen since 1989. Similarly, Dabo Boukary, a medical student arrested in May 1990 by the Presidential Guard has not reappeared to this day. According to the claimant, the authorities are reported to have said that the latter might have fled.

13. As for assassinations, he cited those of Mr. Clement Oumarou Ouedraogo, a University Professor and erstwhile representative of Burkina Faso at UNESCO, gunned down in the middle of a street in Ouagadougou on 9 December 1991, two farmers killed in 1996 at 120 kilometres from Ouagadougou during a so-called police routine check, as well as the 1994/95 assassinations of people in the locality of Kaya (Nahouri). He claims that commandos of the Po military garrison reportedly had a hand in the latter assassinations.

14. The complainant alleges that his organisation has submitted all these cases of human rights violations, but without response to this day, to the following Burkinabe institutions:

    - Competent jurisdictions;
    - The ministries concerned (Justice, Interior and Defence);
    - The Prime Minister; and
    - The President of the Republic of Burkina Faso.

The Complaint

15. The complainant claims that Burkina Faso has violated Articles 3,4,5,6,7,8,9(2), 10,11,12 and 13(2) of the African Charter on Human and Peoples' Rights. He requests the Commission to investigate the said violations and get the respondent state to:

    - Explain the fate of the student, Dabo Boukary;

- Disclose the conclusions of the inquiry on the assassination of Mr. Clement Oumarou Ouedraogo;
- Take measures that can help find a legal solution to all these human rights violation cases; and
- Compensate the victims of such violations.

16. In support of his petition, the Complainant provided abundant documentation on most of the alleged human rights violation cases.

Procedure

17. The communication is dated 25 April 1997. It was received by the Secretariat of the Commission by fax on 25 May 1997. However, the complainant observed that there were annexes to the communication and the Secretariat had to wait to receive them.

18. On 20 August 1997, the Secretariat acknowledged receipt of the communication and asked the complainant to indicate precisely the points contained in the communication that he wanted the Commission to look into and to attach the documents mentioned.

19. On the same day, a Note Verbale was faxed to the Burkinabe Ministry of External Relations and Co-operation forwarding a copy of the communication and requesting for the Ministry's reaction within three months, in accordance with the relevant provisions of the Rules of Procedure. There was no reaction to this Note Verbale.

20. On 5 December 1997, the Secretariat received a correspondence from the complainant reiterating the grievances in his earlier complaint instead of providing the clarifications requested.

21. At its 23rd Session, the Commission decided to be seized of the communication and deferred examination of the issue of admissibility to the 24th Session.

22. On 1 June 1998, a Note Verbale was sent to the Burkinabe government informing it of this decision and calling for its reaction to the admissibility of the communication that was sent. A similar letter was also addressed to the complainant.

23. On 13 July, the Secretariat received a fax from the Burkinabé Minister of Justice and Guardian of the Seals stating that the Ministry of Foreign Affairs had informed him of a complaint submitted against Burkina Faso by the Mouvement Burkinabé des Droits de l'Homme. He stated that the complaint was written in English and requested that the Secretariat provide him with the French version of the complaint since the working language of the country is French.

24. On the same day, the Secretariat reacted to the above-mentioned fax. The minister was informed that the Commission had been seized of the communication and that the respondent state was required to forward its submissions on the issue of admissibility for examination at the 24th Session, scheduled for October 1998.

25. At its 24th Ordinary Session, the Commission heard the parties. Both parties expressed the desire to settle the dispute amicably and requested the Commission's assistance to that effect.

26. The Commission declared the communication admissible. However, in view of the desire of the parties to settle the dispute amicably, it offered its good services for that purpose.

27. On 10 November 1998, the parties were informed by the Secretariat of the Commission's decision.

28. At its 25th Session, the Commission requested for information on the progress of the settlement between the parties.

29. During the 26th Session, the Commission learnt that there had been no reaction from the parties with regard to the progress of the settlement. The Commission therefore decided to defer examination on the merits of the communication to the 29th Session.

30. On 10 December 1999, the Secretariat informed the parties of the Commission's decision.

31. At the 27th Ordinary Session held in Algiers, Algeria, the Commission heard the parties to the complaint and decided that the respondent state should take the initiative in inviting the complainant for an amicable settlement of the case, failing which, the Commission would proceed to consider the case on its merits.

32. On 20 July 2000, the Secretariat of the Commission conveyed the above decision to the parties.

33. On 17 August 2000, the Secretariat of the Commission received a Note Verbale from the Respondent State informing the Commission that they had complied with its decision and invited the complainant for a meeting on 14 August 2000.

34. At the 28th Ordinary Session, the Commission heard both parties. The respondent state informed the Commission that the case of the victims of massacres committed by police officers had been settled but that the other cases were pending. The complainant confirmed that a meeting had been held but that there had been no progress in so far as settling the matter was concerned.

Law
Admissibility

35. Article 56(5) of the African Charter on Human and Peoples' Rights requires that prior to a complainant having recourse to the Commission, communications received in accordance with article 55, should be "…sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

36. In this particular case, the complainant had approached the competent national authorities with a view to obtaining redress for the alleged violations and to clarify the cases of disappearances and assassinations that had remained unpunished. At its 24th Ordinary Session, the Commission heard both parties. They expressed their desire to reach an amicable solution and requested its assistance to this end. The Commission informed the parties that it was at their disposal for purposes of reaching an amicable settlement but the parties did not utilise this avenue. The communication was declared admissible.

Merits

37. Article 3 of the Charter stipulates:

    (1) Every individual shall be equal before the law.

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

38. In order to redress the effects of the suspensions, dismissals and retirements of magistrates that took place on 10 June 1987, the Burkinabé state introduced an amnesty aimed at rehabilitating workers abusively removed under the so-called "Conseil National de la Révolution" regime, which ruled over Burkina Faso from 1983 to 1987. As part of the said measure, many workers

were restored to their posts, while many others, according to information available to the Commission, remained unaffected by the measure. The complainant, Mr. Halidou Ouédraogo, and Mr. Compaoré Christophe, both magistrates, fall in the latter category. They both demanded to be compensated in kind. The request made by Mr. Compaore has not been met to date. The Supreme Court, before which the case was filed over fifteen years ago, has passed no verdict on it. The Commission further notes that no reason with a basis in law was given to justify this delay in considering the case. Nor does the respondent state give any legal reasons to justify the retention of the punishment meted out to these two magistrates. The Commission considers therefore that this is a violation of Articles 18 and 19 of the Fundamental Principles on the Independence of the Judiciary, adopted by the seventh United Nations Congress on Crime Prevention and the Treatment of Offenders, held from 26 August to 6 September 1985, and confirmed by the General Assembly in its Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

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

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

40. It is abundantly clear, as the Commission has already noted that the respondent state has shown no reasons why the rehabilitation measure was applied in a selective manner. The Commission also wonders at the reasons behind the Supreme Court's failure to proceed with the case. Fifteen years without any action being taken on the case, or any decision being made either on the fate of the concerned persons or on the relief sought, constitutes a denial of justice and a violation of the equality of all citizens before the law. It is also a violation of Article 7(1)(d) of the African Charter, which proclaims the right to be tried within a reasonable time by an impartial court or tribunal.

41. Article 4 of the Charter states that:

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

42. The communication contains the names of various people who were victims of assassinations, forced disappearances, attacks or attempted attacks against their physical integrity, and acts of intimidation. The respondent state did not deny these facts. Also, the state has never published the results of the Commission of Enquiry set up following the assassination of Mr. Clement Oumarou Ouédraogo, nor did it identify the perpetrators of the offences or take any measures against them. In conformity with its own jurisprudence which states that "whenever allegations of human rights abuses are not contested by the accused State, … the Commission shall decide on the basis of the facts provided by the plaintiff and treat such facts as they are presented to it" (See communications 25/89, 47/90, 56/93 and 100/93, para. 49), the Commission therefore applies the same reasoning to the facts related in the present communication. The Commission would also like to reiterate a fundamental principle proclaimed in Article 1 of the Charter that not only do the States Parties recognise the rights, duties and freedoms enshrined in the Charter, they also commit themselves to respect them and to take measures to give effect to them. In other words, if a State Party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the Charter, even if the State or its agents were not the perpetrators of the violation. (See communication 74/92, para. 35).

43. The communication points to a series of human rights violations linked to certain events that occurred in Burkina Faso in 1995 and additional elements attached to the dossier describe the

human rights violations perpetrated at Garango, Kaya Navio, as well as the murder of a young peasant at Réo. The communication also mentions the deaths of citizens who were shot or tortured to death, as well as the deaths of two young students who had gone onto the streets with their colleagues to express certain demands, and to support their secondary school colleagues and higher institution teachers. The Commission deplores the abusive use of means of state violence against demonstrators even when the demonstrations are not authorised by the competent administrative authorities. It believes that the public authorities possess adequate means to disperse crowds, and that those responsible for public order must make an effort in these types of operations to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life.

44. Article 5 of the Charter guarantees respect for the dignity inherent in the human person and the recognition of his legal status. This text further prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment. The guarantee of the physical integrity and security of the person is also enshrined in Article 6 of the African Charter, as well as in the Declaration on the Protection of all Persons against Forced Disappearances, adopted by the General Assembly of the United Nations in Resolution 47/133 of 18 December 1992, which stipulates in article 1(2): "Any act leading to forced disappearance excludes the victim from the protection of the law and causes grave suffering to the victim and his family. It constitutes a violation of the rules of international law, especially those that guarantee to all the right to the recognition of their legal status, the right to freedom and security of their person and the right not be subjected to torture or any other inhuman or degrading punishment or treatment. It also violates the right to life or seriously imperils it". The disappearance of persons suspected or accused of plotting against the instituted authorities, including the arrests carried out by the presidential guard and subsequent diappearance in May 1990 of Mr. Guillaume Sessouma and a medical student, Dabo Boukary, constitute a violation of the above-cited texts and principles. In this last case, the Commission notes the submission of a complaint on 16 October 2000.

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

46. Article 12(2) stipulates:

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

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

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

For these reasons, the Commission

Holds a violation of Articles 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter.

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

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

Tripoli, Libya, 23 April to 7 May 2001.

[14th Annual Activity Report: 2000 – 2001]

225/98 Huri-Laws/Nigeria

Summary of Facts

1. The communication is submitted by Huri-Laws, (a non-governmental organisation registered in Nigeria), on behalf of the Civil Liberties Organisation (CLO), another Nigerian human rights NGO based in Lagos.

2. The communication was received at the Secretariat on 24 October 1998, during the 24th Ordinary Session.

3. The communication alleges that since the formation of Civil Liberties Organisation on 15 October 1987, it has experienced all forms of harassment and persecutions from the Nigerian government.

4. This harassment and persecution has always been carried out in the form of arrest and detention of key members and staff of the organisation, and by way of raids and searches without warrant in the organisation's offices by the government security agency, the State Security Services (SSS).

5. One of such acts occurred on 7 November 1997, when Mr. Ogaga Ifowodo, a lawyer with the organisation was arrested at the Nigeria/Benin border while returning from the Commonwealth Summit in Edinburgh, Scotland.

6. It is alleged that officers of the National Drug Law Enforcement Agency initially arrested Mr. Ogaga.

7. He was first detained at 15 Awolowo Road, Ikoyi, the headquarters of the State Security Service (SSS) for a few weeks, before being transferred to Ikoyi Prisons, where he was held until April 1998.

8. The complainant alleges that the victim was detained in a sordid and dirty cell under inhuman and degrading conditions. He was denied medical attention and access to his family and lawyer. He was also denied access to journals, newspapers and books.

9. It is further alleged that he was tortured and rigorously interrogated, and that at no time during his detention was he informed of any charges against him, nor were any charges ever brought against him.

10. In another incident which the complainant contends adds up to the policy of persecutions on the part of the respondent state, it is alleged that the Federal Military Government of Nigeria and its agents, in exercise of the powers under the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended in 1990), arrested and detained Mr. Olisa Agbakoba without charge or trial between 8 May and 26 June 1998.

11. It is alleged that Agbakoba, founder and board member of Civil Liberties Organisation was arrested at Lagos airport on his return from Europe and detained at the SSS detention centre at Awolowo Road, Ikoyi, Lagos for 5 weeks.

12. On 10 May 1998, some officers of the SSS escorted Mr Agbakoba to the offices of Civil Liberties Organisation for the purpose of conducting a search of the premises. Finding few employees present, because it was a non-working day, they departed.

13. On 11 May 1998, at about 10.30 a.m., Mr. Agbakoba was again escorted by about 30 SSS agents for the purpose of conducting a raid on his organisation's headquarters in Lagos, apparently in search of incriminating materials on the activities of the United Action for Democracy (UAD), and of CLO's involvement in its activities and rallies against the military dictatorship of (the late) General Sani Abacha and his self-succession bid.

14. It is further alleged that for about 7 hours, the agents of SSS carried out a thorough search on the offices of CLO from room to room, breaking down doors and ripping open drawers and cabinets in search of documents. During this time, all the staff members present were kept confined to the library, only one at a time being summoned to assist with the searching of their desks.

15. At the end of the search, thirteen computers, official files and diskettes were carted away by the SSS operatives. Most of files and documents were copied and photocopied.

16. Despite various protests by the staff, no warrant of arrest was presented to justify the search.

17. Furthermore, 5 staff of CLO were arrested and detained at the Awolowo Road office of the SSS. Three were released the same night, while Mr. Okezie Ugochukwu and Ibrahim Ismail were detained for 2 days and nights and made to pass through very horrendous interrogation proceedings.

18. After their release, they were mandated to report on a daily basis to the SSS office, where they underwent continuing interrogations.

19. The complainant alleges further that all the materials seized (except for one computer) were released.

20. It is also alleged that Mr. Agbakoba was later removed to Enugu Prison, 600 km east of Lagos.

21. The complainant alleges further that throughout his period of detention, Mr. Agbakoba was neither charged with any crime, nor allowed access to his family, friends, doctors, or lawyers. He was later released on 26 May 1998.

22. It is alleged that lawsuits were filed at the Federal High Court by Huri-laws challenging the arrest and detention of Mr. Agbakoba, and by CLO challenging the arrest and detention of Mr.

Ifowodo, but these suits were unsuccessful since the State Security (Detention of Persons) Decree, No. 2 of 1984, ousts the jurisdiction of the regular courts.

Complaint

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

Procedure

24. At its 25th Ordinary Session held in Bujumbura, Burundi, the Commission decided to be seized of the communication, and requested the Secretariat to notify the Nigerian government. It also requested the Secretariat to submit an opinion on the admissibility of the communication, particularly in accordance with Article 56(7) of the Charter, in relation to Nigeria's current political situation.

25. On 19 August 1999, the Secretariat of the Commission notified the parties of this decision.

26. On 21 October 1999, the Secretariat received a letter from the complainant informing it that they would not attend the 26th Ordinary Session due to lack of funds, but authorised Ms Julia Harrington of the Institute for Human Rights and Development to represent them.

27. During the 26th Ordinary Session held in Kigali, Rwanda, the Secretariat received a submission from Ms Julia Harrington on Additional Information relating to the Admissibility of the communication.

28. At its 26th Ordinary Session held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit written arguments on the merit of the case.

29. On 17 January 2000, the Secretariat notified the parties of the above decision.

30. On 17 February 2000, the Secretariat received a Note Verbale from the High Commission of the Federal Republic of Nigeria in Banjul, referring to the above Note Verbale and requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare appropriate responses to the alleged violations:

    (a) The Draft Agenda for the 27th Ordinary Session and the letter of invitation to the session from the Secretariat;
    (b) A copy of the complaint that was attached to the Secretariat's Note;
    (c) A copy of the Report of the 26th Ordinary Session.

31. Further to the above request, the Secretariat of the Commission on 8 March 2000, forwarded all the documents as requested (except the Report of the 26th Ordinary Session), together with a copy of the summary and status of all pending communications against Nigeria, as well as a copy each of communications 218/98, 224/98 and 225/98, as submitted by their authors.

32. On 21 March 2000, the legal representative of the complainant sent a letter to the Secretariat informing it that she would present oral arguments on the merits of the case and requested for likely dates of such presentation.

33. By letter of 22 March 2000, the Secretariat informed her of the possible date and drew her attention to the necessity of submitting a copy of the address to it before presentation.

34. At its 27th Ordinary Session held in Algeria, the Commission deferred taking a decision on the merits of the case to the 28th Ordinary Session scheduled for Republic of Benin.

35. The above decision was communicated to the parties on 6 July 2000.

Law
Admissibility

36. At its 25th Ordinary Session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of Article 56(7) of the Charter in view of the prevailing political situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well established principle of international law, a new government inherits the previous government's international obligations, including responsibility for the previous government's misdeeds (see Krishna Achutan and Amnesty International/Malawi, communications 62/92, 68/92 and 78/92).

37. The commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (see communications 27/89, 46/91 and 99/93). Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position still remains that the responsibility of the present government of Nigeria would still be engaged for acts of human rights violations which were perpetrated by its predecessors.

38. Furthermore, it submitted that the Commission should not be swayed by the political situation in the country, as that is capable of foreclosing the complainants' right to fair hearing, especially where they may be desirous of remedying the alleged violations. In any case, it noted that although Nigeria is now under a democratically elected government, the new constitution provides by its Section 6(6)(d) that no legal action can be brought to challenge 'any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law'.

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

Merits

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

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

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

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

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

Further, Principle 6 states:

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

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

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

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

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

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

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

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

44. The failure and/or negligence of the security agents of the respondent state to scrupulously comply with these requirements is therefore a violation of the right to fair trial as guaranteed under the African Charter.

45. The complainant alleges violation of Article 7 (1) (a) and (d) of the Charter in that Mr. Ifowodo and Agbakoba had no legal remedies available with which they could challenge their detentions. Further, that the absolute ouster of the jurisdiction of the court to adjudicate on the legality or otherwise of acts done under the decree is a violation of the above provision, and also a contravention of Article 26 of the Charter.

Article 7(1) of the African Charter states:

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

Article 7 (1) (d) states:

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

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

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

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

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

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

Article 9 of the Charter provides:

> ***(1)*** Every individual shall have the right to receive information.
>
> ***(2)*** Every individual shall have the right to express and disseminate his opinions within the law.

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

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

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

> (1) The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard;
> (2) In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;
>
> (3) The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights.

49. The above acts of the respondent state constitute a violation of Article 10 of the Charter.

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

Articles 12 (1) and (2) state:

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

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

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

Article 14 of the African Charter provides:

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

53. The complainant further contends that no evidence was ever offered of public need or community interest to justify the search and seizure. The said encroachment therefore is a violation of Article 14 of the Charter.

54. Unfortunately, to date, the Government of the Federal Republic of Nigeria has neither responded to the Commission's request for additional information/observations nor for the

arguments on the merits of the case. In these circumstances, the Commission is therefore compelled to accept the facts of the complainant as the facts of this case.

For the above reasons, the African Commission

Holds a violation of Articles 5, 6, 7(1)(a) and (d), 9, 10(1), 12(1) and (2), and 14 of the African Charter.

Cotonou, Benin, 23 October to 6 November 2000.

[14th Annual Activity Report: 2000 – 2001]

232/99 John D. Ouko/Kenya

Summary of Facts

1. The complainant claims to be a Student's Union leader at the University of Nairobi, Kenya.

2. He alleges that he was forced to flee the country due to his political opinions.

3. He mentions the following as issues which led to his strained relations with the government and his arrest and detention, and eventually to his fleeing the country:

    (a) The demand for the setting up of a Judicial Commission of Inquiry into the murder of his late uncle and former Kenyan Minister of Foreign Affairs, Mr. Robert Ouko;

    (b) His condemnation of the seeming government involvement in the murder of his predecessor at the Students' Union, Mr. Solomon Muruli;

    (c) His condemnation of corruption, nepotism and tribalism in government;

    (d) His condemnation of the frequent closure of public universities.

4. Prior to his fleeing the country, he was arrested and detained without trial for 10 months at the notorious basement cells of the Secret Service Department headquarters in Nairobi.

5. The detention facility was a two by three metre basement cell with a 250 watts electric bulb, which was left on throughout his ten months detention.

6. The complainant alleges that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.

7. The complainant claims that he fled the country on 10 November 1997 to Uganda, where he initially sought political asylum but was denied asylum.

8. The complainant alleges that since he could not obtain any protection in Uganda, he had to flee to the Democratic Republic of Congo (DRC) in March 1998, and has been residing there to date.

9. The complainant claims to be living presently in Aru, Northeast of the Democratic Republic of Congo.
10. The complainant further alleges that until August 1998, when the war broke out in the DRC, he was under the United Nations High Commissioner for Refugees' (UNHCR) assistance programme.

11. Since the said war started, leading to the evacuation of UNHCR staff, he has been living in a very desperate and despicable situation.

Complaint

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

Procedure

12. At its 26th Ordinary Session held in Kigali, Rwanda, the Commission decided to be seized of the communication and requested the Secretariat to notify the parties.

13. On 18 January 2000, letters were dispatched to the parties notifying them of the Commission's decision.

14. On 23 May 2000, during the 27th Ordinary Session held in Algeria, the Secretariat of the Commission received a letter from the complainant stating, among other things, that he has been in Kampala for medical reasons since November 1999. In addition, he informed the Commission of his ordeals in the Democratic Republic of Congo, including his being kidnapped and forced to work as a computer operator for the rebels in Kisangani.

15. At its 27th Ordinary Session held in Algeria, the Commission examined the case and declared it admissible and requested parties to furnish it with arguments on the merits of the case.

