# Like a candle in the wind: Commentary of communications decided by the African Commission of Human and Peoples' Rights in 2003

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## 1. Introduction

The Africa regional overview 2003 prepared by Amnesty International showed a gloomy picture of human rights situation in the region; wide spread armed conflict, repression of civil and political rights, violence against women, failure to deliver justice to the most vulnerable in society.[1] However, there has been positive development, such as indictment of then Liberian President Charles Taylor by the Special Court for Sierra Leone, which defies the culture of impunity in Africa. Despite continuing human rights violations and human suffering, the culture of human rights is slowly developing in Africa. The gradual development of the human rights jurisprudence by the ACHPR Commission (the Commission) is a good example. The Commission is mandated, under article 45 to ensure the protection and promotion of human and peoples' rights in accordance of the present Charter.[2]

This article deals with the communications decided by the Commission in 2003. There were 14 communications in total before the Commission including six cases that were decided inadmissible. Two files were deemed inadmissible because of the withdrawal of complaint,[3] one due to loss of contact with complainant,[4] and three for non-exhaustion of local remedies.[5] Substantive rights considered in admissible communications include non-discrimination, equality before the law, right to fair trial, freedom from torture, right to liberty and security, and right to collective peace and security. All the communications are reported in the *African Human Rights Law Report* 2003. The article is structured to give a case-by-case commentary. The cases are discussed in terms of its admissibility and merits.

♦The authors would like to thank Professor Frans Viljoen and Magnus Killander for their comments on an earlier version of the article.

[1] Africa Regional Overview 2003, Amnesty International, available at www.amnesty.org/report2004 [accessed on 6 June 2006]

[2] Art 45 of the African Charter provides functions of the Commission.

[3] *Arab organisation for human rights v Egypt* (2003) AHRLR 69 (ACHPR 2003); *Interights v Egypt* (2003) AHRLR 72 (ACHPR 2003)

[4] *Woods and another v Liberia* (2003) AHRLR 111 (ACHPR 2003).

[5] *Aigbe v Nigeria* (2003) AHRLR 128 (ACHPR 2003); *Movement desRéfugiés Mauritaniens au Senegal v Senegal* (2003) AHRLR 131 (ACHPR 2003); *Institute for human rights and development in Africa (on behalf of Simbarakiye) v Democratic Republic of the Congo* (2003) AHRLR 65(ACHPR 2003).

## 2. 'Lunatics and idiots?': Purohit and Another v The Gambia[6]

Mental patients are often invisible. They are invisible, not only in Africa, but in the world in general. Although there are global instruments, such as Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by UN General Assembly in 1993,[7] and Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care,[8] there is no regional declaration or instrument dealing with the rights of mental patients. In that light, the present communication provided a valuable opportunity for the Commission to explore the human rights status of mental patients.

The communication was submitted by Ms Purohit and Mr More, mental health advocates, on behalf of patients in Campama, a psychiatric unit of the Royal Victoria Hospital and "existing and future mental health patients detained under the Mental Health Acts of the Republic of Gambia".[9] The complainants alleged that the Lunatics Detention Act (LDA) was outdated and posed serious problems to patients' well being. The complainants argued that the Act failed to provide a clear definition of "lunatic" and provisions regulating the standard of treatment and care of patients.[10] Furthermore, the patients were detained in an overcrowded unit and there was no independent evaluation of the functioning of the unit.[11] The patients detained in the psychiatric unit were denied of their right to vote and legal aid.[12] The Act failed to protect the patients' right to consent to treatment, and it failed to make provisions for compensation when the patient's rights have been violated.[13] The complainants, hence submitted that the patients' rights under articles 2, 3, 5, 7 (1)(a) and (c), 13(1), 16 and 18(4) of the African Charter have been violated.[14]

Admissibility of communications submitted under article 55 of the African Charter is governed by article 56.[15] The main issue regarding the admissibility of the present communication was article 56(5) that requires complainants to exhaust local remedies before submitting the case before the Commission. The rational behind the rule of exhaustion of local remedies is to give the respondent state a first-hand opportunity to address the alleged violations of human rights within its own domestic legal framework.[16]

On the issue of exhaustion of local remedies, the complainants submitted that it was impossible to exhaust local remedies, as the national laws of the Gambia did not provide the legal recourse to mental patients whose rights are violated. The

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[6] *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).
[7] United Nations General Assembly Resolution 48/96 of 20 December 1993
[8] United Nations General Assembly Resolution 46/119 adopted on 17 December 1991.
[9] *Purohit* case, *supra* n 6, para 1
[10] Para 4.
[11] Para 5-6.
[12] Para 7-8.
[13] Para 8.
[14] African Charter, Art 2 Non-discrimination; Art 3 Equality before the law; Art 5 Right to dignity; Art 7(1)(a) Right to appeal; Art 7(1)(c) Right to defence; Art 13(1) Right to political participation; Art 16 Right to heath; Art 18(4) Right of disabled and aged persons.
[15] Art 56 of the African Charter establishes 7 conditions including identification of authors of communications, a reasonable time limit and exhaustion of local remedies.
[16] *Purohi*t case, *supra* n 6, para 25; Also see *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), para 31.

respondent state, while conceding that under the LDA, there was no provision for review or appeal procedures, argued that the legal recourse could be sought through a constitutional challenge. However, the respondent state further noted that there was no legal aid or assistance to vulnerable groups, except when persons were charged with capital offences. Hence the issue in this case is not the non-existence of domestic remedies but the availability of such remedies to the vulnerable groups in question. The Commission, in this case, considered "theoretical and practical" aspects of the remedies.[17] In order for the remedies to be available and effective, the remedy should be both theoretical and practical.[18] The Commission, to assess the availability and effectiveness of domestic remedies in this particular case, examined the nature and status of persons detained under the Act. It decided that domestic remedies were in fact unavailable in reality because the particular people represented in this communication were 'likely to be picked up from the streets or people from the poor background' who were mostly likely unable to afford private counsel.[19]

One of the main issues with regard to the merits of the case is the nature and extent of state responsibility under international human rights treaties. The Gambia, as a state party to the African Charter, is under the obligation to ratify and amend domestic laws that are in conflict with the human rights standards enshrined in the African Charter. The failure to act upon the treaty obligation would defeat the main object of ratifying a human rights treaty. Such sentiment is clearly reflected in the Commission's decision on articles 6 and 16. Although the Commission decided that article 6 of the African Charter had not been violated because the article does not provide for the cases where a person is institutionalized due to medical reasons,[20] it nevertheless took the opportunity to urge states to take an active role in domesticating international human rights standards.[21] The Commission interpreting article 6, 'no one may be deprived of his freedom except for the reasons and conditions previously laid down by the law',[22] rightly pointed out that despite the 'claw back' clause inbuilt in the article, the state party to the African Charter could not rely on the mere existence of the domestic law.[23] The Commission, reflecting the state obligation under the international human rights treaties, stated that domestic laws should be brought in line with international principles and standards.[24]

Furthermore, related to the issue of the extent and nature of state obligation under the international treaties, the Commission considered that the LDA failed to uphold the standard of medical care and assistance enshrined in article 16.[25] The Commission adopted a broad interpretation of the right to health and declared that the right included "the right to health facilities, access to goods and services" without

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[17] *Institute for Human Rights in Africa v Democratic Republic of the Congo* (2003) AHRLR 65 (ACHPR 2003), para 26; Although the communication was declared inadmissible due to non-exhaustion of local remedies, the Commission took the opportunity to further expend on the principle of local remedies. The Commission viewed that without both 'theoretical and practical' elements of the existence of local remedy, the remedy cannot be said to be available nor effective.
[18] As above para 26.
[19] *Purohit* case, *supra* n 6, para 36.
[20] Para 68.
[21] Para 64.
[22] African Charter, art 6.
[23] *Purohit* case, *supra* n 6, para 64-65.
[24] Para 64.
[25] Para 83.