16. On 12 July 2000, the Secretariat communicated the Commission's decision to the parties.

Law
Admissibility

17. Article 56 of the Charter governs the admissibility of communications brought pursuant to Article 55 of the Charter. The applicable provision in this particular case is Article 56(5) of the Charter, which provides inter alia: “Communications relating to Human and Peoples’ Rights…received by the Commission shall be considered if they…are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged…”

18. The facts of this case reveal the following:

- The complainant is no longer in the Republic of Kenya;
- The complainant has been forced to flee his country because of his political opinions and Student Union activities; he did not voluntarily.
- An attestation dated 30 October 1999, issued by one Mr. Tane Bamba, Head of Sub Office of the United Nations High Commissioner for Refugees, indicates that the complainant "is recognised as a refugee under UNCHR mandate in accordance with the provisions of the OAU Convention of 10 September 1969, the conditions of which he satisfied."

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

Merits

20. The complainant alleges that prior to his fleeing the country, he was arrested and detained for 10 months without trial at the notorious basement cells of the Secret Service Department headquarters in Nairobi.

21. The State Party has not contested this claim. In fact, it has not responded to the many requests made by the Secretariat of the Commission. In this circumstance and following its well laid down precedent on this, the Commission accepts the facts of the complainant as the facts of the case and finds the respondent state in violation of Article 6 of the Charter.

    Article 6 provides:

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

22. The complainant claims that the detention facility had a 250 watts electric bulb, which was left on throughout his ten months detention. Furthermore, that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.

23. The Commission finds the above condition, to which the complainant was subjected, in contravention of the respondent State Party's obligation to guarantee to the complainant the right to the respect of his dignity and freedom from inhuman and degrading treatment under Article 5 of the Charter, which provides:

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

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

25. Principle 1 provides:

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

Principle 6 on the other hand states:

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

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

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

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

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

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

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

30. The State Party concerned has not refuted this fact. The Commission therefore finds the persecution of the complainant and his subsequent flight to the Democratic Republic of the Congo to have greatly jeopardised his chances of enjoying his right to freedom of association guaranteed under Article 10 of the Charter. Article 10 (2) states:

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

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

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

For these reasons, the Commission

Holds a violation of Articles 5, 6, 9, 10 and 12 (1) and (2) of the African Charter on Human and Peoples' Rights.

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

Cotonou, Benin, 20 October to 6 November 2000.

COMMUNICATIONS SUBMITTED AGAINST LESOTHO

[13th Annual Activity Report : 1999 – 2000]

54/91 Malawi African Association/Mauritania
61/91 Amnesty International/Mauritania
98/93 Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO/Mauritania
164/97 à 196/97 Collectif des Veuves et Ayants-droit/Mauritania
210/98 Association Mauritanienne des Droits de l'Homme/Mauritania

Summary of Facts

1. These communications relate to the situation prevailing in Mauritania between 1986 and 1992. The Mauritanian population, it should be remarked, is composed essentially of Moors (also known as 'Beidanes') who live in the North of the country, and various black ethnic groups, including the Soninke, Wolofs and the Hal-Pulaar in the South. The Haratines (freed slaves) are closely associated with the Moors, though they physically resemble the Black population of the South.

2. Following a coup d'état that took place in 1984, and which brought Colonel Maaouya Ould Sid Ahmed Taya to power, the government was criticised by members of the Black ethnic groups for marginalising Black Mauritanians. It was also criticised by a group of Beidanes who favoured closer ties with the Arab world.

3. Communication 61/91 alleges that in early September 1986, over 30 persons were arrested in the aftermath of the distribution of a document entitled "*Le Manifeste des negro - mauritaniens opprimés*" (Manifesto of the Oppressed Black Mauritanians). The document provided evidence of the racial discrimination to which the Black Mauritanians were subjected and demanded the opening of a dialogue with the government. Twenty-one persons were found guilty of holding unauthorised meetings and pasting and distributing publications that were injurious to the national interest, and of engaging in racial and ethnic propaganda. They were convicted and imprisoned, after series of trials that took place in September and October 1986. The accused had been held in custody for a period that was longer than provided for in Mauritanian law. They did not have access to their lawyers before the trials started. The lawyers, therefore, did not have time to prepare the cases, for which reason they withdrew, leaving the accused without defence counsel. The president of the tribunal considered that the refusal of the accused to defend themselves was tacit acknowledgement of their guilt. The trial was conducted in Arabic, even though only three of the accused were fluent in the language. The accused were thus found guilty on the basis of statements made to the police during their time in custody. They however pointed out to the tribunal that some of these statements had been given under duress. The sentences ranged from six months to five years imprisonment with fines, and five – ten years of house arrest.

4. The accused filed an appeal, claiming unfair trial, stating that they were not charged in due time; and that they did not have the opportunity to be defended. On 13 October 1986, the Court of Appeal upheld the sentences, even though the public prosecutor had not contested the appeal.

5. In September 1986, another trial against one Captain Abdoulaye Kébé took place before a special tribunal presided by a military officer; and no appeal was permitted. Captain Kébé was charged with violating military regulations by providing statistics on the racial composition of the army command, which were then quoted in the "*Manifeste des negro - mauritaniens opprimés*". He was held in solitary confinement before his trial, with no access to lawyers, and did not have sufficient time to prepare his defence. He was sentenced to two years imprisonment and twelve years house arrest.

6. In October 1986, a third trial relating to the Manifesto was brought against 15 persons. They were charged with belonging to a secret movement, holding unauthorised meetings and distributing tracts. Three of them were given suspended sentences and the others acquitted.

7. After the 1986 trial, there were protests against the conviction of the authors of the Manifesto. These brought about further arrests and trials.

8. In March 1987, 18 persons were charged before a criminal court for arson. They were not allowed family visits during the five months that their detention lasted. Many of them were alleged to be members of the support committee, established after the first trial relating to the Manifesto, to provide material and moral support to the families of the detainees. Most of the detainees were beaten during their detention. After the trial, nine accused were found guilty and sentenced to prison terms ranging from four to five years. The evidence was based almost exclusively on statements made to the police during their time in custody. They tried in court to retract these statements, arguing that they had been given under duress. Apparently, the tribunal did not try to clarify these facts.

9. At the end of April 1987, six persons were charged with distribution of tracts. Just before their trial, arson charges were added to the list of offences with which they were being accused. The lawyers, once again, did not have sufficient time to prepare the defence of their clients. All of the accused were found guilty by the court and sentenced to four years imprisonment. The Supreme Court later confirmed the sentences, regardless of the irregularities that occurred during the course of the trial.

10. On 28 October 1987, the Mauritanian Minister of Interior announced the discovery of a plot against the government. In reality, all those accused of taking part in this plot belonged to the Black ethnic groups from the South of the country. Over 50 persons were tried for conspiracy by the special tribunal presided by a senior army officer who was not known to have legal training. He was assisted by two assessors, both of them army officers. No appeal was provided for. The accused were kept in solitary confinement in military camps and deprived of sleep during their interrogation. They were charged with "endangering State security by participating in a plot aimed at deposing the government and provoking massacres and looting among the country's inhabitants". A special summary procedure was applied, under the pretext that they had been caught *in flagrante delicto*. This procedure provides for a trial without any prior investigation by an investigating magistrate. It restricts the rights of the defence as well as access to lawyers and allows the court to pass judgement without any obligation on the part of the judges to indicate the legal bases for their conclusions. Such a procedure is not normally applied in cases relating to a conspiracy or an attempted crime. It is applicable to an already consummated crime. Those who were convicted on 3 December 1987 did not have the right to file appeal. Three lieutenants were sentenced to death and executed three days after. The executions were reportedly stretched out in a manner as to subject the convicts to a slow and cruel death. To put an end to their suffering, they had to provoke the executioners to kill them as quickly as possible. The other accused were sentenced to life imprisonment.

11. Some presumed members of the Ba'ath Arab Socialist Party were also imprisoned for a political cause. In September 1987, 17 supposed members of the party were arrested and charged with belonging to a criminal association, participating in unauthorised meetings and abduction of children. Seven of the accused were sentenced to a seven-month suspended term of imprisonment. On 10 September 1988, in another trial before the State Security Section of the special tribunal, 16 presumed Ba'athists were charged with disturbing the internal security of the State, having contacts with foreign powers and recruiting military personnel in a time of peace. Thirteen of them were found guilty, mainly on the basis of statements that they sought to withdraw during the trial, on the basis that they had been made under duress. The accused were held in solitary confinement in a police camp and did not have the right to consult their lawyers until three or four days before the trial. Communication 61/91 avers that the accused were arrested and imprisoned for their non-violent political opinions and activities.

12. Communication 61/91 also alleges that their conditions of detention were the worst and cites many examples to prove these allegations. Thus, from December 1987 to September 1988, those detained at Ouatala prison only received a small amount of rice per day, without any meat or salt. Some of them had to eat leaves and grass. The prisoners were forced to carry out very hard labour day and night and were chained up in pairs in windowless cells. They only received one set of clothes and lived in very bad conditions of hygiene. As from February 1988, their guards regularly beat them up. From the time of their arrival in the detention camp, they only received one visit. Only the guards and prison authorities were authorised to approach them. Between August and September 1988, four prisoners died of malnutrition and lack of medical attention. After the fourth death, the civilian prisoners in Ouatala were transferred to the Aïoun-el Atrouss prison, which had medical infrastructure. Some of them were so weak that they could only move on all fours. In the Nouakchott prisons, the cells were overcrowded. The prisoners slept on the floor without any blankets, even during the cold season. The cells were infested with lice, bedbugs and cockroaches, and nothing was done to ensure hygiene and provision of health care. The Black prisoners, from the South of the country, complained of discrimination by the guards and security forces, who were mainly of the Beidane or Moorish ethnic group, supposedly Whites. They could not receive visits from their families, doctors or lawyers, except when the Ba'ath party supporters, all of them Beidanes, were in the same prison.

13. All these communications describe the events that took place in April 1989, simultaneously with the crisis that nearly caused a war between Senegal and Mauritania. The crisis was caused by Mauritania's expulsion of almost 50,000 people to Senegal and Mali. The government claimed that those expelled were Senegalese, while many of them were bearers of Mauritanian identity cards, which were torn up by the authorities when they were arrested or expelled. Some of them seemed to have been expelled mainly because of their relationship with the political prisoners or due to their political activities. Many of those who were not expelled were on the run to escape the massacres. Though the borders were later reopened, no security was assured those who desired to return, and they had no means by which to prove their Mauritanian citizenship. Many had been living in refugee camps since 1989, in extremely difficult conditions.

14. The main victims were Black Mauritanian government employees suspected of belonging to the Black opposition, and Black villagers from the South, mainly from the Hal-Pulaar or Peul ethnic group. The Haal-Pulaars traditionally live in the River Senegal valley where the land is fertile.

15. The complainants allege that thousands of people were arbitrarily detained. They state that the detentions were followed by expulsion, such as in the case of political opponents, people who had resisted the confiscation of their property, not to mention the cases that followed the incursions of [returning] refugee groups. This last category of arrests seems to have been carried out as a generalised reprisal, to the extent that there was no evidence of contacts between the detainees and the refugees who were returning to Mauritania. This type of retaliation and reprisal is contrary to Mauritanian law. Some of the detainees were released in early July 1990.

16. The communications allege also that there was daily persecution of villagers in the South between 1989 and 1990. There were many identity-card checkpoints where the Hal-Pulaar had to show their identity cards and prove that they were of Mauritanian origin. The security forces confiscated their livestock. Sometimes the villagers had to obtain military authorisation to take out their livestock to pasture, to go fishing or to work their fields. Nevertheless, such authorisation did not protect them from arrest.

17. The security forces are accused of surrounding the villages, confiscating land and livestock belonging to the Black Mauritanians and forcing the inhabitants to flee towards Senegal, leaving their property for the Haratines to take or to be destroyed. The Haratines who possessed the land of those who had been expelled were armed by the authorities and were expected to arrange their own defence. So they formed their own militia, which had no foundation in law, but which seemed to work in close collaboration or under the supervision of the army and internal security

forces. Communication 96/93 provides a list of villages all or almost all of whose inhabitants were expelled to Senegal. Communication 98/93 provides a list of villages that were destroyed.

18. These communications also point to various incidents and extra-judicial executions of Black Mauritanians in the South of the country. Following the mass expulsions, some refugees in Senegal carried out incursions into the villages inhabited by the Haratines. Generally, after these raids, the Mauritanian army, the security forces and the Haratine militia would invade the villages reoccupied by the original inhabitants, and identified victims, generally Hal-Pulaar. The communications mention many cases of summary executions. On 10 and 20 April, for instance, military and Haratine patrols arrested 22 people. They were later found dead, with their arms tied up. Some of them had been shot, others had their skulls smashed with stones. On 7 May 1990, Dia Bocar Hamadi, for example, was killed while he was searching for livestock taken from him by Haratines. When his brothers protested to the police, they were arrested and detained until early July. On 12 April 1990, Thierno Saibatou Bâ, a religious leader, was shot dead, on his way to meet his pupils.

19. A curfew was imposed on all villages in the South. Anyone who broke it was shot at sight, even if there was not proof that they were engaged in acts that endangered the lives of other inhabitants. Communication 61/81 mentions a specific case where the victims were arrested, tied up, and taken to a location where they were executed. According to the complainants, the army, security forces and Haratines enjoy total impunity. Many villagers who were not expelled had to flee in order to escape the massacres.

20. Whenever the villagers protested, they were beaten and forced to flee to Senegal or simply killed. Many villagers were arrested and tortured. A common form of torture was known as "Jaguar". The victim's wrists are tied to his feet. He is then suspended from a bar and thus kept upside down, sometimes over a fire, and is beaten on the soles of his feet. Other methods of torture involved beating the victims, burning them with cigarette stubs or with a hot metal. As for the women, they were simply raped.

21. In September 1990, a wave of arrests took place, ending between November and December 1990. Thousands of people were arrested. These were essentially Hal-Pulaar members of the armed forces or civil servants. All those arrested were from the South of the country. Later, the authorities alleged that there had been an attempt to unseat the government; but no proof was ever given. The accused were never put on trial, but were kept in what communication 96/93 describes as "death camps", in extremely harsh conditions.

22. Communication 61/91 contains a list of 339 persons believed to have died in detention. Some detainees were reportedly executed without trial. Thirty-three soldiers were hung, without trial, on 27 and 28 November 1990. Others were buried in sand to their necks and left to die a slow death. Many however died as a result of the torture they underwent. The methods used include the so-called 'Jaguar' mentioned above, electric shocks to the genital organs, as well as burns all over their bodies.

23. In February 1991, detainees in the J'Reida military camp were undressed, hands tied behind their backs, sprayed with cold water and beaten with iron bars. The 'Jaguar' torture was also utilised. The detainees were burned with coal embers, or they had some powder spread on their eyes, causing a terrible burning sensation. Their heads were plunged in dirty water to the point of suffocation; some were buried in sand to their necks. They were permanently chained in their cells, without toilet facilities. Some were kept in underground cells or dark cells where it got very cold at night.

24. In March 1991, the government announced the release of a number of political prisoners who had been convicted, as well as of other persons detained since November and December 1990. In April, other detainees were released, and President Maaouya Ould Taya announced that all those

arrested had been released. However, there was never any response to the reports referring to people who had been killed in detention, nor on the unknown fate of many detainees. Communication 61/91 provides a list of 142 people whose deaths are confirmed, and another 197 who were not released and are probably dead.

25. According to communication 61/91, the government set up a commission of inquiry, but did not indicate either its prerogatives or the extent of its field of action. It is essentially composed of military men. And even if one were to believe that the commission has finished its work, no report ever made its conclusions public.

26. Communication 54/91 alleges that there are over 100,000 Black slaves serving in Beidane houses. And that though 300,000 had bought their freedom, they remain second-class citizens. Besides, Blacks do not have the right to speak their own languages. According to communication 98/93, a quarter of the population (500,000 out of 2,000,000 inhabitants in the country) are either slaves or Haratines (freed slaves). The freed slaves maintain many traditional and social links with their former masters, which constitutes a more subtle form of exploitation.

27. Amnesty International, *Union Interafricaine des Droits de l'Homme* and *Rencontre Africaine pour la Défense des Droits de l'Homme* made statements at the 19th session, reiterating the facts already presented. Amnesty International stated in writing that an amicable settlement could only be possible if the government set up an independent commission of inquiry to shed light on these violations, brought the authors to justice according to the internationally respected rules regarding fair trial, without using the death penalty; tried all other political prisoners according to international norms, and compensated the victims in a satisfactory manner.

The Government's Response

28. The government's response to these allegations was that Amnesty International had taken sides in the conflict between Senegal and Mauritania. The government admits that there had been what it calls "incidents" in late 1990, but that the "necessary measures had been taken to restore order as soon as possible and to limit the damage". It also declares that administrative sanctions were imposed on some army officers. The government maintains that a new pluralist Constitution was adopted, and that Mauritania is now a democratic State that respects the norms of the African Charter on Human and Peoples' Rights.

29. At the 19th Session of the Commission, the Mauritanian government representative in attendance did not contest the complainants' allegations, claiming that grave and massive human rights violations had been committed between 1989 and 1991. He expressed his governments wish to work together with the Commission to assist the victims, making it clear that the country's economy could not allow them all to be compensated. He further declared that it would be difficult to verify the situation of each victim prior to the 1989 events, which would make their resettlement impossible. He continued, saying that all those displaced could return to their native villages. Besides, the Mauritanian government representative categorically denied that the Black ethnic groups did not have the right to speak their languages. He reiterated his government's official position, that slavery had been abolished in Mauritania during French colonial days.

Provisions of the Charter alleged to have been violated

The communications allege violation of Articles 2, 4, 5, 6, 7, 9, 10, 11, 12, 14, 16, 18, 19 and 26 of the African Charter on Human and Peoples' Rights.

Procedure

30. Communication 54/91 is dated 16 July 1991 and was submitted by Malawi African Association, a non-governmental organisation.

31. The Commission was seized of it on 14 November 1991 and the Mauritanian government was notified and called upon to make its observations known. No response was received from it.

32. At the 19th Session held in March 1996, the Commission heard Mr. Ahmed Motala, representative of Amnesty International, Mr. Halidou Ouédraogo of UIDH, Mr. Alioune Tine and Mr. C. Faye of RADDHO, as well as the representative of the Mauritanian government. Mr. Ahmed Motala then sent the Commission a letter dated 31 March 1996.

33. At the end of the hearings, the Commission held the view that the government did not seriously contest the allegations brought against it. The Mauritanian delegate admitted that human rights violations had indeed been committed. He did not try to explain the circumstances in which they had taken place. He requested the Commission to give its assistance in finding a solution to the problem. He further added that his government was ready to receive a delegation from the Commission to that end. Following this, the Commission reiterated its decision to send a mission to Mauritania to try and obtain an amicable settlement. It was also decided that the mission would be composed of the Chairman of the Commission and Commissioners Rezag-Bara and Ondziel-Gnelenga, as well as the Secretary to the Commission.

34. The mission was in Mauritania from 20 to 27 June 1996.

35. At the 20th Session held in Grand Bay, Mauritius, the Commission considered the mission's report and deferred the decisions on the communications to its 21st Session.

36. On 7 February 1997, the Secretariat wrote to the complainants explaining to them that the mission report would be sent to the government for its observations by the end of February and that they would subsequently have the chance to make comments on the said report.

37. At the 21st session held in Nouakchott in April 1997, the Commission deferred its decision on this communication to the 22nd Session, pending its receipt of the Mauritanian government's reaction to the mission report.

38. Communication 61/91 was submitted by Amnesty International, on 21 August 1991.

39. The Commission was seized of it at its 10th Session, held in October 1991.

40. The Mauritanian government was notified of it by the Secretariat on 14 November 1991.

41. At the 15th Session, the Commission decided to compile all the communications filed against Mauritania.

42. From that date, the procedure for the present communication became identical to that for communication 54/91.

43. Communication 96/93 was submitted on 12 March 1993 by Ms. Sarr Diop, on behalf of the victims.

44. The Commission was seized of it at its 13th Session held in April 1993. Notification of it was sent to the accused state, asking it to forward its observations to the Secretariat. No response was received.

45. At the 15th Session held in March 1994, it was decided to combine all the communications filed against Mauritania.

46. From that date, the procedure for the present communication became identical to that for the above-mentioned communication 54/91.

47. Communication 98/93 was submitted on 30 March 1993 by two NGOs, *Rencontre Africaine pour la Défense des Droits de l'Homme* (RADDHO, African Association for the Defence of Human Rights) and *Union Interafricaine des Droits de l'Homme* (UIDH, Inter-African Human Rights Union).

48. The Commission was seized of them at its 13th Session.

49. On 12 April 1993, notification of it was sent to the accused State, asking it to address its observations to the Secretariat of the Commission.

50. At the 15th Session held in March 1994, it was decided to combine all the communications filed against Mauritania.

51. From that date, the procedure for the present communication became identical to that for the above-mentioned communication 54/91.

52. At the 22nd Session held in Banjul, from 2 – 11 November 1997, the representative of Mauritania pointed out that his government was in the process of considering the mission report of the Commission and expected to have its observations ready before the 23rd Session. The Commission thus decided to defer consideration of all the communications filed against Mauritania to its following session, while bearing in mind that they had been pending before the Commission for quite a long time now.

53. At the 23rd Session held in Banjul (The Gambia), from 20 – 29 April 1998, the Commission decided to combine it with the procedure ongoing for communications 164/97 to 196/97 as well as communication 210/98. In addition, three Notes Verbales were addressed on 25 April and 9 and 10 July 1998, respectively, to the Mauritanian Ministry of Foreign Affairs, to inquire about the government's reaction. They have remained without reply to date.

54. Communications 164/97 – 196/97 allege that between September and December 1990, there was a wave of arrests in Mauritania directed at specific sectors of the population. Those arrested were mostly military men and public servants belonging to the Hal-Pulaar ethnic group and other ethnic groups from the South of the country. Some time after this wave of arrests, the government announced, without providing any proof, that there had been an attempted coup d'état.

55. The accused were never brought before a court of law; according to communications 164/97 – 196/97, about a dozen of the accused were tortured and executed in the military camps of Inal, J'réida, Tiguint and Aleg between November and December 1990. Most remarkably, most of the communications allege that the victims were beaten to death.

56. The widows and mothers behind the present communications, have previously brought their complaints before the Mauritanian national authorities, both civilian and military, in particular the Minister of Interior, the head of the national army, the National Assembly, the Senate, the Special Court of Justice, the Nouakchott Criminal Court, the President and the Minister of National Defence. In all these cases they were either ignored or chased away.

57. On 14 June 1993, the Mauritanian government issued an enactment, No. 023 93, granting an amnesty to those accused of perpetrating the series of murders for which the beneficiaries of the victims are hereby claiming compensation of injuries suffered.

Provisions of the Charter alleged to have been violated

58. The communications allege a series of grave and massive violations of Articles 2, 3, 4, 5, 6, 7, 16 and 26 of the African Charter.

Procedure

59. Communications 164/97 – 196/97 were received by the Secretariat in April 1997. The beneficiaries of the alleged victims submitted them all.

60. On 6 October 1997, the Secretariat received a note verbale dated the 1st of the same month, with reference number 075/MAEC communicating the Mauritanian government's reaction to the accusations made against it. The gist was that Mauritania called on the Commission not to be seized of the said communications for the reason that they "deal with a naturally deplorable, but peculiar and exceptional situation [...] that has in any case since been surmounted... ".

61. On 9 October 1997, the Secretariat acknowledged receipt of the said note, pointing out that the fact that the Mauritanian state had paid compensation to the beneficiaries of the victim of the alleged violations (which are in any case not denied by the state) cannot invalidate the Commission's deliberations.

62. At the 23rd Session, the Commission adjudged on the admissibility of the communications and decided to combine the procedure followed for the present communications with those for communications 54/91, 61/91, 96/93, 98/93, 198/97 and 210/98. The Commission referred the dossiers for consideration as to the merits at its 24th Session.

63. Communication 210/98 was submitted by the Association Mauritanienne des Droits de l'Homme (AMDH, Mauritanian Human Rights Association), on behalf of the Collectif des Rescapés, Anciens Détenus Civils Torturé (CRADPOCIT, Collective of Survivors, Ex-Civilian Detainees and the Tortured), against Mauritania. It alleges that during the bloody political events that troubled Mauritania between 1986 and 1991, those who have now joined together under the umbrella of CRADPOCIT were arrested, along with other Mauritanian citizens of black African stock and detained in the Nouakchott civil prison, and later transferred to various gaols where they were subjected to torture and other inhuman and degrading forms of treatment; this is alleged to have led to the death of some of their co-detainees.

64. After more than fifteen days of detention, some of them were released, while others were charged to court and held in the civilian prisons.

65. Following a number of court cases, some of those on remands were released and others were given suspended sentences, while yet others were sentenced to prison terms varying from three months to five years. These verdicts were aggravated with loss of civic rights, heavy fines and banishment after release.

66. In 1993, members of the armed forces who had been subjected to the same treatment as those who came together under CRADPOCIT were granted pension benefit coupons. Imbued with the hope raised by this measure, they addressed a letter to the President of the Republic on 3 November 1993, in which they demanded their rehabilitation, in line with what had been provided to their compatriots of Arabo-Berber origin and the military personnel of black African origin. This move yielded no results.

67. Two years later, they addressed a second letter to the Head of State, with the same demands, without achieving any better results than in 1993. It was after this second failure that they decided to constitute themselves into a collective in order to better defend their rights. Application for the official recognition of the said collective (CRADPOCIT) was addressed to the Ministry of Interior. At the same time, its founding documents were sent to the Head of State, the Presidents of the Senate and the National Assembly, as well as the Mediator of the Republic, with the same demands annexed in all cases.

68. The complainant claims that as of the time of the arrest of the members of CRADPOCIT, the majority of them were civil servants who had each accumulated ten to twenty years of service.

Furthermore, the complainant claims that at present they are subject to the most precarious living conditions, aggravated by unemployment and onerous family responsibilities. Some of them have even seen their homes broken following divorces that they were unable to prevent.

Procedure

69. The communication was received by the Secretariat of the Commission on 26 January 1998.

70. At the 23rd Ordinary Session, held from 20 – 29 April 1998 in Banjul (The Gambia), the Commission decided:

    a) to notify the Mauritanian government representative at the session of the communication (with signed acknowledgement);

    b) to combine it with the ongoing procedure for communications 54/91, 61/91, 96/93, 98/93 and communication 164/97 to 196/97. It took the view that the reaction of the Mauritanian government to the various Notes Verbales from the Secretariat, as contained in Note No. 075/MAEC, dated 1 October 1997, was valid for the case under consideration.

    c) to defer the communication to its 24th Session for consideration of its merits.

71. At the 24th Session held in Banjul, The Gambia, from 22 – 31 October 1998, it was decided that the members of the Commission who had undertaken the mission to Mauritania should consider the communications, taking into account the response of the Government of Mauritania to their mission report. Consideration of these communications was thus deferred to the 25th Session.

Provisions of the Charter alleged to have been violated

72. Members of CRADPOCIT are complaining of discriminatory practices on the part of the Mauritanian government, which they accuse of operating "a policy of double standards", since the officials of Arabo-Berber origin who had been subjected to the same situation had been reintegrated into their various workplaces, while the members of the collective who are of Black African origin saw their pleas rejected.

73. They further point out that while they were in detention, in September 1987, when about fifteen pro-Iraqi Ba'athist Arabo-Berber military men (charged for belonging to a criminal organisation, participation in unauthorised meetings and kidnapping of children) joined them in the same prison, their arrival led to a notable improvement in their conditions of detention. They claim that they were then allowed to take walks within the prison courtyard, a "privilege" that was previously denied to them. However, they were still denied visits as a policy, while their Arabo-Berber compatriots had the right to receive anyone, including their spouses.

74. Immediately after the release of the Arabo-Berbers, the black Africans were thrust back to the difficult gaol conditions to which they had previously been subjected, which consisted, remarkably, of keeping them chained in pairs during the whole day, with all inconveniences arising from such a situation, hard labour, fetching water, etc. These inhuman prison conditions, coupled with poor nourishment and lack of hygiene are said to be the cause of the above-mentioned deaths of four of their co-detainees (two military and two civilians).

75. **The Mauritanian Human Rights Association claims violation of the following provisions of the African Charter of Human and Peoples' Rights**:

(a) Article 2: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status”;

(b) Article 4: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”;

(c) Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”;

(d) Article 15: “Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work”;

(e) Article 16: 1. “Every individual shall have the right to enjoy the best attainable state of physical and mental health;
2. “States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick”;

(f) Article 19: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another”.

Law
Admissibility

76. Communications 54/91, 61/91, 98/93, 96/93, 164/97 – 196/97 and 210/98 allege cases of grave and massive violations of human rights attributed to the Mauritanian State.

77. In the African Charter on Human and Peoples’ Rights, admissibility is governed by article 56, which defines all the conditions that communications must meet in order to be considered. These criteria are applied with due regard to the specificity of each communication. The case under consideration, of which the Commission was seized through the present procedure, is a combination of four communications which it decided to consider together in view of the similarity of the facts related. The Commission had previously taken the same decision regarding communications submitted against Benin, Zaïre and Rwanda (Cf. decisions on communications 16/88, 17/88, 18/88, 25/89, Legal Assistance Group vs/ Zaïre, and 27/89, 46/91, 49/91, 99/93 World Organisation against Torture, International Association of Democratic Jurists, International Commission of Jurists and Inter-African Human Rights Union vs/ Rwanda. All these communications were submitted by non-governmental organisation and they all allege various violations that are inter-related and similar.

78. Article 56(1) of the Charter demands that anyone submitting communications to the Commission relating to human and peoples’ rights must reveal their identity. They do not necessarily have to be the victims of such violations or members of their families. This characteristic of the African Charter reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims themselves or may be dangerous to pursue.

79. In the above-mentioned decisions, the Commission recognised that in a situation of grave and massive violations, it may be impossible to give a complete list of names of all the victims. It will be noted that article 56(1) demands simply that communications should indicate the names of those submitting and not those of all the victims of the alleged violations.

80. Article 56(5) of the Charter demands that the complainants must have exhausted internal remedies, where these exist, before the Commission can be seized of a communication. The Commission maintains that one of the justifications for this demand is that the accused state should be informed of the human rights violations it is being accused of, to provide it with an opportunity to redress them and save its reputation, which would be inevitably tarnished if it were brought before an international jurisdiction. This provision also enables the African Commission on Human and Peoples' Rights to avoid playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself.

81. The Mauritanian state was informed of the worrying human rights situation prevailing in the country. Particular attention, both within the national and international communities, was paid to the events of 1989 and succeeding years. Even if it were to be assumed that the victims had instituted no internal judicial action, the government was sufficiently informed of the situation and its representative, on various occasions, stressed before the Commission that a law known as the "general amnesty" law, dealing with the facts arraigned was adopted by his country's parliament in 1993. The Mauritanian government justified the said law with the argument that "the civilians had benefited from an amnesty law in 1991, and consequently the military wanted to obtain the same benefits; especially as they had given up power after allowing the holding of presidential (1992) and legislative (1993) elections".

82. The Commission notes that the amnesty law adopted by the Mauritanian legislature had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs are complaining; and that the said law also had the effect of leading to the foreclosure of any judicial actions that may be brought before local jurisdictions by the victims of the alleged violations.

83. The Commission recalls that its role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter.

84. Also, the Islamic Republic of Mauritania, being a party to the African Charter on Human and Peoples' Rights, has no basis to deny its citizens those rights that are guaranteed and protected by an international convention, which represents the minimum on which the States Parties agreed, to guarantee fundamental human freedoms. The entry into force of the Charter in Mauritania created for that country an obligation of consequence, deriving from the customary principle *pacta sunt servanda*. It consequently has the duty to adjust its legislation to harmonise it with its international obligations. And, as this Comission has previously had to emphasise, "contrary to other human rights instruments, the African Charter does not allow for derogation from obligations due to emergency situations. Thus, even a situation of civil war […] cannot be cited as justification for the violation by the State or its authority to violate the African Charter" (cf. communication 74/92, para. 36).

85. Finally, the Commission interprets the provisions of article 56(5) in the light of its duty to protect human and people's rights as stipulated in the Charter. The Commission does not believe that the condition that internal remedies must have been exhausted can be applied literally to those cases in which it is "neither practicable nor desirable" for the complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims. The gravity of the human rights situation in Mauritania and the great number of victims involved renders the channels of remedy unavailable in practical terms, and, according to the terms of the Charter, their process is "unduly prolonged". In addition, the amnesty law adopted by the Mauritanian parliament rendered obsolete all internal remedies.

For these reasons, the commission declares the communications admissible

Merits

86. In June 1996, the Commission sent a good-offices mission to Mauritania. The delegation met with members of the government and non-governmental organisations to discuss the overall human rights situation in the country.

87. The mission was undertaken at the initiative of the Commission in its capacity as promoter of human and peoples' rights. It was not an enquiry mission; and while it permitted the Commission to get a better grasp of the prevailing situation in Mauritania, the mission did not gather any additional specific information on the alleged violations, except on the issue of slavery. The present decision is therefore based on the written and oral declarations made before the Commission over the past six years.

88. In the case under consideration, no indication from the government, with the exception of the issue of slavery, seeks to refute the facts adduced in the communications. The representative of the government, who appeared before the Commission at the 19th Session and subsequent sessions, admitted that the communications of which the Commission was seized "deal with a naturally deplorable, but peculiar and exceptional situation [...] that has in any case since been surmounted... ". And according to the government, "most of the issues raised have already been resolved, others are in the process of being settled". It claims, as regards the ex-prisoner civil servants that "the démarches undertaken by those who have constituted themselves into a collective are the result of manipulations of the opposition…" with the aim of countering government action.

89. Though the above-mentioned declaration by the government representative could have constituted a basis for an amicable solution, such a solution could only take place with the agreement of the parties. However at least one of the complainants has clearly indicated that a resolution can only be reached on the basis of some specific conditions, of which none has so far been met to its satisfaction. While it appreciates the government's good will, and hopes to collaborate with it in future to ensure the effectiveness of the settlement of the damages suffered by all the victims of the events described above, the Commission has an obligation to adjudge on the clearly stated facts contained in the various communications. More so as it does not consider acceptable the position of the government that the atrocities and other assassinations committed within the military institution were "an internal affair of the army; that the army had conducted its own inquiry, following which appropriate sanctions were meted out to those military men who were found guilty".

90. Article 7 of the Charter stipulates that:

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

(a) the right to an appeal to competent national organs against acts violating his fundamental rights...;
(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
(c) the right to defence, including the right to be defended by counsel of his choice;
(d) the right to be tried within a reasonable time by an impartial court or tribunal.

91. Mauritania ratified the African Charter on 14 June 1986, and it came into force on 21 October 1986. The September trials, thus, took place prior to the entry into force of the Charter. These trials led to the imprisonment of various persons. The Commission can only consider a violation that took place prior to the entry into force of the Charter if such a violation continues or has effects which themselves constitute violations after the entry into force of the Charter (cf. decision taken on communication 59/91, p. 28). The Commission should therefore have the competence to

consider these trials with a view to ascertaining whether the incarcerations that resulted from them constitute a violation of Article 6 of the Charter.

92. The government did not give any substantial response to the allegations that the said trials were arbitrary. Consequently, in conformity with its well-established jurisprudence, the Commission (cf. decisions taken on communications 59/91, 60/91, 64/91, 87/93 and 101/93) shall adjudge based on the elements provided by the complainants.

93. The State Security Section of the Special Tribunal does not provide for any appeal procedure. Two specific cases mentioned in the communications took place in September and October 1987 (see paras. 10 and 11) and no appeals were authorised. One of the trials ended in the execution of 3 army lieutenants.

94. Furthermore, even when an appeal was allowed, as in the first case in the "Manifesto" (paras. 3 and 4), on 13 October 1986, the Court of Appeal confirmed the verdicts, even though the accused had contested the procedure of the initial trial, and the Public Prosecutor's office did not contest the complaints of the accused. From all indications, the Court of Appeal simply confirmed the sentences without considering all the elements of fact and law. Such a practice cannot be considered a genuine appeal procedure. For an appeal to be effective, the appellate jurisdiction must, objectively and impartially, consider both the elements of fact and law that are brought before it. Since this approach was not followed in the cases under consideration, the Commission considers, consequently, that there was a violation of Article 7 (1) (a) of the Charter.

95. In the judgement of early September 1986 (para. 3), the presiding judge declared that the refusal of the accused persons to defend themselves was tantamount to an admission of guilt. In addition, the tribunal based itself, in reaching the verdicts it handed down, on the statements made by the accused during their detention in police cells, which statements were obtained from them by force**.** This constitutes a violation of Article 7 (1) (b).

96. In most of the cases brought up in these communications (paras. 3,4,5,9,10,11), the accused either had no access or had restricted access to lawyers, and the latter had insufficient time to prepare the defence of their clients. This constitutes a violation of Article 7 (1) (c) on the right to defence.

97. The right to defence should also be interpreted as including the right to understand the charges being brought against oneself. In the trial on the September Manifesto (para. 3), only 3 of the 21 accused persons spoke Arabic fluently, and this was the language used during the trial. This means that the 18 others did not have the right to defend themselves. This also constitutes a violation of Article 7 (1) (c).

98. A senior military officer who is not required to have legal training, heads the section responsible for matters relating to state security in the Special Tribunal. Two assessors, both military men, assist him. The Special Tribunal is itself presided by an army officer. In the joint procedure on communications 139/94, 154/96 and 161/97 (International Pen, Constitutional Rights Project, Interights and Civil Liberties Organisation/Nigeria), the Commission reached the conclusion that the "Special Military Tribunals …constituted a violation of Article 7 (1) (d) of the Charter by the very virtue of their composition, which is reserved to the discretion of the executive organ". Withdrawing criminal procedure from the competence of the courts established within the judicial order and conferring onto an extension of the executive necessarily compromises the impartiality of the Courts, to which the African Charter refers. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary and, thereby, of Article 7 (1) (d).

99. Article 26 of the Charter states that:

States Parties to the present Charter shall have the duty to guarantee the independence of the courts...

100. By establishing a section responsible for matters relating to state security within the Special Tribunal, the Mauritanian state was reneging on its duty to guarantee the independence of the courts. The Commission therefore concludes that there has been violation of Article 26.

101. Article 9 (2) of the Charter stipulates that:

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

102. Communication 61/91 alleges that the trials on the Manifesto (paras. 3,4,5,6) and the other related cases (paras. 8 and 9) violate the right to freedom of expression and dissemination of one's opinions, to the extent that the accused were charged with distributing a manifesto which provided statistics on racial discrimination and were calling for a dialogue with the government. The expression "within the laws" must be interpreted as reference to the international norms. To the extent that the Manifesto did not contain any incitement to violence, it should be protected under international law.

103. Once again, the government did not contest the facts adduced by the complainants. In view of the foregoing, the Commission shall base its argument on the elements provided by the complainants (cf. Decisions 59/91 et al, cited in para. 89).

104. Considering that the trials in question in paragraphs 3, 4 and 5 took place prior to the entry into force of the African Charter, the Commission finds no violation of Article 9 (2) as regards these cases. However, if the indictments constituted a violation of the African Charter, the detentions that ensued from them would be arbitrary and violate Article 6. The Commission is of the view that these cases would have led to violation of Article 9 (2) had they taken place after the entry into force of the Charter. Consequently, the detention of the accused would have been a violation of Article 6.

105. The cases mentioned in paragraphs 8, 9 and 10, which were heard after the entry into force of the Charter, are a violation of the rights stated and protected in Article 9 (2).

106. Article 10 (1) of the Charter stipulates:

Every individual shall have the right to free association provided that he abides by the law…

107. Some presumed supporters of the Ba'ath Arab Socialist Party were imprisoned for belonging to a criminal association. The accused in the third case relating to the Manifesto (para. 6) were charged for belonging to a secret movement. The government did not provide any argument to establish the criminal nature or character of these groups. The Commission is of the view that any law on associations should include an objective description that makes it possible to determine the criminal nature of a fact or organisation. In the case under consideration, the Commission considers that none of these simply rational requirements was met and that there was violation of Article 10(2).

108. Article 11 of the Charter stipulates:

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 particular, those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

109. The accused in the Manifesto case were charged for holding unauthorised meetings (paras. 3

and 6). The trial in question in paragraph 3 took place before the entry into force of the African Charter. Consequently, the Commission cannot consider that there was a violation of Article 11 as regards this particular case. However, had the indictments constituted a violation of Article 11, the detentions that ensued from them would have been a violation of Article 6, which prohibits arbitrary detention.

110. The presumed supporters of the Ba'ath Arab Socialist Party are equally accused of holding unauthorised meetings.

111. The government did not come up with any element to show that these accusations had any foundation in the "interest of national security, the safety, health, ethics and rights and freedoms of others", as specified in Article 11. Consequently, the Commission considers that there was violation of Article 11 in the cases in question in paragraphs 3 and 11.

112. Article 6 of the Charter stipulates:

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

113. There were recurring violations of Article 6. The indictments and trials of September 1986 (paras. 3,4 and 5) were not in conformity with the provisions of the Charter. All those who were incarcerated in its wake were denied their rights as guaranteed in Article 6. The imprisonment resulting from the other cases (paras. 6 and 8), and the two cases from November 1987 (para. 10) as well as the cases against the presumed members of the Ba'ath Arab Socialist Party (para. 11) are arbitrary, for the fact that they were not in conformity with international norms relating to fair trial.

114. The complainants allege that hundreds of people were detained in connection with the 1989 events (para. 15). They allege, further, that a wave of arrests at the end of 1990 resulted in the detention of hundreds of people without charge or trial. According to the complainants, some, and not all, of the detainees were released, adding however that the fate of many people remains unknown. The government did not deny that these arrests and detentions took place, but it maintained that such arbitrary detentions no longer exist. Even if that were the case, it would not annul the previous violations. The Commission considers, therefore, that there was massive violation of Article 6.

115. Article 5 of the African Charter prohibits torture, cruel, inhuman or degrading punishment and treatment. This article also stipulates: "Every individual shall have the right to the respect of the dignity inherent in a human being". All the communications detail instances of torture, and cruel, inhuman and degrading treatments. During their time in custody, the detainees were beaten (para 8), they were forced to make statements (paras 8 and 11), and they were denied the opportunity of sleeping (para 10). Both during the trial as well as the period of arbitrary detention, some of the prisoners were held in solitary confinement (paras. 5, 8, 10, 11 and 12).

116. The conditions of detention were, at the very least, bad: the prisoners were not fed; they were kept in chains and locked up in overpopulated cells lacking hygiene and access to medical care (para. 12); some were burnt or buried in sand and left to die a slow death; electrical shocks were administered to their genital organs and they had weights tied on to them; their heads were plunged into water to the point of provoking suffocation; pepper was smeared on their eyes and some were permanently kept in small, dark (or underground) cells which got very cold at night (para 23).

117. Both within and outside the prisons, the so-called "Jaguar" position was the form of torture utilised, (see paras 20 and 22). The prisoners were beaten (paras 12 and 20) and their bodies burnt using various instruments (paras 20 and 22). The women were raped (para 20).

118. The government did not produce any argument to counter these facts. Taken together or in isolation, these acts are proof of widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of article 5. The fact that prisoners were left to die slow deaths (para 10) equally constitutes cruel, inhuman and degrading forms of treatment prohibited by Article 5 of the Charter.

119. Article 4 of the Charter stipulates that:

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

120. Following the November 1987 trial, which already violated the provisions of Article 7, three army lieutenants were sentenced to death and executed (para 10). The trial itself constituted a violation of the African Charter. Furthermore, the Commission is of the view that the executions that followed the said trial constitute a violation of Article 4. Denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death point to a shocking lack of respect for life, and constitutes a violation of Article 4 (see para 12). Other communications provide evidence of various arbitrary executions that took place in the villages of the River Senegal valley (see paras 18 and 19) and stress that people were arbitrarily detained between September and December 1990 (see para 22). The Commission considers that there were repeated violations of article 4.

121. Article 16 of the Charter states that:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

122. The State's responsibility in the event of detention is even more evident to the extent that detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The general state of health of the prisoners deteriorated due to the lack of sufficient fool; they had neither blankets nor adequate hygiene. The Mauritanian state is directly responsible for this state of affairs and the government has not denied these facts. Consequently, the Commission considers that there was a violation of Article 16.

123. Article 18(1) states that:

> The family shall be the natural unit and basis of society. It shall be protected by the State…

124. Holding people in solitary confinement both before and during the trial, and during such detention, which is, on top of it all, arbitrary, (paras 5,8,10, 11 and 12) and depriving them of their right to a family life constitutes a violation of Article 18(1).

125. Article 12(1) states that:

> Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

126. Evicting Black Mauritanians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of Article 12(1). The representative of the Mauritanian

government described the efforts made to ensure the security of all those who returned to Mauritania after having been expelled. He claimed that all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth. He affirmed that his government had established a department responsible for their resettlement. The Commission adopts the view that while these efforts are laudable, they do not annul the violation committed by the State.

127. Article 14 of the Charter reads as follows:

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

128. The confiscation and looting of the property of black Mauritanians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in Article 14.

129. Article 2 of the Charter states that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour…

130. The representative of the government as well as the authors of the communications declared that many Black Mauritanians were forced to flee or were detained, tortured or killed because of the colour of their skin, and that the situation in Mauritania became explosive due to the extreme positions adopted by the francophone and arabophone factions that were in opposition to each other in the country.

131. Article 2 of the Charter lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective under-pins the Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities adopted by the General Assembly of the United Nations in resolution 47/135 of 18 December 1992. Article 1(1) of this document indeed stipulates: "States shall protect the existence and national or ethnic, cultural, religious or linguistic identity of the minorities within their respective territories and shall stimulate the establishment of conditions conducive to the promotion of such identity." From the foregoing, it is apparent that international human rights law and the community of States accord a certain importance to the eradication of discrimination in all its guises. Various texts adopted at the global and regional levels have indeed affirmed this repeatedly. Consequently, for a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its Article 2.

132. Article 5 of the Charter states that:

> All forms of exploitation and degradation of man particularly slavery … shall be prohibited.

133. Communications 54/91 and 98/93 allege that a majority of the Mauritanian population is composed of slaves. The government states that slavery had been abolished under the French colonial regime. The communications also allege that freed slaves maintain traditional and close links with their former masters and that this constitutes another form of exploitation.

134. During its mission to Mauritania in June 1996, the Commission's delegation noted that it was still possible to find people considered as slaves in certain parts of the country. Though Edict Nº 81-234 of 9 November had officially abolished slavery in Mauritania, it was not followed by effective measures aimed at the eradication of the practice. This is why, in many cases, the descendants of slaves find themselves in the service of the masters, without any remuneration. This is due either to the lack of alternative opportunities or because they had not understood that they had been freed of all forms of servitude for many years. From all appearances, some freed slaves chose to return to their former masters. From the Commission's point of view, the State has the responsibility to ensure the effective application of the Edict and thus ensure the freedom of its citizens, to carry our inquiries and initiate judicial action against the perpetrators of violations of the national legislation.

135. Independently from the justification given, by the defendant State, the Commission considers, in line with the provisions of Article 23(3) of the Universal Declaration of Human Rights, that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. These provisions are complemented by those of Article 7 of the International Covenant on Economic, Social and Cultural Rights. In view of the foregoing, the Commission deems that there was a violation of Article 5 of the Charter due to practices analogous to slavery, and emphasises that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore considers that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man, both practices condemned by the African Charter. However, the African Commission cannot conclude that there is a practice of slavery based on these evidences before it.

136. Article 17 of the Charter stipulates that:

> 2. Every individual may freely take part in the cultural life of his community.
>
> 3. The promotion and protection of morals and traditional values recognised by the Community shall be the duty of the State…

137. Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.

138. The government made it known that there exists in the country an institute of national languages, for over ten years now, and that this institute teaches those languages. However, a persisting problem is the fact that many of these languages are exclusively spoken in small parts of the country and that they are not written. Communication 54/91 alleges the violation of linguistic rights but does not provide any further evidence as to how the government denies the black groups the right to speak their own languages. Information available to the Commission does not provide it a sufficient basis to determine if there has been a violation of Article 17.

139. Article 23 of the Charter states: "All peoples shall have the right to national and international peace and security".

140. As advanced by the Mauritanian government, the conflict through which the country passed is the result of the actions of certain groups, for which it is not responsible. But in the case in question, it was indeed the Mauritanian public forces that attacked Mauritanian villages. And even if they were rebel forces, the responsibility for protection is incumbent on the Mauritanian State, which is a party to the Charter (cf. Commission's decision in

communication 74/92). The unprovoked attacks on villages constitute a denial of the right to live in peace and security.

141. Article 19 provides that:

> All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another…

142. At the heart of the abuses alleged in the different communications is the question of the domination of one section of the population by another. The resultant discrimination against Black Mauritanians is, according to the complainants (cf. especially communication 54/91), the result of a negation of the fundamental principle of the equality of peoples as stipulated in the African Charter and constitutes a violation of its Article 19. The Commission must however admit that the information made available to it do not allow it to establish with certainty that there has been a violation of Article 19 of the Charter along the lines alleged here. It has nevertheless identified and condemned the existence of discriminatory practices against certain sectors of the Mauritanian population (cf. especially paragraph 164).

For these reasons, the Commission

Declares that, during the period 1989 – 1992, there were grave or massive violations of human rights as proclaimed in the African Charter; and in particular of articles 2, 4, 5 (constituting cruel, inhuman and degrading treatments), 6, 7 (1) ((a), (b), (c) and (d), 9 (2), 101(), 11, 12 (1), 14, 16(1), 18(1), and 26.

Recommends to the government:

(1) To arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, and to identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned.
(2) To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation for the deprivations of the victims of the above-cited events.
(3) To take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations.
(4) To reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all the legal consequences appertaining thereto.
(5) As regards the victims of degrading practices, to carry out an assessment of the status of such practices in the country with a view to identifying with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication.
(6) To take appropriate administrative measures for the effective enforcement of Ordinance No. 81-234 of 9 November 1981, on the abolition of slavery in Mauritania.

The Commission assures the Mauritanian State of its full cooperation and support in the application of the above-mentioned measures.

Algiers, Algeria, 11 May 2000.

[13th Annual Activity Report: 1999 – 2000]

205/97 Kazeem Aminu/Nigeria

Summary of Facts

1. The complainant alleges that Mr. Ayodele Ameen (hereinafter referred to as "client"), a citizen of Nigeria was arbitrarily arrested, detained and tortured by Nigerian security officials on several occasions between 1995 and the date of the complaint.

2. The complainant alleges that Mr. Ayodele Ameen while in detention on one occasion was denied medical treatment and also subjected to inhuman treatment.

3. The complainant alleges that his client is being sought after by the Nigerian security agents as a result of his political inclination which manifested itself in his role and involvement in agitation within the Nigerian society for a validation of the previously annulled June 12, 1994 elections by the Nigerian military government.

4. The complainant alleges that his client has resorted to the courts for protection, but to no avail, by virtue of the provisions of Decree No. 2 of 1984 as amended.

5. As of the date of the communication, the complainant alleges that his client is in hiding after escaping arrest at the Aminu Kano International airport, Kano, on his way to Sudan.
6. The complainant states that the matter is not pending in any court of law.

Complaint

7. The complainant asserts that the following articles of the African Charter have been violated: Articles 3(2), 4, 6 and 10(1).

Procedure

8. The communication is dated 11 July 1997, and was received at the Secretariat of the Commission on 18 August 1997.

9. At its 23rd Ordinary Session held in Banjul, The Gambia, the Commission decided to be seized of the matter and to notify the Government of Nigeria accordingly. Further information was requested regarding the current situation of the victim.

10. At its 26th Ordinary Session of the Commission held in Kigali, Rwanda, the Commission declared the communication admissible and requested parties to submit their arguments on the merits of the case.

Law
Admissibility

11. The condition for the admissibility of this case was based on Article 56(5) of the Charter. This provision requires the exhaustion of local remedies before its consideration by the Commission.

12. The complainant alleged that his client had resorted to the courts for protection, but to no avail, because of the operation of Decree No. 2 of 1984, as amended. This decree, it is alleged, contains an ouster clause, which, like most other decrees promulgated by the military government of Nigeria, excludes the courts from entertaining any matter or proceedings relating to it.

13. Relying on its case law, (see Communications 87/93, 101/93 and 129/94) the Commission held that local remedies would not only be ineffective, but are sure to yield no positive result. Secondly, the Commission noted that the complainant's client is in hiding and still fears for his

life. In this regard, the Commission calls in aid the statement of the representative of Nigeria in Communication 102/93 about the "chaotic" situation that had transpired after the annulment of the elections (see paragraph 57), the validation of which the complainant's client is agitating for. Given the above situation and the constructive notice the Commission has about the prevailing situation under the Nigerian military regime, the Commission decided that it would not be proper to insist on the fulfilment of this requirement.

For the above reasons, the Commission declared the case admissible.

Merits

14. The complainant alleges a violation of Article 3(2) of the Charter by the Respondent State. Article 3(2) provides: “Every individual shall be entitled to equal protection of the law.”

15. The Commission finds that the rampant arrests and detention of Mr. Kazeem Aminu by the Nigerian security officials, which eventually led to his going into hiding for fear of his life has deprived him of his right to equal protection of the law guaranteed under Article 3 of the Charter.

16. The complainant had alleged that his client was tortured and subjected to inhuman treatment on several occasions by the Nigerian security operatives. The allegation has not been substantiated. In the absence of specific information on the nature of the acts complained of, the Commission is unable to find a violation as alleged.

17. The complainant alleged that the series of arrests and detention suffered by his client, and his subsequent going into hiding is in violation of his right to life under Article 4 of the Charter.
18. The Commission notes that the complainant's client (victim) is still alive but in hiding for fear of his life. It would be a narrow interpretation to this right to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one's life and the dignity of his person, which this article guarantees would be protected in a state of constant fear and/or threats, as experienced by Mr. Kazeem Aminu. The Commission therefore finds the above acts of the security agents of the Respondent State in violation of Article 4 of the Charter. Article 4 provides:

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

19. It is alleged that Mr. Kazeem Aminu was arbitrarily arrested and detained on several occasions between 1995 and the date of filing of this communication (11 July 1997). In his explanation, the complainant asserts that he has resorted to the courts for protection, but to no avail, because of the provisions of Decree No. 2 of 1984 as amended. The Decree, it is alleged, like other decrees promulgated by the military regime, contains an ouster clause barring courts from entertaining proceedings relating to it.

20. It is the duty of the State Party to apprehend persons whom it reasonably believes have committed or are in the process of committing offences recognised by its laws. However, such arrests and/or detentions must be in accordance with known laws, which in turn must be in accordance with the provisions of the Charter.

21. In the instant case, the Commission finds the above situation where the complainant's client is constantly arrested and detained, without charge and any recourse to the courts for redress arbitrary and in contravention of Article 6 of the Charter. Article 6 provides:

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

22. The complainant further alleged that the respondent state is in violation of Article 10(1) of the Charter, in that his client is being sought after by the Nigerian security agents as a result of his political belief that manifested itself in his involvement in the agitation for the validation of the annulled June 12 elections. Article 10(1) provides:

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

23. In considering the above, the Commission duly takes cognisance of the problem created as a result of the annulment of the elections in Nigeria and its earlier decision thereof (see decision on Communication 102/93). In the circumstance, the Commission finds the acts of the security agents towards Mr. Kazeem Aminu in contravention of his right to free association guaranteed under Article 10(1) of the Charter.

24. Unfortunately, the government of Nigeria has not responded to the several requests from the Commission for its reaction to the communication.

25. The African Commission in several previous decisions has set out the principle that where allegations of human rights violations go uncontested by the government concerned, particularly after repeated notifications or requests for information on the case, the Commission must decide on the facts provided by the complainant and treat those facts as given (see communications Nos. 59/91, 60/91, 64/91, 87/93 and 101/93).

26. In the circumstances, the Commission finds itself compelled to adopt the position that the facts alleged by the complainant are true.

For the above reasons, the Commission

Holds a violation of Articles 3(2), 4, 5, 6 and 10(1) of the Charter.

Requests the government of Nigeria to take necessary measures to comply with its obligations under the Charter.

Algiers, Algeria, 11 May 2000.

[13th Annual Activity Report: 1999 – 2000]

48/90 Amnesty International/Sudan
50/91 Comité Loosli Bachelard/Sudan
52/91 Lawyers Committee for Human Rights/Sudan
89/93 Association of Members of the Episcopal Conference of East Africa/Sudan

All of these communications pertain to the situation prevailing in Sudan between 1989 and 1993.

Summary of Facts

1. Communication 48/90, submitted by Amnesty International, and communication 50/91, submitted by Comité Loosli Bachelard, deal with the arbitrary arrests and detentions that took place following the coup of 30 July 1989, in Sudan. It is alleged therein that hundreds of prisoners were detained without trial or charge.

2. Communication 50/91 alleges that since June 1990 members of opposition groups, among them Abdal-Qadir, Mohammed Salman and Babiker Yahya, have been arrested, detained, and subjected to torture. Other detainees include lawyers, members of opposition groups and human rights activists. The allegations are based on information from a wide variety of sources including interviews with eyewitnesses.

3. According to the plaintiff, Decree No. 2 of 1989 permits the detention of anyone "suspected of being a threat to political or economic security" under a state of emergency; the right to personal liberty and security was protected under Article 21 of the 1985 Transitional Constitution, but the Constitution was suspended in 1989. The complainant further claims that the President can order the arrest of anyone without the need to give reasons for such detention. No judicial challenge of such decisions is permissible. Decree No. 2 also provides for the creation of special courts to try those arrested under the state of emergency legislation. Section 9 of the decree ousts the jurisdiction of the ordinary courts in cases arising from its enforcement. It is further alleged that the 1990 National Security Act created a National Security Council and Bureau. Under this Act, the security forces have powers of arrest, entry and search. Persons can be detained under this Act, without access to family, or lawyers for up to 72 hours, renewable for up to one month. Detention can be for up to three months if it is for the "maintenance of public security" and on approval of the Security Council and a magistrate. Appeal to a magistrate is permitted. In 1994 this Act was amended, enabling the National Security Council to renew a three-month order without reference to any persons. Further renewals require approval by a judge. There is no right to challenge detention under this Act and no reasons need be given for such detention.

4. The communications additionally allege that political prisoners are kept in secret detention centres known as "ghost houses". One of these was closed in 1995, and the prisoners transferred to the main civil prison in Khartoum.

5. The communications also allege widespread torture and ill treatment in the prisons and "ghost houses" in Sudan. These allegations are supported by doctors' testimonies, personal accounts of alleged victims and a report by the UN Special Rapporteur. A number of individual victims are named. Additionally, it is alleged that many individuals were tortured after being arrested at army checkpoints or in military or war zones. Acts of torture include forcing detainees to lie on the floor and being soaked with cold water; confining four groups of individuals in cells 1.8 metres wide and one metre deep, deliberately flooding cells to prevent detainees from lying down, forcing individuals to face mock executions, and prohibiting them from washing. Other accounts describe burning with cigarettes and the deliberate banging of doors at frequent intervals throughout the night to prevent sleeping. Individuals were bound with rope such that circulation was cut off to parts of their bodies, beaten severely with sticks, and had battery acid poured onto open wounds.

6. The communications allege extra-judicial executions. Thousands of civilians have been killed in southern Sudan in the course of the civil war, and the government is alleged to have executed suspected members of the SPLA without trial and there has been no investigation into or prosecution for such incidents. In the course of counter-insurgency attacks, civilians in the Nuba Mountains area and northern Bahr al-Ghazal have been killed when their villages were destroyed. These occurred in 1987-1989 but events are still continuing to this day.

7. In addition, detainees suspected of being supporters of the SPLA were alleged to have been arrested and immediately executed, in areas in southern Sudan.

8. Executions are also alleged to have been carried out by militia groups, which are believed to have close connections with, and the support of the government. No independent inquiry has been conducted into their activities nor have any persons been prosecuted in connection with

such killings. These allegations are supported by evidence collected by the UN Special Rapporteur.

9. According to the complainant, an investigation was conducted in December 1987 by Abdel Latif District magistrate, Osamn Suleiman, into executions. A provincial judge ordered the investigation and the resulting report was believed to have been sent to the High Court in December 1988. No conclusions were ever made public.

10. In 1987, Dr Abdel Nabi Ali Ahmed, the Governor of South Darfur, announced the creation of a Commission of Enquiry into the massacres that occurred in the region in 1987. It was to be composed of the District Prosecutor and police and security officials. A Second Commission was also said to have been set up to look into the background of the disturbances. The Commission of Enquiry sent a report to the Prime Minister in September 1987, but this was never made public. A National Committee of Investigation was set up by the Prime Minister, but it is unclear whether it was ever convened.

11. The complainant also claims that the 1983 Penal Code permits the use of the death penalty for a number of offences: murder - where it is mandatory; mutiny by a member of the armed forces; political offences-such as subversion, war against the state, treason, espionage, upsetting the national economy. Death sentences for murder can be set aside if the victim's relatives agree and compensation is paid to them by the accused. Section 47 creates an offence of attempt, abatement, causing or conspiring with others to facilitate mutiny, with a maximum penalty of death. The penalty also applies to those present at a mutiny without doing their utmost to suppress it; having knowledge or information or intention to go on a mutiny and failure to report such state of affairs.

12. Communication 48/90 describes how calling and organising a strike, possession of undeclared foreign currency, illegal production of and trading in drugs can also result in the death sentence. Individuals sentenced to death were not allowed to appeal against their conviction to a high court, or permitted to have legal representation at new trials.

13. Communication 48/90 alleges that the 28 army officers executed on 24 April 1990 were allowed no legal representation. It adds that in July 1989, the Constitution of Special Tribunals Act was passed, dealing exclusively with the establishment of such tribunals. Under Section 3 of that Act, the President, his deputies or senior army officers may appoint 3 military officers or “any other competent persons” as judges. All sentences were to be confirmed by the Head of State and appeal is only allowed against the death penalty or imprisonment terms of more than one year.

14. In September 1989 these special tribunals were abolished and replaced by the so-called Revolutionary Security Courts. The presiding judge and two others were to be chosen by the RCC for their competence and expertise. Appeal was to a Revolutionary Security High Court but only against sentences of death and (for those of) imprisonment for more than 30 years. The September Laws were required to be applied in these courts from December 1989.

15. In December 1989 the government created more special courts in which lawyers, while being permitted to consult the accused prior to trial, are not allowed to address the court. Appeal is to the Chief Justice alone, not to any higher court.

16. Communication 52/91 provides evidence that over one hundred judges have been dismissed in order to systematically dismantle the judiciary who were opposed to the formation of special courts and military tribunals.

17. Information contained in communications 48/90 and 52/91, presented by the Lawyers Committee for Human Rights, describes government efforts to undermine the independence of the judiciary and the rule of law. It is alleged, in particular, that the government established special tribunals, which are not independent. The ordinary courts are precluded from hearing cases that are of the exclusive competence of the special tribunals. It is further alleged that the right to defence before these special tribunals is restricted. The communications also indicate that people brought before these tribunals were denied the right to contest the grounds for their detention under emergency legislation.

18. Communication 89/93, submitted by the Association of Members of the Episcopal Conference of East Africa alleges oppression of Sudanese Christians and religious leaders, expulsion of all missionaries from Juba, arbitrary arrests and detention of priests, the closure and destruction of Church buildings, the constant harassment of religious figures, and prevention of non-Muslims from receiving aid.

19. The people of the southern part of Sudan are predominantly Christian or of traditional beliefs, whereas the religion in the north of the country and the regime imposed by the government are Islamic. Shari'a is the national law.

20. The said communication alleges that non-Muslims are persecuted in order to ensure their conversion to Islam. Non-Muslims are prevented from preaching or building churches, and the freedom of expression of the national press is restricted. Members of Christian clergy are harassed, and there are arbitrary arrests of Christians, expulsions and denial of access to work and food aid.

The government's contention

21. The government confirms the situation claimed by the complainants in respect of the composition of the Special Courts. National legislation indeed permits the President, his deputies and senior military officers to constitute these courts to consist of "three military officers or any other persons or integrity and competence".

22. The government states in its submission of 1 January 1991 that the military courts are not extraordinary because trial is preceded by enquiry; evidence is taken on oath; information obtained during inquiry is not considered as evidence; decisions are taken after listening to the prosecution and defence; the right of appeal is ensured as provision is made for a Military Court of Appeal to be constituted by the assent of the head of state. It consists of three army officers whose ranks are not less than that of Colonel, and shall include an officer from the Judicial Branch of the military; the accused may be accompanied by an advocate or friend. The government further states that the law establishing these tribunals permits the accused to be assisted by an advocate or any other person of his choice, and that the accused has the right to be defended before the special tribunals by a friend agreed to by the court. As regards the military tribunals, the national legislation allows the accused to be accompanied by a friend or lawyer.

23. In the remarks on these communications submitted to the Commission by the Sudanese Ministry of External Relations, dated 25 April 1999, the Sudanese government attributes a number of the alleged facts to the existence of a rebellion in the southern part of the country and claims that over 90 per cent of the alleged violations took place in areas currently under the control of the Sudanese People's Liberation Army (SPLA), led by rebel John Garang. It also refers to significant progress achieved in the eradication of the harmful effects of the war since the signing on 10 April 1996 of the Peace Charter and of the Khartoum peace agreement of 21 April 1997. The Sudanese government indicates that all persons cited in communication 50/91 have been released. As regards the allegations in communication 89/93, the government reiterates its adherence to Article 24 of the Sudanese constitution, which guarantees freedom

of faith and worship, and recalls Pope John Paul II's pastoral visit to Sudan on 10 February 1993, as well as the conduct in Khartoum of the International Conference on Religions in October 1994.

Procedure

24. The Commission undertook an antipodal (sic) examination of the four communications. Communication 48/90, filed by Amnesty International, was received by the Secretariat in October 1990. On 20 October 1990, at its 8th Ordinary Session, the Commission was seized of the communication, and the decision on admissibility was passed on 12 October 1991 at the 10th Ordinary Session. Communication 50/91 was received on 30 November 1991. The Commission was seized of it at its 12th Session, held in October 1992. At the 13th Session, held in March 1993, the Commission (after declaring it admissible) decided to combine its procedure with that of communication 48/90. Communication 52/91, was received on 19 March 1991, and the Commission was seized of it on 22 October 1991. At the 13th Session held in March 1993, the communication was declared admissible and its procedure combined with that of communication 48/90. Communication 89/93 was received on 27 August 1992. The Commission was seized of it at the 13th Ordinary Session in March 1993, and its procedure was combined with that of the three preceding communications.

25. The parties were regularly notified of all the submissions and had the opportunity to present their conclusions and material evidence at all stages of the procedure.

26. The Commission deployed a mission to Sudan, comprising three Commissioners (E.V.O. Dankwa, Robert H. Kisanga and Mohamed Kamel Rezag-Bara) from 1 – 7 December 1996. The mission was able to verify on the ground, elements of the four communications under consideration. The mission report was presented to the Commission, which adopted it and decided to publish it.

27. The Commission ruled on the merits of the four communications at its 26th Ordinary Session.

Law
Admissibility:

28. Admissibility of communications under the African Charter is governed by Article 56, which sets out conditions that all communications must meet before they can be decided upon. These criteria must be applied bearing in mind the character of each communication. The case at hand is a combination of four different communications, which the Commission decided to consider together, in accordance with its jurisprudence. (Cf. communications 16/88, 17/88, 18/88, 25/89, Legal Assistance Group/Zaire and 27/89, 46/91, 49/91, 99/93 World Organisation Against Torture, International Association of Democratic Lawyers, International Commission of Jurists and Inter-African Human Rights Union/Rwanda). This decision was based on the similarity of the allegations presented, on the one hand, and the human rights situation prevailing in Sudan during the period covered by these allegations of violations, on the other. The communications were submitted by NGOs and allege many overlapping and inter-related details.

29. Article 56(5) of the African Charter requires, as a condition for admissibility, that communications must be:

> submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

30. In applying this provision, the Commission has elaborated through its jurisprudence, criteria on which to base its conviction as to the exhaustion of internal remedies, if any. The

Commission has drawn a distinction between cases in which the complaint deals with violations against victims identified or named and those cases of serious and massive violations in which it may be impossible for the complainants to identify all the victims.

31. In a case of violations against identified victims, the Commission demands the exhaustion of all internal remedies, if any, if they are of a judicial nature, are effective, and are not subordinated to the discretionary power of public authorities. The Commission is of the view that this provision must be applied concomitantly with Article 7, which establishes and protects the right to fair trial.

32. The Commission has stated that one of the justifications for this requirement is that a government should be aware of a human rights violation in order to have the chance to remedy such violation, thus protecting its reputation which would inevitably be tarnished by being called to plead its case before an international body. This condition also precludes the African Commission from becoming a tribunal of first instance, a function that it cannot, either as a legal or practical matter, fulfil (See ACHPR/25/89: 53-54).

33. In the cases under consideration, the Government of Sudan has not been unaware of the serious human rights situation existing in that country. For nearly a decade the domestic situation has focused national and international attention on Sudan. Many of the alleged violations are directly connected to the new national laws in force in the country in the period covered by these communications. Even where no legal action has been brought by the alleged victims at the domestic level, the government has been sufficiently aware to the extent that it can be presumed to know the situation prevailing within its own territory as well as the content of its international obligations.

34. Furthermore, the Commission is of the view that the internal remedies that could have been available to the complainants do not fulfil its conditions or are simply non-existent. In these communications, Section 9 of Decree No. 2, promulgated in 1989, suspends the jurisdiction of the regular courts in favour of the special tribunals as regards any action undertaken in the application of the said decree. In addition, it outlaws any legal action taken in relation to anything done under the same decree. Further, the remedies provided for under the 1990 national security law do not conform to the demands of protection of the right to a good administration of justice, to the extent that the appeals provided for in this law cannot be brought before a judge. It is evident that this appeal procedure, as provided for in the 1990 national security law, cannot be considered as fulfilling the criteria of effectiveness.

35. The 1994 law, which repeals and replaces that of 1990, brings up the principle of the inexistence of remedies, as well as the retroactivity of its provisions. Indeed, under the 1990 law, accused persons could always file an appeal before a judge. This new law stipulates: “no legal action, no appeal is provided for against any decision issued under this law”. This manifestly makes the procedure less protective of the accused and is tantamount to inexistence of an appeal procedure.

36. The Commission also holds the view that the appeal before the High Court (as provided for), against verdicts passed by the revolutionary security courts (which replaced the special tribunals) does not fulfil the demands of effectiveness and existence contained in the African Charter. Indeed, appeals to this court are only permissible in the event of a death penalty or prison terms over thirty years. This implies that no other sentence can be appealed before the High Court, which consequently renders the appeal procedure inexistent for the complainants.

37. In the Commission’s view, the right to an appeal, being a general and non-derogable principle of international law must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that

the latter should, in this regard, provide all necessary guarantees of good administration of justice.

38. In cases of serious and massive violations, the Commission reads Article 56.5 in the light of its duty to protect human and peoples' rights as provided for by the Charter. Consequently, the Commission does not hold the requirement of exhaustion of local remedies to apply literally, especially in cases where it is "impractical or undesirable" for the complainants or victims to seize the domestic courts.

39. The seriousness of the human rights situation in Sudan and the great numbers of people involved renders such remedies unavailable in fact, or, in the words of the Charter, their procedure would probably be “unduly prolonged”.

For these reasons, the Commission declared the communications admissible.

Merits

40. Sudan ratified the African Charter on Human and Peoples' Rights on 18 February 1986. Prior to that, though Sudan had other obligations under international law, it was not bound by the African Charter, since the Charter only came into force there on 21 October 1986. It follows that the Commission can only take up violations that occurred after 21 October 1986. Continuing violations, as in the case of a law adopted prior to 1986, but that remains in force, fall within the competence of the Commission. This is because the effect of such laws extends beyond that date. Furthermore, ratification obliges a State to diligently undertake the harmonisation of its legislation with the provisions of the ratified instrument.

41. This decision does not encompass all human rights violations that may have occurred in Sudan after the period covered by the communications. In general, the Commission takes up only violations that are brought before it by complainants. Other violations can be discussed in the Commission's report on its mission to Sudan, which is not confined to the subjects of the communications.

42. Article 1 of the Charter confirms that the government has bound itself legally to respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them. Whilst the Commission is aware that states may face difficult situations the Charter does not contain a general provision permitting states to derogate from their responsibilities in times of emergency, especially for what is generally referred to as non-derogable rights.

43. The Commission is faced with the difficulty of deciding upon multifaceted allegations, some involving legal provisions that have changed over time. Since the communications were submitted, the situation in Sudan has not been static. And, as the government states, it has evolved in a direction that is more protective of human rights.

44. Confirming its willingness to cooperate with the Commission, the government replied in writing to the communications on 1 January 1991, 10 July 1997, 14 September 1997 and 25 April 1999, and received a mission of the Commission from 1-7 December 1996.

45. The Commission would like to commend and encourage the Sudanese government for its efforts to improve the domestic human rights situation, with the adoption of a new constitution and the repeal of the emergency laws, which seriously jeopardised the rights guaranteed in the Charter. It however maintains that these new changes have no effect on the past violations, which it is required, by virtue of its mandate to protect and promote human rights, to rule upon.

46. The Commission indeed undertook a mission to Sudan; but this mission must be considered as part of its human-rights promotion activities and does not constitute a part of the procedure of the communications, even if it did enable the Commission to obtain information on the human rights situation in that country. Consequently, this decision is essentially based on the allegations presented in the communications and analysed by the African Commission.

47. Article 4 of the Charter reads:

> Every human being shall be entitled to respect for his life … No one may be arbitrarily deprived of this right.

48. It is alleged that prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extra-judicial executions. These allegations are upheld by evidence taken from the report of the United Nations Special Rapporteur.

49. The government provides copies of the laws governing the executions alleged in the communications, but provides no specific information on the said executions. The Commission's delegation was unable to obtain this information either.

50. In addition to the individuals named in the communications, there are thousands of other executions in Sudan. Even if these are not all the work of forces of the government, the government has a responsibility to protect all people residing under its jurisdiction (See ACHPR/74/91: 93, Union des Jeunes Avocats vs/Chad). Even if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law.

51. The investigations undertaken by the Government are a positive step, but their scope and depth fall short of what is required to prevent and punish extra-judicial executions. Investigations must be carried out by entirely independent individuals, provided with the necessary resources, and their findings should be made public and prosecutions initiated in accordance with the information uncovered. Constituting a commission of the District Prosecutor and police and security officials, as was the case in the 1987 Commission of Enquiry set up by the Governor of South Darfur, overlooks the possibility that police and security forces may be implicated in the very massacres they are charged to investigate. This commission of enquiry, in the Commission's view, by its very composition, does not provide the required guarantees of impartiality and independence.

52. According to the Commission's long-standing practice, in cases of human rights violations, the burden of proof rests on the government (See, ACHPR/59/91, ACHPR/60/91, ACHPR/64/91, ACHPR/87/93 ACHPR/101/93). If the government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at the least probable or plausible. On the information available, the Commission considers that there was a violation of Article 4 of the African Charter on Human and Peoples' Rights.

53. Article 5 of the Charter reads:

> "Every individual shall have the right to the respect of the dignity inherent in a human being...All forms of...degradation of man particularly...torture, cruel, inhuman or degrading treatment and punishment shall be prohibited".

54. There is substantial evidence produced by the complainants to the effect that torture is practised. All of the alleged acts of physical abuses, if they occurred, constitute violations of

Article 5. Additionally, holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family whether the individual is being held and his whereabouts is inhuman treatment of both the detainee and the family concerned.

55. The Sudanese Penal Code prohibits torture and perpetrators are punishable with up to 3 months imprisonment or a fine.

56. The government does not deal with these allegations in its report. The Commission appreciates the fact that the government's has brought some officials to trial for torture, but the scale of the government's measures is not commensurate with the magnitude of the abuses. Punishment of torturers is important, but so also are preventive measures such as halting of incommunicado detention, effective remedies under a transparent, independent and efficient legal system, and ongoing investigations into allegations of torture.

57. Since the acts of torture alleged have not been refuted or explained by the government, the Commission finds that such acts illustrate, jointly and severally, government responsibility for violations of the provisions of Article 5 of the African Charter.

58. Article 6 of the Charter reads:

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

59. In its written submission to the Commission on 1 January 1991, in reply to the allegations of arbitrary arrests made by the complainants, the government described the powers given to the President of the Revolutionary Command Council to issue orders and take measures in a state of emergency. Simply because an arrest is carried out under a written provision in force does not amount to a violation of Article 6. This article must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society. In these cases, the wording of this decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter.

60. Furthermore, appeal in the case of arrest lies to the body whose president orders the arrests. Such a remedy provides no guarantee of good administration of justice and is more akin to an appeal for clemency than a judicial appeal. Additionally, numerous arrests have been effected in disregard of this decree. The Commission is constrained to find that in Sudan there have been serious and continuing violations of Article 6 during the period under consideration.

61. Article 7.1 of the Charter reads:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
> (b) the right to be presumed innocent until proved guilty by a competent court of tribunal;
> (c) the right to defence, including the right to be defended by counsel of his choice;
> (d) the right to be tried within a reasonable time by an impartial court or tribunal".

62. All of these provisions are mutually dependent, and where the right to be heard is infringed, other violations may occur, such as detentions being rendered arbitrary. Especially sensitive is the definition of "competent," which encompasses facets such as the expertise of the judges and the inherent justice of the laws under which they operate.

63. At the level of procedure, the complaints allege extensive interference with due process, including the institution of numerous special courts and trial of individuals who were denied the assistance of counsel. Some individuals were denied the right to challenge the legal grounds for their detention.

64. The government's submission is only in respect of Decree No. 2, which establishes the right of individuals to appeal to the Revolutionary Command Council. However, the government does not present evidence that this right was afforded to the persons in these cases. It is also unclear if accused persons have in all cases been permitted to select their own advocates without interference, or if the tribunal reserves the right to bar certain advocates from court. The right to freely choose one's counsel is essential to the assurance of a fair trial. To give the tribunal the power to veto the choice of counsel of defendants is an unacceptable infringement of this right. There should be an objective system for licensing advocates, so that qualified advocates cannot be barred from appearing in particular cases. It is essential that the national bar be an independent body which regulates legal practitioners, and that the tribunals themselves not adopt this role, which will infringe the right to defence.

65. The communications allege that the 28 army officers executed on 24 April 1990 were allowed no legal representation. The government states that its national legislation permits the accused to be assisted in his defence during the trial by a legal advisor or any other person of his choice. While before the Special Courts, the accused has the right to be defended by a friend to be approved by the Court. The government argues that the court procedures were strictly followed in the case of these officers.

66. While there is a simple contradiction of testimony between the government and the complainant, the Commission must admit that in the case of the 28 executed army officers basic standards of fair trial have not been met. Indeed, the Sudanese government has not given the Commission any convincing reply as to the fair nature of the cases that resulted in the execution of the 28 officers. It is not sufficient for the government to state that these executions were carried out in conformity with its legislation. The government should provide proof that its laws are in accordance with the provisions of the African Charter, and that in the conduct of the trials the accused's right to defence was scrupulously respected. In this case, the very fact that the accused's choice is subject to the assent of the Court before which he is to appear constitutes a violation of the right to be represented by counsel of one's choice, as provided for in Article 7 of the African Charter, cited above.

67. Article 7 is closely related to Article 26 of the Charter, which provides that:

> States parties to the present Charter shall have the duty to guarantee the independence of the courts...

68. The government confirms the situation alleged by the complainants in respect of the composition of the Special Courts. National legislation permits the President, his deputies and senior military officers to appoint these courts to consist of "three military officers or any other persons of integrity and competence". The composition alone creates the impression, or indicates the reality, of lack of impartiality, and as a consequence, violates Article 7(1)(d).

The government has a duty to provide the structures necessary for the exercise of this right. By providing for courts whose impartiality is not guaranteed, it has violated Article 26.

69. The government does not contest the allegation of dismissal of over one hundred judges who were opposed to the formation of special courts and military tribunals. To deprive courts of the personnel qualified to ensure that they operate impartially thus denies the right to individuals to have their case heard by such bodies. Such actions by the government against the judiciary constitute violations of Articles 7(1)(d) and 26 of the Charter.

70. The government provided no contrary element in refutation of the allegations made against it, and the laws that it cites are deficient. Accordingly the Commission holds a violation of Article 7.1(c).

71. Article 8 of the Charter reads:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

72. These issues should be considered in relation to Article 2 of the Charter, which provides for equal protection under the laws, and Article 8, on religious freedom, which will be treated below. While fully respecting the religious freedom of Muslims in Sudan, the Commission cannot countenance the application of law in such a way as to cause discrimination and distress to others.

73. Another matter is the application of Shari'a law. There is no controversy as to Shari'a being based upon the interpretation of Islam, the Muslim religion. When Sudanese tribunals apply Shari'a, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they so wish.

74. It is alleged that non-Muslims were persecuted in order to cause their conversion to Islam. They do not have the right to preach or build their churches; there are restrictions on freedom of expression in the national press. Members of the Christian clergy are harassed; Christians are subjected to arbitrary arrests, expulsions and denial of access to work and food aid.

75. In its various oral and written submissions to the African Commission, the government has not responded in any convincing manner to all the allegations of human rights violations made against it. The Commission reiterates the principle that in such cases where the government does not respect its obligation to provide the Commission with a response on the allegations of which it is notified, it shall consider the facts as probable.

76. Other allegations refer to the oppression of Christian civilians and religious leaders and the expulsion of missionaries. It is alleged that non-Muslims suffer persecution in the form of denial of work, food aid and education. A serious allegation is that of unequal food distribution in prisons, subjecting Christian prisoners to blackmail in order obtain food. These attacks on individuals on account of their religious persuasion considerably restrict their ability to practice freely the religion to which they subscribe. The government provides no evidence or justifications that would mitigate this conclusion. Accordingly, the Commission holds a violation of Article 8.

77. Article 9 of the Charter reads:

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

78. The communications under consideration allege that persons were detained for belonging to opposition parties or trade unions. The government confirmed that the "Decree on Process and Transitional Powers Act 1989", promulgated on 30 June 1989, stipulates in Section 7 that during a state of emergency, any form of political opposition by any means to the regime of the Revolution for National Salvation is prohibited, where there is "imminent and grave threat to the security of the country, public safety, independence of the State or territorial integrity and economic stability".

79. As stated above, the Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.

80. The Commission has established the principle that where it is necessary to restrict rights, the restriction should be as minimal as possible and should not undermine fundamental rights guaranteed under international law (ACHPR/101/93: 25, Civil Liberties Organisation/Nigeria). Any restrictions on rights should be the exception. The government concerned has imposed a blanket restriction on the freedom of expression. This constitutes a violation of the spirit of Article 9 (2).

81. Article 10 of the Charter reads: "Every individual shall have the right to free association provided he abides by the law".

82. Section 7 of The Process and Transitional Powers Act, 1989 prohibits effecting without special permission, any assembly for a political purpose in a public or private place. This general prohibition on the right to associate in all places is disproportionate to the measures required by the government to maintain public order, security and safety. In addition, there is evidence from the complainants, which is not contested by the government, that the powers were abused. In the absence of information from the government the Commission must give weight to the facts submitted by the complainant. Accordingly, the Commission holds a violation of Article 10(1).

83. The Commission is cognisant of the fact that it has found many violations of the Charter on the part of the Government. In concrete terms, this shows that the citizens of Sudan have endured a lot of suffering. To change so many laws, policies and practices will of course not be a simple matter. However, the Commission must emphasise that the people of Sudan deserve no less. The government is bound by its international obligations and the Commission's findings are specific enough to permit their implementation. This decision does not constitute the Commission's viewpoint on the overall human rights situation in Sudan. It is based on the allegations of violations committed by Sudan after its ratification of the African Charter on Human and Peoples' Rights and on verifications carried out in this regard, while not failing to note that the situation has improved significantly.

For the above reasons, the Commission

Holds a violation of Articles 2, 4, 5, 6, 7.1(a), (c), (d), 8, 9, 10 and 26;

Recommends strongly to the Government of Sudan to put an end to these violations in order to abide by its obligations under the African Charter on Human and Peoples' Rights.

[13th Annual Activity Report: 1999 – 2000]

143/95, 150/96 Constitutional Rights Project and Civil Liberties Organisation/ Nigeria

Summary of Facts

1. Communication 143/95 alleges that the Government of Nigeria, through the State Security (Detention of Persons) Amended Decree No. 14 (1994), has prohibited any court in Nigeria from issuing a writ of habeas corpus, or any prerogative order for the production of any person detained under Decree No. 2 (1984). Complainant argues that this law violates the African Charter on Human and Peoples' Rights. The decrees were applied to detain without trial several human rights and pro-democracy activists and opposition politicians in Nigeria.

The State Party's Response and Observations

2. The government has presented no written response to this allegation, but in oral statements before the Commission (31 March 1996, 19th Ordinary Session, Ouagadougou, Burkina Faso, Chris Osah, Head of Delegation) maintains that no individual is presently being denied the right to habeas corpus in Nigeria. It has said that the provision of Decree No. 14 suspending the right to habeas corpus applies only to persons detained in respect of state security, and was implemented only between 1993 and 1995, during the period of political insecurity following the annulled elections of June 1993.

3. The government acknowledges that this provision is still on the statute books in Nigeria, but suggested that the right to habeas corpus would be restored in the future by saying, "as the democratisation of society goes on, all these [decrees] will become superfluous. They will have no place in society".

4. Communication 150/96 complains that the State Security (Detention of Persons) Decree No. 2 of 1984, which enables a person to be detained for a reviewable period of three months if he endangers State security, violates Article 6 of the Charter. It also complains of the amended Decree of 1994 prohibiting the writ of habeas corpus.

5. The communication alleges that Mr. Abdul Oroh, Mr. Chima Ubani, Dr. Tunji Abajom, Chief Frank Kokori, Dr. Fred Eno, Honourable Wale Osun and Mr. Osagie Obayunwana were detained under this decree, without charge, and also deprived of the right to bring habeas corpus actions. The communication alleges that they are detained in dirty, hidden (sometimes underground) security cells; they were denied access to medical care, to their families and lawyers; and were not permitted to have journals, newspapers and books. It is alleged that the detainees are sometimes subjected to torture and rigorous interrogations. The communication alleges that these conditions combined with the courts' inability to order the production of detained persons even on medical grounds, places the detainees' lives in danger. The communication alleges that these circumstances constitute inhuman and degrading punishment or treatment.
6. The communication complains that the clauses ousting the jurisdiction of the courts to consider the validity of decrees or acts taken thereunder is a violation to the right to have one's cause heard, protected by Article 7(1)(a) and 7(1)(d) of the Charter, and undermines the independence of the judiciary in contravention of Article 26.

7. The government has presented no response in respect of this communication.

Complaint

8. The communications allege violation of Articles 5, 6, 7 and 26 of the Charter.

Procedure

9. Communication 143/95 dated 14 December 1994 and filed by the Constitutional Rights Project, was received at the Secretariat on 2 February 1995.

10. In February 1995, the Commission was seized of the communication, and on 7 February 1995, a notification was sent to the Nigerian Government with the attached communication asking the said Government to respond within three months.

11. At the 18th Session in October 1995, the communication was declared admissible, and the Commission decided that the proposed mission to Nigeria should bring it up.

12. Communication 150/96 is submitted by Civil Liberties Organisation and dated 15 January 1996. It was received at the Secretariat on 29 January 1996.

13. At the 20th session held in Grand Bay, Mauritius in October 1996, the Commission declared the communication admissible, and decided that the planned mission would take it up with the relevant authorities to Nigeria.

14. The mission went to Nigeria from 7 to 14 March 1997 and a report was submitted to the Commission.

15. The parties were duly notified of all the procedures.

Law
Admissibility

16. Article 56 (5) of the Charter requires that a complainant exhausts local remedies before the Commission can consider the case. Section 4 (1) of the State Security (Detention of Persons) Decree No. 2 of 1984 states:

> (1) no suit or other proceedings shall lie against any persons
> for anything done or intended to be done in pursuance of this Act.
>
> Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be
> inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question.

17. In its decision on communication 129/94, the Commission accepted the argument of the complainants that the above ouster decrees create a situation in which "it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results." (ACHPR 129/94:8.)

18. The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos Division have occasionally found that they have jurisdiction; in 1995, the Court of Appeal in Lagos relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree

is "offensive and utterly hostile to rationality". On their face, ouster clauses remove the right of courts to review decrees.

19. For these reasons, the Commission declared the communications admissible.

Merits

20. Both communications allege that the government has prohibited the issuance by any court of the writ of
habeas corpus or any prerogative order for the production of any person detained under Decree No. 2 of 1984. Decree No. 14 denies the right to those detained for acts "prejudicial to state security or the economic adversity (sic) of the nation". A panel has the power to review the detentions but this is not a judicial body and its members are appointed by the President.

21. Article 6 of the Charter reads:

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

22. The problem of arbitrary detention has existed for hundreds of years. The writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and to demand that the authority either release or justify all imprisonment.

23. Habeas corpus has become a fundamental facet of common law legal systems. It permits individuals to challenge their detention proactively and collaterally, rather than waiting for the outcome of whatever legal proceedings may be brought against them. It is especially vital in those instances in which charges have not, or may never be, brought against the detained individual.

24. Deprivation of the right to habeas corpus alone does not automatically violate Article 6. Indeed, if Article 6 were never violated, there would be no need for habeas corpus provisions. However, where violation of Article 6 is widespread, habeas corpus rights are essential in ensuring that individuals' Article 6 rights are respected.

25. The question thus becomes whether the right to habeas corpus, as it has developed in common law systems, is a necessary corollary to the protection of Article 6 and whether its suspension thus violates this Article.

26. The African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding its expression through the laws of each country. The government has conceded that the right to habeas corpus is important in Nigeria, and emphasised that it will be reinstated "with the democratisation of society."

27. The importance of habeas corpus is demonstrated by the other dimensions of communication 150/96. The government argued that no one had actually been denied the right to habeas corpus under the Amended Decree. Communication 150/96 provides a list of such individuals who are detained without charge in very poor conditions, some incommunicado, and who are unable to challenge their detention due to the suspension of this right. The government has however made no specific response to this communication.

28. First of all, in accordance with its well-established precedent (See the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93), since the government has presented no defence or contrary evidence that the conditions of detention are acceptable, the Commission accepts the

allegations that the conditions of detention are a violation of Article 5 of the Charter, which prohibits inhuman and degrading treatment. The detention of individuals without charge or trial is a clear violation of Articles 6 and 7(1)(a) and (d).

29. Furthermore, these individuals are being held incommunicado with no access to lawyers, doctors, friends or family. Preventing a detainee access to his lawyer clearly violates Article 7(1)(c) which provides for the "right to defence, including the right to be defended by a counsel of his choice." It is also a violation of Article 18 to prevent a detainee from communicating with his family.

30. The fact that the government refuses to release Chief Abiola despite the order for his release on bail made by the Court of Appeal is a violation of Article 26 which obliges States parties to ensure the independence of the judiciary. Failing to recognise a grant of bail by the Court of Appeal militates against the independence of the judiciary.

31. These circumstances dramatically illustrate how a deprivation of rights under Articles 6 and 7 is compounded by the deprivation of the right to apply for a writ of habeas corpus. Given the history of habeas corpus in the common law to which Nigeria is an heir, and its acute relevance in modern Nigeria, the amended Decree suspending it must be seen as a further violation of Articles 6 and 7(1)(a) and (d).

32. The government argues that habeas corpus actions are still available to most detainees in Nigeria, and that the right to bring habeas corpus actions is denied only to those detained for state security reasons under Decree No. 2. While this does not create a situation as serious as when all detainees were denied the right to challenge their detention, the limited application of a provision does not guarantee its compatibility with the Charter. To deny a fundamental right to a few is just as much a violation as denying it to many.

33. The government attempts to justify Decree No. 14 with the necessity for state security. While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform.

34. Finally, as noted in the admissibility section of this decision, there is a persistent practice of ouster clauses in Nigeria, which remove many vital matters from the jurisdiction of the ordinary courts. A provision for habeas corpus is not of much use without an independent judiciary to apply it. The State Security Decree contains a clause forbidding any court from taking up any matter arising under it. In previous decisions on ouster clauses in Nigeria, the Commission has found that they violate Articles 7 and 26 of the Charter, the duty of the government to ensure the independence of the judiciary (See the Commission's decisions in communications 60/91, 87/93 and 129/94).

For these reasons, the Commission

Holds a violation of Articles 5, 6, 7(1)(a), (c) and (d), 18 and 26 of the Charter and

Requests the Government of Nigeria to bring its laws into conformity with the Charter.

Kigali, Rwanda, 15 November 1999.

[12th Annual Activity Report: 1998 – 1999]

137/94, 139/94, 154/96 and 161/97 International PEN, Constitutional Rights Project, Interights

and Civil Liberties Organisation (On behalf of Ken Saro-Wiwa Jnr.)/Nigeria

The Facts as submitted by the authors

1. These communications were submitted to the African Commission by International Pen, the Constitutional Rights Project, Interights [and Civil Liberties Organisation] respectively. They were joined because they all concern the detention and trial of Kenule Beeson Saro-Wiwa, a writer and Ogoni activist, president of the Movement for the Survival of the Ogoni People. The communications 139/94 and 154/96 also complain of similar human rights violations suffered by Mr. Saro-Wiwa's co-defendants, also Ogoni leaders.

2. The communications 137/94 and 139/94 were submitted in 1994 before any trial began. After the murder of four Ogoni leaders on 21 May 1994, following riot during a public meeting organised by Movement for the Survival of the Ogoni Peoples (MOSOP) representing the rights of those who lived in oil producing areas of Ogoni land, Saro-Wiwa and many hundreds of others were arrested, Saro-Wiwa himself on 22 May 1994 and the vice-president of MOSOP, Ledum Mitee, shortly thereafter. Both communications allege that Mr. Saro-Wiwa was severely beaten during the first days of his detention and was held for several days in leg irons and handcuffs. He was also denied access to his lawyer and the medicine he needed to control his blood pressure, at times prevented from seeing his family, and held in very poor conditions.

3. In its communication, submitted on 9 September 1994, the Constitutional Rights Project included a list of 16 other Ogonis who had been held without charge or bail for what was at that time over three months. Both communications alleged that Mr. Saro-Wiwa had been detained because of his political work in relation to MOSOP. He had been detained five times for brief periods since the beginning of 1993, and released each time without charge, except on one occasion in mid-1993 where he was held for several weeks and charged with unlawful assembly.

4. The State Military Administrator declared that Mr. Saro-Wiwa and his co-defendants had incited members of MOSOP to murder four rival Ogoni leaders, but no charges were brought until 28 January 1995. In the months between arrest and the beginning of the trial, the defendants were not allowed to meet with their lawyers, and no information on the charges was provided to the defence.

5. In February 1995 the trial of the defendants began before a tribunal established under the Civil Disturbances Act. The three members of this tribunals were appointed directly by General Abacha in November 1994, although counsel for the Rivers State Administrator argued in August that the cases were within the exclusive jurisdiction of the Rivers State High Court, since Rivers State is where the offences occurred.

6. In June 1995 the Constitutional Rights Project submitted a supplement to its communication, alleging irregularities in the conduct of the trial itself: harassment of defence counsel, a military officer's presence at what should have been confidential meetings between defendants and their counsel, bribery of witnesses, and evidence of bias on the part of the tribunal members themselves. In October 1995 PEN also copied to the Commission a letter it sent to General Abacha protesting the lack of concrete evidence and the unfair conduct of the trial.

7. On 30 and 31 October 1995, Ken Saro-Wiwa and eight of the co-defendants (Saturday Dobee, Felix Nuate, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien and Baribor Bera) were sentenced to death, while six others including Mr. Mitee were acquitted. The CRP submitted an emergency supplement to its communication on 2 November 1995, asking the Commission to adopt provisional measures to prevent the executions.

8. The Secretariat of the Commission faxed a note verbale invoking interim measures under revised Rule 111 of the Commission's Rules of Procedure to the Ministry of Foreign Affairs of Nigeria,

the Secretary General of the OAU, the Special Advisor (Legal) to the Head of State, the Ministry of Justice of Nigeria, and the Nigerian High Commission in The Gambia. The note verbale pointed out that as the case of Mr. Saro-Wiwa and the others was already before the Commission, and the government of Nigeria had invited the Commission to undertake a mission to that country, during which mission the communications would be discussed, the executions should be delayed until the Commission had discussed the case with the Nigerian authorities.

9. No response to this appeal was received before the executions were carried out.

10. On 7 November 1995 the Provisional Ruling Council (PRC) confirmed the sentences of death and on 10 November 1995 all the accused persons were executed in secret at the Port Harcourt Prison. By section 7 of the Civil Disturbances (Special Tribunals) Decree No. 2 of 1987, under which the executed persons were tried, the PRC are required to receive the records of the trial Tribunal before confirmation of the decision is possible. These records were not prepared by the Tribunal and so were not available for the PRC.

11. In 1996 the Secretariat received a communication from Interights representing Ken Saro-Wiwa Jr. It alleged that the condemned persons had been detained arbitrarily prior to and during the trial and that they had been subjected to torture in the Army camp. Furthermore it alleged serious irregularities concerning the conduct of the trial: that the tribunals that convicted the accused persons were not independent; that there was no presumption of innocence; that the accused persons had not been given time or facilities in which to prepare their defence; that they had been denied legal representation by a counsel of their choice; that there was no right of appeal and that following the sentencing the persons were held incommunicado. Interights asserted that they were tried, convicted and sentenced to death for the peaceful expression of their views and opinions on the violations of the rights of the Ogoni people.

12. In December 1996 the Secretariat received a communication from the Civil Liberties Organisation, alleging that the Civil Disturbances (Special Tribunal) Decree is invalid because it was made without participation of the people; that its composition with military officers and members of the Provisional Ruling Council meant that it could not be impartial; and that the lack of judicial review of the decisions of this tribunal amount to a violation of the right to appeal and fair trial. The communication alleges that the trial, conviction and sentencing of Ken Saro-Wiwa and others violated Articles 7.1(b)(c) and (d) of the African Charter, and that the execution of these persons violates Article 4. The communication alleges that the arraignment of 19 more alleged suspects constitutes another potential violation of the Charter.

Complaint

13. The Communications allege violation of Articles 1, 4, 5, 7, 9, 10, 11, 16 and 26 of the African Charter.

The State response and observations

14. The government argues that its actions were necessary to protect the rights of the citizens who had been murdered; that the tribunal which tried Saro-Wiwa was competent because two of its three members were lawyers; that the process of confirmation by a state government was an adequate appeal; that the Civil Disturbances Decree had not been protested upon its enactment in 1987 and that it had been set up to deal with a crisis situation.

Procedure before the Commission

15. Communication 137/94 is dated 28 September 1994 and was submitted by International Pen.

16. Communication 139/94 is submitted by Constitutional Rights Project and dated 9 September 1994.

17. The Commission was seized of the communications at its 16th Session in October 1994, but deferred its decision on admissibility pending notification and receipt of additional information from the Nigerian Government.

18. At the 16th session the Commission decided to merge the communications.

19. On 9 November 1994, a notification of the two communications was sent to the Nigerian Government and Rule 109 of the Rules of Procedure was invoked, requesting the Nigerian Government not to cause irreparable prejudice to Mr. Saro-Wiwa.

16. On 6 February 1995 a letter was received from International Pen stating that Mr. Saro-Wiwa was being ill-treated and that he was facing the death penalty.

21. On 13 February a letter was sent to the Nigerian Government re-emphasising the need for Rule 109 to be applied.

22. On 22 February 1995, a letter was received from complainants stating that Ken Saro-Wiwa had been charged and was scheduled to appear before a three person tribunal from which there was no right of appeal. The tribunal members are chosen by General Abacha in violation of international fair trial standards. The complainant recognised that local remedies had yet to be exhausted and announced its intention to present an update of the case to the Commission once the trial was completed.

23. At the 17th session the Commission declared the communications admissible. They were to be heard on their merits at the 18th session.

24. On 20 April 1995, letters were sent to the Government of Nigeria and the complainants informing them of this.

25. On 28 June 1995 a letter was received from the Constitutional Rights Project describing developments in the case.

26. On 1 September 1995, a letter was sent to the government of Nigeria stating that the communication would be heard on the merits at the 18th session of the Commission and inviting the government to send a representative.

27. At the 18th session the Commission decided that the communications should be taken up by the mission planned for Nigeria.

28. On 9 October 1995 a letter was received from PEN American Centre expressing concern for the state of health of Mr. Saro-Wiwa.

29. On 1 November 1995, upon hearing that a death sentence had been passed on Mr. Saro-Wiwa and eight of his co-defendants, the Secretariat faxed a note verbale to the government of Nigeria, invoking the revised Rule of Procedure 111 (formerly 109) asking that the executions should be delayed until the Commission had taken its mission and spoken with the competent authorities. This note verbale was also faxed to the Secretary General of the OAU, the Nigerian High Commission in Banjul, and the Special Adviser (Legal) to the Head of State of Nigeria.

30. On 2 November 1995 a letter was received from the Constitutional Rights Project notifying the Secretariat of the death sentences and requesting that provisional measures be invoked.

31. On 9 November 1995 Commissioner Dankwa, hearing that the death sentence had been confirmed, wrote to the Secretariat requesting such action. He was faxed a copy of the note verbale.

32. On 20 November 1995 the Secretariat received a note verbale from the Nigerian High Commissioner in Banjul, attempting to justify the executions.

33. On 21 November 1995 the Secretariat wrote a note verbale to the Nigerian High Commission in Banjul, requesting the official judgement in the Saro-Wiwa case, which had been mentioned in the note verbale.

34. On 30 November 1995 a letter was sent to the complainants stating that the communications would be taken up by the Commission's mission to Nigeria.

35. On 13 December 1995, the Secretariat received a letter dated 13 November 1995 from the office of the Special Adviser to the Head of State, attempting to justify the executions.

36. On 18 and 19 December 1995, the Commission held an extraordinary session on Nigeria in Kampala.

37. On 26 January 1996 a letter was sent to the Constitutional Rights Project informing it of the interim measures taken with regard to Ken Saro-Wiwa.

38. At the 19th session, held in March/April 1996 in Ouagadougou, Burkina Faso, the Commission heard statements from the government of Nigeria and the complainants. Mr. Chidi Anselm Odinkalu was duly authorised to appear for the complainants, and Mr. Osah and Mr. Bello appeared for the Nigerian Government. At the end of the hearing the Commission took a general view on the cases and deferred taking final decision in each case pending the accomplishment of its proposed mission to Nigeria. The Commission proposed May 1996 as the dates for the visit. The Nigerian delegation said they will communicate these dates to the Government of Nigeria for confirmation.

39. On 8 May 1996 the Commission wrote to the Nigerian Government, Constitutional Rights Project and International PEN informing them that a decision had been taken at the 19th session to send a mission to the country where the cases would be taken up.

40. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the communications to the next session, awaiting the result of the planned mission to Nigeria. The Commission also decided to join communication 154/96 with these communications.

41. On 10 December 1996 the Secretariat sent letters to the complainants informing them of the decisions of the Commission.

42. On 10 December 1996 the Secretariat sent a note verbale to the government informing it of the decisions of the Commission.

43. On 29 April, the Secretariat received a letter from Mr. Olisa Agbakoba entitled 'Preliminary objections and observations to the Mission of the Commission which visited Nigeria from March 7-14 1997. The document was submitted on behalf of Interights with regard to 14 communications, including this one.

44. Among the objections raised and or observations made were: a) the neutrality, credibility And relevance; and composition of the Mission.

45. At its 21st Session held in April 1997, the Commission postponed taking decision on the Merits to the next session, pending the submission of scholarly article and court decisions by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria. It must be stated that Mr. Chidi Odinkalu did send the article mentioned above.

46. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.

47. Communication 154/96 is dated 6 November 1995 and received at the Secretariat on 4 March 1996.

48. The communication requested the Commission to take interim measures to prevent the executions. A supplementary submission was sent with the communication informing the Commission that the executions had taken place on 10 November but that the communication was reaffirmed.

49. On 13 November 1995 the Nigerian Government wrote to the Commission informing it of the Government's view of the situation.

50. On 20 November 1995 the High Commission of Nigeria in the Gambia giving its opinion on the matter.

51. On 21 November 1995 the Commission wrote to the High Commission of Nigeria in the Gambia requesting a copy of the Justice's judgement in the case.

52. On 12 March 1996 a confirmation was sent to this effect by the complainant.

53. At the 19th session in March 1996 the communication was not considered, but the Commission took a general view of all the communications against Nigeria and deferred any decision on cases pending the accomplishment of its proposed mission to Nigeria.

54. On 13 August 1996 a complete copy of the communication was sent to the government of Nigeria.

55. On 13 August 1996 a letter was sent to the complainant informing him of the status of the case.

56. On 4 February 1997, the Secretariat received a letter entitled supplementary submissions with respect to communication No. 154/96.

57. On 4 April, the Secretariat acknowledged receipt of the letter.

58. On 29 April, the Secretariat received a letter from Mr. Olisa Agbakoba entitled 'Preliminary objections and observations' to the Mission of the Commission which visited Nigeria from March 7-14 1997. The document was submitted on behalf of Interights with regard to 14 communications, including this one.

59. Among the objections raised and or observations made were: a) the neutrality, credibility and relevance; and composition of the mission.

60. At its 21st Session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly articles and court case by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

61. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.

62. On May 27, the Secretariat received a letter from the complainant entitled 'Additional Information on Ouster Clauses in Nigerian Law' in which he promised to furnish the Secretariat with the information requested by the Commission at its 21st session " within the next three weeks".

63. From this day on the procedure is identical to communications 137/94 and 139/94.

64. Communication 161/97 was received on 10 January 1997.

65. On 14 January 1997 a note verbale with a copy of the communication was sent to the Ministry of External Affairs, copy to the Special Legal Adviser to the Head of State, the Nigerian High Commission, and the Embassy of Nigeria in Addis Ababa.

66. On 23 January 1997 an acknowledgement of receipt was sent to the complainant.

67. At its 21st session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly articles and court case by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

68. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.

69. At the 22nd Ordinary session, the Commission postponed taking a decision on the cases pending the discussion of the Nigerian Mission report.

70. At the 23rd Ordinary session held in Banjul The Gambia, from 20-29 April 1998, the Commission was unable to consider the communication due to lack of time.

71. On 25 June 1998, letters were sent from the Secretariat of the Commission to all parties concerned regarding the status of the communications.

Law
Admissibility

72. Article 56 of the African Charter reads:

> Communications...shall be considered if they:
> ...5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,...

73. This is just one of the 7 conditions specified by Article 56, but it is that which usually requires the most attention. Because Article 56 is necessarily the first considered by the Commission, before any substantive consideration of communications, it has already been the subject of substantial interpretation; in the jurisprudence of the African Commission, there are several important precedents.

74. Specifically, in the four decisions the Commission has already taken concerning Nigeria, Article 56.5 is analysed in terms of the Nigerian context. Communication 60/91 (Decision ACHPR/60/91) concerned the Robbery and Firearms Tribunal; Communication 87/93 (Decision ACHPR/87/93) concerned the Civil Disturbances Tribunal; Communication 101/93 (Decision ACHPR/101/93) concerned the Legal Practitioners Decree; and Communication

129/94 (ACHPR/129/94) concerned the Constitution (Modification and Suspension) Decree and the Political Parties (Dissolution) Decree.

75. All of the Decrees in question in the above communications contain "ouster" clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (ACHPR/60/91:23 and ACHPR/87/93:22). The Legal Practitioners Decree specifies that it cannot not be challenged in the courts and that anyone attempting to do so commits a crime (ACHPR/101/93:14-15). The Constitution Suspension and Modification legally prohibited their challenge in the Nigerian Courts (ACHPR/129/94:14-15).

76. In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illusory. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is "offensive and utterly hostile to rationality" (Reprinted in the Constitutional Rights Journal). It remains to be seen whether any Nigerian courts will be courageous enough to follow this holding, and whether the government will abide by their rulings should they do so.

77. In the present case, while the above reasoning was used in the initial decisions on admissibility, it is at the present time unnecessary. In light of the fact that the subjects of the communications are now deceased, it is evident that no domestic remedy can now give the complainants the satisfaction they seek. The communications are thus admissible.

Merits

78. Article of the Charter 5 reads:

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

79. Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.

80. International PEN alleges that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty, then denied medical attention, during the first days of his arrest. There was no evidence of any violent action on his part or escape attempts that would justify holding him in irons. Communication 154/96 alleges that all the victims were manacled in their cells, beaten and chained to the walls in their cells.

81. The government has made no written submission in these cases, and has not refuted these allegations in its oral presentation. It is well-established jurisprudence of the Commission that where allegations go entirely unchallenged, it will proceed to decide on the facts presented (See, e.g., the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93). Thus, the Commission holds a violation of Article 5 of the Charter.

82. Article 6 of the African Charter reads:

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

83. All the victims were arrested and kept in detention for a lengthy period under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 (1994), that stipulates that the government can detain people without charge for as long as three months in the first instance. The decree also states that the courts cannot question any such detention or in any other way intervene on behalf of the detainees. This decree allows the government to arbitrarily hold people critical of the government for up to 3 months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The decree therefore prima facie violates the right not to be arbitrarily arrested or detained protected in Article 6.

84. The government has made no defence of this decree, either for its general validity or its justice as applied in this case. Thus, the Commission holds a violation of Article 6.

85. Article 7 of the African Charter reads:

> 1. Every individual shall have the right to have his cause heard. This comprises:
> the right to appeal to competent national organs against acts of violating his fundamental rights;
> the right to be presumed innocent until proved guilty by a competent court or tribunal;
> the right to defence, including the right to be defended by counsel of his choice;
> the right to be tried within a reasonable time by an impartial court or tribunal.

86. As regards the conduct of the trial itself, it is unnecessary for the Commission to delve into the specific circumstances, because by the Commission's own precedent the tribunal was defective. As will be recalled, in its decision on Communication 87/93, the Commission considered that special tribunals established under the Civil Disturbances Act violate Article 7.1(d) of the African Charter, because their composition is at the discretion of the executive branch. Removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality, which is required by the African Charter. This violation of the impartiality of tribunals occurs in principle, regardless of the qualifications of the individuals chosen for a particular tribunal.

87. The note verbale of the Nigerian High Commissioner in The Gambia points out that the tribunal was not a military one, but was presided over by a judge of the Nigerian Court of Appeal, and that tribunals are properly constituted in the Nigerian judicial system to deal with specific issues and for speedier dispensation of justice. The note verbale makes other specific points on the conduct of the trial, arguing for its fairness: the placement of evidence, its conduct in public, and the fact that some of the defendants were ultimately acquitted.

88. In its oral presentation at the 19th session, the government argued that the confirmation of sentence given by the state governors is an adequate appeal.

89. The Commission might cite opposing facts, casting doubt upon the fairness of the tribunal. For example, The Head of State personally chose its members consisting of three instead of the five persons required by the Civil Disturbances Act. When defence counsel wrote to the Chief Judge of the Federal High Court on 27 November 1994 for information on when the trial would begin, the judge responded, "This Court has nothing to do about the Tribunal. It is the responsibility of the Presidency".

90. There is a great deal of information available from Nigerian and international sources on the day-to-day conduct of the tribunal and the significance of its legal rulings. Yet in reaching its

decision, the Commission need only rely upon its earlier holding, made in less politically charged circumstances, that the special tribunals established under the Civil Disturbances Act are in violation of the African Charter. As a result, it finds that Ken Saro-Wiwa and his co-defendants were denied the right to a fair trial, in violation of Article 7.1(d).

91. Section 7 of the Civil Disturbances (Special Tribunals) Decree No. 2 of 1987 decides that the confirming authority of judgments given under the act is the PRC, that is the ruling council of the Federal Military government, the members of which are exclusively members of the armed forces.

92. Section 8(1) of the same Decree stipulates:

> The validity of any decision, sentence, judgement, confirmation, direction, notice or order given or made, as the case may be, or any other thing whatsoever done under this Act shall not be inquired into by any court of law.

93. In this case, it is not safe to view the Provisional Ruling Council as impartial or independent. Section 8(1) effectively ousts all possibility of appeal to the ordinary courts. Thus, the accused persons had no possibility of appeal to a competent national organ, and the Commission finds a violation of Article 7.1(a).

94. Article 26 of the African Charter reads:

> States parties to the present Charter shall have the duty to guarantee the independence of the Courts....

95. As stated above, the Special Tribunal and the Provisional Ruling Council are not independent. The Commission also finds that there is a violation of Article 26 of the African Charter.

96. The government has not contradicted the allegations contained in communication 154/96 that at the conviction in October 1995 the Tribunal itself admitted that there was no direct evidence linking the accused to the act of the murders, but held that they had each failed to establish that they did not commit the crime alleged. Communication 154/96 has also affirmed that prior to and during the trial, leading representatives of the government pronounced MOSOP and the accused guilty of the crimes at various press conferences and before the United Nations. As the allegations have not been contradicted, the Commission find a violation of the right to be presumed innocent, Article 7.1(b).

97. Initially, the accused were defended by a team of lawyers of their own choice. According to Communication 154/96 and Communication 139/94, this team withdrew from the case because of harassment, both in the conduct of the trial and in their professional and private lives outside. Communication 154/96 alleges that two of the lawyers were seriously assaulted by soldiers claiming to be acting on the instruction of the military officer responsible for the trial. On three occasions defence lawyers were arrested and detained and two of the lawyers had their offices searched. When these lawyers withdrew from the case, the harassment subsided.

98. After the withdrawal of their chosen counsel, the accused were defended by a team assigned by the Tribunal. However, this team also resigned, complaining of harassment. After that, the accused declined to accept a new team appointed by the Tribunal, and the court proceedings were closed without the accused having legal representation for the duration.

99. Communication 154/96 also claims that the defence was denied access to the evidence on which the prosecution was based and that files and documents which were required by the

accused for their defence were removed from their residences and offices when they were searched by security forces on different occasions during the trial.

100. The government claims that: "Their [the accused] defence team which comprised sly human rights activists such as Femi Falana and Gani Fawehinmi, known to be more disposed towards melodrama than the actual defence of their clients, inexplicably withdrew from the Special Tribunal at a crucial stage of the trial in order to either play to the gallery or delay and frustrate the process".

101. This statement does not contradict the allegations of Communication 154/96, that two different defence teams were harassed into quitting the defence of the accused persons; it merely attributed malicious motives to the defence. The government has not responded to the allegations of withholding evidence from the defence. The Commission therefore finds itself with no alternative but to conclude that a violation of Article 7.1(c) has occurred.

102. Article 4 of the African Charter reads:

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

103. Given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4. The violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any "irreparable prejudice" to the subjects of the communications before the Commission had concluded it consideration. Executions had been stayed in Nigeria in the past on the invocation by the Commission of its rule on provisional measures (Rule 109 now 111) and the Commission had hoped that a similar situation will obtain in the case of Ken Saro-Wiwa and others. It is a matter of deep regret that this did not happen.

104. The protection of the right to life in Article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of Article 4.

105. Article 11 of the African Charter provides:

> Every individual shall have the right to assemble freely with others...

106. Communication 154/96 alleges that Article 11 was violated because the murder trial directly followed public meetings of MOSOP. In its judgement, the Tribunal held that the condemned persons "created the fire that consumed the four Ogoni chiefs" by wrongfully organising election campaign rallies and permitting a large crowd of fanatical MOSOP and NYCOP youths to congregate. It appears that the Tribunal holds the accused responsible for the murders because they organised the rally after which the murders took place, although Ken Saro-Wiwa for one was prevented by government officials from attending the rally. The Commission has considerable difficulty with this position as it can adversely affect the right to assembly.

107. Article 10 (1) of the African Charter reads:

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

108. Communication 154/96 alleges that Article 10 (1) was violated because the victims were tried and convicted for their opinions, as expressed through their work in MOSOP. In its judgement, the Tribunal held that by their membership in MOSOP, the condemned persons were responsible for the murders, guilt by association, it would seem furthermore that, government officials at different times during the trial declared MOSOP and the accused guilty of the charges, without waiting for the official judgement. This demonstrates a clear prejudice against the organisation MOSOP, which the government has done nothing to defend or justify. Therefore the Commission finds a violation of Article 10 (1).

109. Article 9 (2) of the African Charter reads:

> Every individual shall have the right to express and disseminate his opinions within the law.

110. There is a close relationship between the rights expressed in the Articles 9 (2), 10 (1) and 11. Communication 154 alleges that the actual reason for the trial and the ultimate death sentences was the peaceful expression of views by the accused persons. The victims were disseminating information and opinions on the rights of the people who live in the oil producing area of Ogoniland, through MOSOP and specifically a rally. These allegations have not been contradicted by the government, which has already been shown to be highly prejudiced against MOSOP, without giving concrete justifications. MOSOP was founded specifically for the expression of views of the people who live in the oil producing areas, and the rally was organised with this in view. The Government's actions is inconsistent with Article 9 (2) implicit when it violated Articles 10 (1) and 11.

111. Article 16 of the Charter reads:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
> 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

112. The responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of Article 16.

113. Nigeria has been a State Party to the African Charter for over a decade, and is thus bound by Article 1 of the African Charter.

114. The Commission assists States parties to implement their obligations under the Charter. Rule 111 of the Commission's Rules of Procedure (revised) aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule. The Commission had hoped that the Government of Nigeria would respond positively to its request for a stay of execution pending the former's determination of the communication before it.

115. This is a blot on the legal system of Nigeria that will not be easy to erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something that we pray will never happen again. That it is a violation of the Charter is an understatement.

116. The Nigerian Government itself recognises that human rights are no longer solely a matter of domestic concern. The African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A state not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must.

For the above reasons, the Commission

Decides that there has been a violation of Articles 5 and 16 in relation to Ken Saro-Wiwa's detention in 1993 and his treatment in detention in 1994 and 1995;

Decides that there has been a violation of Articles 6 in relation to the detention of all the victims under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 (1994). The government therefore has the obligation to annul these Decrees;

Reiterates its decision on communication 87/93 that there has been a violation of Article 7 (1)(d) and with regard to the establishment of the Civil Disturbances Tribunal. In ignoring this decision, Nigeria has violation Article 1 of the Charter;

Decides that there has been a violation of Articles 4 and 7 (1) (a), (b) (c) and (d) in relation to the conduct of the trial and the execution of the victims;

Holds that there has been a violation of Articles 9(2), 10(1) and 11, 26, 16;

Holds that in ignoring its obligations to institute provisional measures, Nigeria has violated Article 1.

Banjul, 31 October 1998.

[12th Annual Activity Report: 1998 – 1999]

105/93, 128/94, 130/94, 152/96 Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project/Nigeria

The Facts as submitted by the complainant

1. Communications 105/93, 128/94 and 130/94 state that after the annulment of the Nigerian elections of 12 June 1993, several decrees were issued by the government. These proscribed the publication of two magazines. State officials sealed the premises of the two magazines embarking upon frequent seizures of copies of magazines critical of its decisions and arrest of newspaper vendors selling such magazines.

2. By decree, the government also proscribed 10 newspapers published by four different media organisations. The complainant alleges that the newspapers and their operators were not previously accused of any wrongdoing either publicly or before a court of law or given any opportunity to defend themselves before their premises were sealed up on July 22 and they were subsequently outlawed by Decree 48 of 1993, which was released on 16 August 1993.

3. Constitution (Suspension and Modification) Decree no. 107 of 17 November 1993 Article 5 specifies: "No question as to the validity of this Decree or any other Decree made during the

period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by a court of law in Nigeria."

4. On 16 August 1993, the Government also announced the promulgation of the Newspaper Decree No. 43 of 1993. By virtue of Section 7 of the Decree, it is an offence, punishable with either a fine of N250.000 or imprisonment for a term of 7 years or both for a person to own, publish or print a newspaper not registered under the Decree. The registration of existing newspapers under a previously subsisting law (the Newspaper Act) is extinguished by the Decree.

5. The decision whether or not to register a newspaper is vested exclusively in the Newspapers Registration Board set up under the Decree. Compliance with the formal pre-registration requirements stipulated in the Decree does not guarantee registration of a newspaper because the Newspaper Registration Board has total discretion to decide whether the registration of a newspaper is "justified having regard to the public interest". There are no procedures for challenging the Board's decision not to register a newspaper.

6. If the Board decides to register a newspaper, N100.000 must be paid as registration fee. Furthermore, N250.000 must be deposited into a fund to meet the amount of any penalty imposed on or damages awarded against the owner, printer, or publisher of the newspaper by a court of law in the future. Under the Newspapers Act (now repealed by Decree 43), a bond for N500 with sureties was sufficient security for possible penalties or damages which might be imposed on or awarded against a newspaper.

7. Although released by the Government on 16 August 1993, the Decree is given a retroactive commencement date to 23 June 1993 and persons intending to own, print or publish newspapers in Nigeria are obliged to apply for registration within three weeks of the commencement of the Decree (i.e. by 14 July 1993) after complication with pre-registration requirements, thus making all newspapers in Nigeria immediately "illegal", and owners, printers and publishers liable to be arrested and detained.

8. Communications 128/94 and 130/94 deal specifically with the events of 2 January 1994 when 50,000 copies of TELL magazine were seized by heavily armed policemen and other security officers on the printer's premises. In addition, twelve films and fourteen plates, used for processing, were also confiscated. TELL is a popular weekly magazine whose aim is to promote and protect human rights in Nigeria. That week's issue was entitled: "The Return of Tyranny - Abacha bares his fangs". The story involved a critical analysis of certain legislation enacted by the military government which ousts the jurisdiction of the courts. The complainant stated that no remedies were available at the local level, the jurisdiction of the courts having been ousted in considering the validity of such actions.

9. Communication 152/96 was submitted by Constitutional Rights Project. It states that on 23 December 1995 Mr. Nosa Igiebor, the Editor in Chief of TELL Magazine was arrested and detained. The Constitutional Rights Project alleges that he was not told the reason for his arrest and that no charge has been made against him. Furthermore, Constitutional Rights Project alleges that he has been denied access to his family, doctors and lawyers and that he has received no medical help even though his health is deteriorating.

10. Constitutional Rights Project also claim that TELL Magazine was declared illegal and in violation of Decree No. 43 of 1993 which requires all newspapers to register with the Newspaper Registration Board and to pay a pre-registration fee of N250,000 and a non-refundable fee of N100,000. These payments would be put into a fund for payment of penalties from libel actions against the owner, publisher or printer. Constitutional Rights Project stated that Decree No. 43 of 1993 had been declared null and void by two different courts, namely the Ikeja High Court on 18 November 1993, and the Lagos High Court on 5 December 1993. The Nigerian Government did not appeal against these decisions.

11. In his oral arguments before the Commission, the complainants' representative emphasised that the government's prerogative to make laws for peace and good government does not entitle it to evade its obligations under international law.

The State Party's Response and Observations

12. The government has made no written submissions in respect of this communication. At the 19th session, held in March 1995 in Ouagadougou, Burkina Faso, the government sent a delegation of several persons. Mr. Chris Osah, Assistant Director General of the Legal and Treaties Department at the Ministry of Foreign Affairs, made the following statements in his presentation on the communication.

13. He stated that "Decree No. 43 of 1993 was made to underscore not only the government's sovereign rights but also its policy of free enterprise. Registration fees are payable to an independent board. It is in the public interest that all newspaper providers or publishers should ensure registration of their enterprises. The government is convinced that such registration fees are reasonable and justifiable in any democratic society. In any case, many newspapers and magazines operate although they have not registered".

14. On ouster of the jurisdiction of the courts, the government stated that "there is nothing particularly new about this. It is the nature of military regimes to provide for ouster clauses, the reasons being that for a military administration which has come in, the resources of litigation become too cumbersome for the government to do what it wants to do".

15. As for retroactive effect, the government maintained that, although the decree technically did have retroactive effect, not a single newspaper was declared illegal or harassed for violating the decree.

Complaint

16. The communications allege violations of Articles 6, 7, 9, 14 and 16. of the Charter.

Procedure before the Commission

17. Communication 105/93 is dated 1 September 1993. The Commission was seized of the communication at the 14th Session. The state concerned was notified on January 1994.

18. Communication 128/94 is not dated but was received at the Secretariat between January and April 1994. The Commission was seized of the communication at the 15th session. The text of the communication was sent to the state concerned on 29 July 1994.

19. Communication 130/94 is dated 5 January 1994. The Commission was seized of the communication at its 15th session and the text was sent to the state on 29 July 1994. The procedure relating to these three cases is the same.

20. On 14 September 1994 a letter was sent to the complainants concerning communications no. 105/93, 128/94 and 130/94, asking whether all domestic remedies had been exhausted and whether any further seizures of TELL Magazine has occurred since 2 January 1994.

21. A reminder was sent by the Secretariat of the Commission to the government of Nigeria on 22 September 1994.

22. At the 16th session, held in October 1994 in Banjul, The Gambia, the Commission declared the communications admissible.

23. At the 17th session, held in March 1995 in Lomé, Togo, it was decided to delay final decision on the cases so that they might be taken up with the Nigerian authorities when the Commission undertook its mission to that country. It was also declared that the chairman of the OAU should be informed of the situation in Nigeria.

24. On 20 April 1995, a letter was sent by the Secretariat of the Commission to the complainants stating that the communications were declared admissible, and that a mission would be sent to Nigeria, and that a decision on the merits would be taken at the 18th session.

25. On 7 June 1995, a letter was sent by the Secretariat of the Commission to the government of Nigeria stating that the communications were declared admissible and that a mission would be sent to Nigeria.

26. On 1 September 1995, a letter was sent to the government of Nigeria stating that the communications would be heard on the merits at the 18th session of the Commission and inviting the government to send a representative.

27. At the 18th session of the Commission it was decided that the communications would be taken up by the mission to Nigeria, and if the government did not facilitate the visit, the Commission would at the next session adopt a decision on the facts available.

28. On 30 November 1995 a letter was sent to the complainants reflecting this decision.

29. On 30 November 1995 a note verbale was sent to the government of Nigeria reflecting this decision.

30. At the 19th session, the Commission heard Mr. Chidi Anselm Odinkalu, who was duly instructed to appear for all the complainants in all cases against Nigeria, except that brought by International PEN. The Commission heard Mr. Osah and Mr. Bello for the Nigerian Government in reply. At the end of the hearing the Commission took a general view on the cases and deferred taking final decision in each case pending the accomplishment of its proposed mission to Nigeria.

31. On 9 May 1996 letters were send to the Nigerian Government, Constitutional Rights Project and Media Rights Agenda informing them of the Commission's renewed decision to take a mission to the country and that the three communications detailed above would be considered on their merits at the 20th session in October 1996.

32. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the communications to the 21st session, awaiting the result of the planned mission to Nigeria.

33. On 10 December 1996 the Secretariat sent a note verbale to this effect to the government.

34. On 10 December 1996 the Secretariat sent letters to this effect to the complainants.

35. Communication 152/96 is dated January, 1996.

36. On 5 February 1996 a letter was sent to the complainant acknowledging receipt of the communication and that the admissibility of the case would be examined at the 20th session in October 1996.

37. At the 19th session the communication was not examined.

38. At the 20th session held in Grand Bay, Mauritius October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria. At the same time it was joined with communications 105/93, 128/94 and 130/94.

39. On 29 April, the Secretariat received a letter from Mr. Olisa Agbakoba entitled 'Preliminary objections and observations' to the Mission of the Commission which visited Nigeria from March 7-14 1997. The document was submitted on behalf of Interights with regard to 14 communications including this one.

40. Among the objections raised and or observations made were on: the neutrality, Credibility and Relevance; and, composition of the Mission.

40. At its 21st session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly articles and court case by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

41. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.

42. From this date on, the procedure in respect of the communication is identical to that in communication 105/93, 128/94 and 130/94, above.

43. At the 22nd Ordinary session the Commission postponed taking a decision on the cases pending the discussion of the Nigerian Mission report.

44. At the 23rd ordinary session held in Banjul, The Gambia, the Commission postponed consideration of the case to the next session due to lack of time.

46. On 25 June 1998, the Secretariat sent letters to the parties concerned informing them of the status of the case.

The Law
Admissibility

47. Article 56 of the African Charter reads:

> Communications...shall be considered if they:...Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged

48. Specifically, in the four decisions the Commission has already taken concerning Nigeria, Article 56.5 is analyzed in terms of the Nigerian context. Communication 60/91 (Decision ACHPR/60/91) concerned the Robbery and Firearms Tribunal; Communication 87/93 (Decision ACHPR/87/93) concerned the Civil Disturbances Tribunal; Communication 101/93 (Decision ACHPR/101/93) concerned the Legal Practitioners Decree; and Communication 129/94 (ACHPR/129/94) concerned the Constitution (Modification and Suspension) Decree and the Political Parties (Dissolution) Decree.

49. All of the Decrees in question in the above communications contain "ouster" clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (ACHPR/60/91:23 and ACHPR/87/93:22). The Legal Practitioners Decree specifies that it cannot not be challenged in the courts and that anyone attempting to do so

commits a crime (ACHPR/101/93:14-15). The Constitution Suspension and Modification legal prohibited their challenge in the Nigerian Courts (ACHPR/129/94:14-15).

50. In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is "offensive and utterly hostile to rationality" (Reprinted in the Constitutional Rights Journal). It remains to be seen whether any Nigerian courts will be courageous enough to follow this holding, and whether the government will abide by their rulings should they do so.

51. In communication 152/96 the complainant states that Decree no. 43 has been declared null and void by two different courts, but these decisions have not been respected by the government. This is a dramatic illustration of the futility of seeking a remedy from the Nigerian courts.

52. For these reasons, consistent with its earlier decisions, the Commission declared the communications admissible.

Merits

53. Article 9 of the African Charter reads:

> 1. Every individual shall have the right to receive information.
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

54. This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country. The problem at hand is whether the decrees requiring the registration of newspapers, and prohibiting many of them, violate this Article.

55. A payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression. The government has argued that these fees are "justifiable in any democratic society", and the Commission does not categorically disagree.

56. However, the amount of the registration fee should not be more than necessary to ensure administrative expenses of the registration, and the pre-registration fee should not exceed the amount necessary to secure against penalties or damages against the owner, printer or publisher of the newspaper. Excessively high fees are essentially a restriction on the publication of news media. In this case, the fees required for registration, while high, are not so clearly excessive that they constitute a serious restriction.

57. Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9 (1). There has thus been a violation of Article 9 (1).

58. Also of serious concern is the retroactivity of the decree. The government bases its defense on the non-enforcement of this aspect of the decree. The government representative offered this defense: "Article 7 (2) of the Charter is very specific: "no one may be condemned", and

we are saying that no one has been condemned. Second, it says "no penalty may be inflicted" we are also submitting that there has been no penalty inflicted...We are even going further to say that more than 3/4 of the newspapers in Nigeria have registered and yet nobody has taken them to court."

59. While it is reassuring to hear that no one has suffered under the retroactivity clause of the Decree No. 43, the Commission must take a stand on the issue of justice underlying Article 7.2 and condemn the literal, minimalist interpretation of the Charter offered by the representative of Nigeria. Article 7.2 must be read to prohibit not only condemnation and infliction of punishment for acts which did not constitute crimes at the time they were committed, but retroactivity itself. It is expected that citizens must take the laws seriously. If laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal. For a law-abiding citizen, this is a terrible uncertainty, regardless of the likelihood of eventual punishment.

60. Furthermore, the Commission unfortunately cannot rest total confidence in the assurance that no one and no newspaper has yet suffered under the retroactivity of Decree 43. Potential prosecution is a serious threat. An unjust but un-enforced law undermines, as above, the sanctity in which the law should be held. The Commission must thus holds that Decree No. 43 violates Article 7 (2).

61. Communication 152/96 states that two different courts have declared Decree No. 43 null and void, without any result.

62. This shows not only a shocking disrespect by the Nigerian government for the judgments of the courts, it is also a violation of Article 7 (1). The right to have one's cause heard by competent and independent courts must naturally comprise the duty of everyone, including the state, to respect and follow these judgments.

63. Decree No. 48 proscribes approximately 10 newspapers published by four different media organizations without having subjected them to the due process of the law. Decree No. 48 likewise permitted the newspapers and their operators to have their premises sealed without being given any opportunity to defend themselves and without previously being accused of any wrongdoing before a court of law.

64. The Commission decided, in its decision on communication 101/93, with respect to freedom of association, that "competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards."(ACHPR\A\101/93:18).

65. With these words the Commission states a general principle that applies to all rights, not only freedom of expression. Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.

66. According to Article 9 (2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

67. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.

68. The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27 (2), that is, that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest."

69. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.

70. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.

71. The government has provided no evidence that the prohibition was for any of the above reasons given in Article 27 (2). Given that Nigerian law contains all the traditional provisions for libel suits, so that individuals may defend themselves where the need arises, for the government to proscribe a particular publication, by name, is disproportionate and uncalled for. Laws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law, guaranteed by Article 3. The proscription of "The News" cannot therefore be said to be "within the law" and constitutes a violation of Article 9 (2).

72. Communications 128/94 and 130/94 allege that 50,000 copies of TELL magazine were seized without any possibility of having the decision judged by a court of law, because of an article critical of the government.

73. In the present case, the government has provided no evidence that seizure of the magazine was for any other reason than simple criticism of the government. The article in question might have caused some debate and criticism of the government, but there seems to have been no information threatening to, for example, national security or public order in it. All of the legislation criticized in the article was already known to members of the public information, as laws must be, in order to be effective.

74. The only person whose reputation was perhaps tarnished by the article was the head of state. However, in the lack of evidence to the contrary, it should be assumed that criticism of the government does not constitute an attack on the personal reputation of the head of state. People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.

75. It is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security. If the government thought that this particular article represented merely an insult towards it or the head of state, a libel action would have been more appropriate than the seizure of the whole edition of the magazine before publication. The seizure of the TELL therefore amounts to a violation of Article 9 (2).

76. Article 14 of the Charter reads:

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

77. The government did not offer any explanation for the sealing up of the premises of many publications. Those affected were not previously accused in a court of law, of any wrongdoing. The right to property necessarily includes a right to have access to property of one's own and the right not for one's property to be removed. The Decrees which enabled these premises to be sealed up and for publications to be seized cannot be said to be "appropriate" or in the interest of the public or the community in general. The Commission holds a violation of Article 14. In addition, the seizure of the magazines for reasons that have not been shown to be in the public need or interest also violates the right to property.

78. In his oral argument, the complainant specifically raised the ouster of the court's jurisdiction over the decrees at issue here, denying the alleged victims the right to challenge the acts which affected them. The government offered the surprising defense that "[I]t is in the nature of military regimes to provide for ouster clauses", because without such clauses the volume of litigation would make it "too cumbersome for the government to do what it wants to do".

79. This argument rests on the assumption that ease of government action takes precedence over the right of citizens to challenge such action. It neglects the central fact that the courts are a critical monitor of the legality of government action, which no lawful government acting in good faith should seek to evade. The courts' ability to examine government actions and, if necessary, halt those that violate human rights or constitutional provisions, is an essential protection for all citizens.

80. It is true that if national tribunals are not deprived of their powers, they will almost certainly eventually pronounce on the legality of military government itself. The government representative's argument implicitly admits what the Commission has already said in its decision on communication 102/93, which is that military regimes rest on questionable legal ground. Government by force is in principle not compatible with the rights of peoples' to freely determine their political future.

81. A government that governs truly in the best interest of the people, however, should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law.

82. The Commission must therefore reject the defense of "the nature of military regimes" offered by the government's representative, and holds that the ouster of the court's jurisdiction violates the right to have one's cause heard, under Article 7 (1).

83. Article 6 of the African Charter reads:

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

84. Communication 152/96 alleges that Mr. Nosa Igiebor was arrested and detained without being told any reason and without any charges being made.

85. The government has offered no substantive response to this allegation.

86. The Commission, in several previous decisions, has set out the principle that where allegations of human rights abuses go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the government at treat those facts as given (See, e.g., the Commission's decisions in communications 59/91,

60/91, 64/91, 87/91 and 101/93). Therefore the Commission finds that there has been a violation of Article 6.

87. Article 7 (1) (c) of the African Charter reads:

> 1. Every individual shall have the right to have his cause heard. This comprises:
> .....(c) The right to defense, including the right to be defended by counsel of his own choice;

88. Constitutional Rights Project alleges that Mr. Nosa Igiebor was denied access to lawyers. The government has made no response to this allegation. Therefore the Commission must take a decision on the facts as presented by the complainant. To be denied access to a lawyers is a violation of Article 7 (1) (c) even if there were no charges against Mr. Igiebor. People who are detained in violation of the Charter must not have lesser rights that those detained in conformity with the rules in Article 7.

89. Article 16 of the African Charter reads:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> 2. States Parties to the present Charter shall take the necessary measures to protect the health go their people and to ensure that they receive medical attention when they are sick.

90. Constitutional Rights Project alleges Mr. Nosa Igiebor was denied access to doctors and that he received no medical help even though his health was deteriorating through his detention. The government has made no response to this allegation. Therefore the Commission must take a decision on the facts as presented by the complainant.

91. The responsibility of the government is heightened in cases where the individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the activities of the authorities. To deny a detainee access to doctors while his health is deteriorating is a violation of Article 16.

For these reasons, the Commission

Holds a violation of Article 6, 9 (1), 9 (2), 7 (1) (c), 7 (2), 14, et 16 of the African Charter;
Requests that the Government of Nigeria take the necessary steps to bring its law into conformity with the Charter.

Banjul, 31 October 1998.

[9th Annual Activity Report : 1995 – 1996]

74/92 Commission Nationale des Droits de l'Homme et des Libertes/Chad[1]

The Facts

[1] The English language version is generally of shorter length (26 paragraphs in all) and is less detailed than the French language version (forty one paragraphs).

1. The communication is brought by La Commission Nationale des Droits de l'Homme et des Libertes de la Federation Nationale des Unions de Jeunes Avocats de France. The complaint alleges several massive and severe violations in Chad.

2. The complaint alleges that journalists are harassed, both directly and indirectly. These attacks are often by unidentified individuals who the complainants claim to be security service agents of the Government. The Government denies responsibility.

3. The complaint alleges the arbitrary arrest of several people, among those four members of the opposition party, R.D.P., by the security services. These people were never brought before a court, although they were eventually set free. 15 more people were illegally detained, but have now been liberated.

4. There are several accounts of killings, disappearances and torture. 15 people are reported killed, 200 wounded, and several persons tortured as a result of the civil war between the security services and other groups.

5. The communication alleges the assassination of Bisso Mamadou, who was attacked by armed individuals. The Minister responsible was warned of the danger to Mr. Bisso, but he refused to issue protection. Subsequently, the Minister did not initiate investigation into the killing.

6. The communication also alleges the assassination of Joseph Betudi, Vice-President of Ligue Tchadienne des Droits de l'Homme. It also contains allegations of inhuman treatment of prisoners.

Procedure Before the Commission

7. The communication is dated 11 May 1992 and includes a report based on an observation mission to Chad made by the Association "Agir ensemble pour les droits de l'Homme" and the Federation Nationale des Unions de Jeunes Avocats.

8. The Commission was seized of the communication at its 12th Session and on 16 November 1992 the Government of Chad was notified of the communication.

9. On 10 March 1993, the Ministry of Justice responded to the communication.

10. On 12 April 1993, the Chairman of the Commission wrote to the Ministry of Foreign Affairs and requested its permission to conduct an on-the-spot investigation in Chad.

11. The Government did not reply to that letter, nor to the following reminders.

12. A letter was sent to the Government on 3 February 1995, and to the complainant on 17 February1995, stating that the communication would be considered at the 17th Session.

13. At the 17th Session in March 1995, the communication was declared admissible. The Government and complainant were informed of that decision.

14. On 1 September 1995, a letter was sent to the Government stating that the communication would be heard on its merits at the 18th Session of the Commission and inviting the Government to send a representative.

15. At the 18th Session, the Commission heard Ms. Fabienne Trusses-Naprous, of the Federation Nationale des Unions de Jeunes Avocats, Commission Nationale des Droits de l'Homme et des Libertes of France. She reiterated the information in the original communication, both verbally and by way of a memoire. This memoire, in addition to summarizing the

information in the original communication, affirmed that the human rights situation in Chad has not seen improvement to the present day. The Commission decided the communication on the merits, resolving that there was evidence of serious and massive violations of human and peoples' rights. Article 58 was invoked to draw the attention of the Assembly of Heads of State and Government of the OAU to this fact.

16. On 27 November 1995 a letter was received from the Ministry of External Affairs of Chad with regard to the Secretariat's letter of 1 September 1995. This letter stated that the National Human Rights Commission of Chad could find no record of the communication.

The Law

17. Article 1 of the African Charter reads:

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

18. In this case, the complainant claims that not only did Government agents commit violations of the African Charter, but that the state failed to protect the rights in the Charter from violation by other parties.

19. The Government claims that no violations were committed by its agents, and that it had no control over violations committed by other parties, as Chad is in a state of civil war.

20. The Charter specifies in Article 1 that the States Parties shall not only recognize the rights duties and freedoms adopted by the Charter, but they should also "undertake.....measures to give effect to them". In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.

21. The African Charter, unlike other human rights instruments [2], does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.

22. In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.

23. The complainant claims that the events in Chad constitute violations of Articles 4 (right to life), Article 5 (Prohibition of Torture, inhuman and degrading treatment), 6 (Right to Life and Security of Persons), 7 (Right to a Fair Trial), and 10 (Right to Freedom of Expression).

24. In the present case, there has been no substantive response from the Government of Chad, only a blanket denial of responsibility.

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[2] E.g. the European Convention on Human Rights, Article 15, the Inter American Convention on Human Rights, and the International Covenant on Civil and Political Rights.

25. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the Government concerned, Commission must decide on the facts provided by the complainant and treat those facts as given [3]. This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights. Since the Government of Chad does not wish to participate in a dialogue, that the Commission must, regrettably, continue its consideration of the case on the basis of facts and opinions submitted by the complaints alone.

26. Thus, in the absence of a substantive response by the Government, in keeping with its practice, the Commission will take its decisions based on the events alleged by the complainants.

For these reasons, the Commission
Finds that there have been serious and massive violations of human rights in Chad.
Finds that there have been violations of Articles 4, 5, 6, and 7.
Praia, Cape Verde, October 1995.

[9th Annual Activity Report: 1995 – 1996]

25/89, 47/90, 56/91, 100/93 (Joined), Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah/Zaire[4]

The Facts

1. Communication 25/89 is filed by the Free Legal Assistance Group, the Austrian Committee Against Torture, and the Centre Haitien des Droits et Libertés, all members of the World Organization Against Torture (OMCT). The submission of the Free Legal Assistance Group was dated 17 march 1989, that of the Austrian Committee Against Torture dated 29 March 1989, that of the Centre Haitien dated 20 April 1989. The Communication alleges the torture of 15 persons by a Military Unit, on or about 19 January 1989, at Kinsuka near the Zaire River. On 19 April 1989 when several people protested their treatment, they were detained and held indefinitely.

2. Communication 47/90, dated 16 October 1990, is filed by the Lawyers' Committee for Human Rights in New York. It alleges arbitrary arrests, arbitrary detentions, torture, extra-judicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, and suppression of the freedom of the Press.

3. Communication 56/91 is submitted by the Jehovah's Witnesses of Zaire and dated 27 March 1991. It alleges the persecution of the Jehovah's Witnesses, including arbitrary arrests, appropriation of church property, and exclusion from access to education.

4. Communication 100/93 is submitted by the Union Interafricaine des Droits de l'Homme and dated 20 March 1993. It makes allegations of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleges that

[3] See, e.g., the Commission's decisions in communications 59/91, 60/91, 64/91,87/93 and 101/93.

[4] The French language version is more detailed and contains more paragraphs (64 paragraphs) than the English language version (48 paragraphs in all).

public finances were mismanaged; that the failure of the Government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years; that freedom of movement was violated; and that ethnic hatred was incited by the official media.

5. The African Commission, when it determined that the communications, taken together, evidenced a grave and massive violation of human rights in Zaire, brought the matter to the attention of the Assembly of the Heads of State of the Organization of African Unity, in December 1995.

6. The Commission also requested that a mission consisting of two members of the Commission be received in that country, with the objective of discovering the extent and cause of human rights violations and endeavouring to help the government to ensure full respect for the African Charter. The government of Zaire has never responded to these requests for a mission.

Procedure Before the Commission

7. The Commission in June 1989 received communication 25/89. The Commission was seized of the communication at its 11th Session in October 1989 and the State of Zaire was notified on 14 March 1990.

8. Between 1990 and 1993, numerous reminders were sent by the Secretariat to the Government of Zaire, but no response was received.

9. The Secretariat also sent the complainants regular updates on the status of the communications.

10. On 23 September 1993, the Ministry of Justice of Zaire wrote that no copy of the communication had ever been received.

11. A copy was sent on 3 March 1994 by registered post to the Embassy of Zaire in Dakar but no response was forthcoming.

12. At the 16th Session, held in April 1994, the Commission decided to send a mission to Zaire in order to create a dialogue.

13. At the 17th Session, held in March 1995, the Communications against Zaire were declared admissible.

14. The Government of Zaire was notified of this decision on 26 April 1995.

15. At the 18th Session, held in October 1995, the Commission decided to apply Article 58 (1) of the Charter and to draw the attention of the Heads of State and Government to the serious and massive violations of human rights in Zaire.

16. On 12 January 1996, a note verbale was sent to the Ministry of Foreign Affairs of Zaire informing the Ministry of the proposed mission to Zaire to be undertaken by Commissioner Nguema and Ben Salem.

17. Communication No. 47/90 was received by the Commission in October 1990.

18. On 20 October 1990, at its 8th Ordinary Session in Banjul, the African Commission was seized of the communication and decided to notify the State of Zaire of the complaint and invite its written comments on the admissibility.

19. On 6 November 1990, the Secretariat of the Commission informed the Ministry of Zaire of this decision by registered post. No response was forthcoming.

20. At its 11th Ordinary Session, the Commission decided to send a reminder to Zaire. The Secretariat sent this reminder on 30 March 1992. No response was forthcoming.

21. At its 12th Ordinary Session, held in Banjul in October 1992, the Commission declared the communication admissible and decided that it would be examined on the merits.

22. The notice of this decision was sent on 16 November 1992. No response was forthcoming.

23. In 1993 and 1994, the Secretariat sent several reminders to the government of Zaire. No response was received.

24. From August 1994 to the present, the correspondence in respect of this communication is identical with that in the communication 25/89, above.

25. Communication No. 56/91 was received by the Commission in summer 1991.

26. The Commission was seized of the communication at its 10th Session in October 1991 and a notification was sent to the state on 14 November 1991. No response was forthcoming.

27. Two reminders were sent by the Secretariat to the Government of Zaire in 1992.

28. In a letter dated 14 September 1993, the Ministry of Justice of Zaire claimed that a copy of the communication had never been received.

29. A copy of the communication was sent 3 March 1994 by registered post to the Embassy in Dakar, but no response was received.

30. From August 1994, the correspondence in respect of this communication is identical with that in communication 25/89, given above.

31. Communication No. 100/93 was received by the Commission in April 1993.

32. The Commission was seized of the communication at its 13th Session in April 1993 and it was brought to the attention of the State on 12 April 1993. No response was forthcoming.

33. In 1993 and 1994, reminders were sent to the Government of Zaire but no response was forthcoming.

34. As from August 1994, the correspondence in respect of this communication is identical with that in communication 25/89, given above.

The Law
Admissibility

35. After deliberations, as envisioned by Article 58 of the African Charter, the Commission considered that communications 25/89, 47/90, 56/91 and 100/93 against Zaire reveal the existence of serious and massive violations of human rights.

36. Article 56 of the African Charter requires that complainants exhaust local remedies before the Commission can take up a case, unless these remedies are as a practical matter unavailable or unduly prolonged. The requirement of exhaustion of local remedies is founded on the

principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body. In this case, the government has had ample notice of the violation.

37. The Commission has never held the requirement of local remedies to apply literally in case where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation. This is the situation here, given the vast and varied scope of the violations alleged and the general situation prevailing in Zaire.

38. For the above reasons, the Commission declared the communications admissible.

The Merits

39. The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the State concerned, which remedies the prejudice complained of. A pre-requisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.

40. In the present case, there has been no substantive response from the Government of Zaire, despite the numerous notifications of the communications sent by the African Commission. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given.[5] This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights. Since the Government of Zaire does not wish to participate in a dialogue, the Commission must, regrettably, continue its consideration of the case on the basis of facts and opinions submitted by the complainants alone.

41. Article 5 of the African Charter prohibits torture and inhuman or degrading treatment. The torture of 15 persons by a military unity at Kinsuka, near the Zaire River, as alleged in communication 25/89, constitutes a violation of this article.

42. Article 6 of the African Charter guarantees the right to liberty and security of person. The indefinite detention of those who protested against torture, as described in communication 25/89, violates Article 6.

43. Article 4 of the African Charter protects the rights to life. Communication 47/90, in addition to alleged arbitrary arrests, arbitrary detention and torture, alleges extrajudicial executions which are a violation of Article 4.

44. Article 7 of the African Charter specifies the right to have one's cause heard. The unfair trials described in communication 47/90 constitute a violation of this right.

45. Article 8 of the African Charter protects freedom of conscience. The harassment of the Jehovah's Witnesses, as described in communication 56/91, constitutes a violation of this article, since the government has presented no evidence that the practice of their religion in any way threatens law and order. The arbitrary arrests of believers of this religion likewise constitutes a contravention of Article 6, above.

[5] See, e.g. the Commission's decisions in communications 59/91, 60/91, 87/93 and 101/93.

46. The torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press described in communication 100/93 violate the above Articles.

47. Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16.

48. Article 17 of the Charter guarantees the right to education. The closures of universities and secondary schools as described in communication 100/93 constitutes a violation of Article 17.

For these reasons, the Commission

Holds that the facts constitute serious and massive violations of the African Charter, namely of Articles 4,5,6,7,8,16 and 17.
Taken at the 18th Ordinary Session, Praia, Cape Verde, October 1995.