discrimination of any kind.[26] Interpreting the right to health together with article 18(4) of the Charter, the Commission granted "special measures of protection" to mental patients.[27] The Commission's decision echoed closely the ICESCR General Comment 14.[28] While the Commission acknowledged the practical difficulties that state parties face, it, nonetheless, observed that the state has an obligation under article 16 to 'take concrete and targeted steps' to ensure the realization of the right to health without discrimination.[29]

Another broad underlying theme of the case is the application of the principle of non-discrimination. In this case, the Commission had an opportunity to rule, both directly and indirectly, on the issue of non-discrimination.[30] The Commission held that the lack of practical legal recourse for the people who are detained under the LDA constitute a violation of articles 2 and 3 that essentially deal with non-discrimination and equal protection before the law. Unfortunately, the Commission did not fully explore the issue with regard to peoples with disabilities. Mental illness is defined as a disability under the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.[31] Article 2 of the African Charter that prohibits discrimination based on 'race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'[32] It would have been desirable if the Commission took the opportunity to include disability in 'other status' to strengthen the rights of peoples with disabilities.

The Commission's decision on the issue of non-discrimination echoes its opinion on the matters of exhaustion of local remedies. The respondent state have argued that the mental patients detained under the LDA could bring claims under the tort law and the patients have the right to challenge the Act in the Constitutional Court of the Gambia. However, considering that there is no legal aid or assistance, the Commission was of the view that only a certain privileged group of people can afford such legal recourse. Such can be viewed as discrimination based on 'social origin and fortune'[33] and such provisions fall short of international standard.[34] The Commission again emphasized the application of a principle of non-discrimination in respect to a right to enjoy a right to human dignity. The Commission emphasized that the mentally disabled persons also have the right to enjoy a decent life and their dignity should be protected and respected.[35] Determining whether the Gambia had violated the article 5 of the African Charter, the Commission drew its inspiration from both its

[26] Para 80.
[27] Para 81; Art 18(4) of the African Charter provides that aged and the disabled should have the "right to special measures of protection".
[28] Substantive issues arising the implementation of the ICESCR, General Comment No 14 (2000) The right to the highest attainable standard of health (Art 12 of the ICESCR), para 11 interprets the right to health to include not only health care, but also "the underlying determinants of health" such as food, healthy environment, adequate sanitation, safe water and housing.; also see Mbazira C, "The right to health and the nature of socio-economic rights obligations under the African Charter" 6 ESR 4 (2005)
[29] *Purohit* case, *supra* n 6, para 84.
[30] The Commission consider the issue of non-discrimination directly when determining whether the Gambia has violated articles 2 and 3, and indirectly when considering articles 5 and 13(1) of the African Charter.
[31] Standard Rules, *supra* n 8, para17.
[32] African Charter, art 2.
[33] As above
[34] *Purohit* case, *supra* n 6, para 52-53.
[35] Para 60.

jurisprudence[36] and the United Nations Principles for the Protection of Persons with Mental Illness and Improvement of Mental Care.[37] The Commission's decision that the language of the LDA that branded persons with mental illness as 'lunatics' and 'idiots' dehumanized and violated a right to human dignity protected under article 5 of the African Charter, seems to indicate its continued efforts to interpret the wording of the article as broad as possible.[38] The principle of non-discrimination also sets the bases of interpreting article 13(1) of the African Charter. Article 13(1) provides 'every citizen' the right to political participation and the right should be applied 'in accordance with the provisions of the law.'[39] Interpreting 'every citizen', the Commission held that the right may only be limited based on 'legal incapacity' or citizenship status of an individual.[40] The Commission differentiated between 'legal incapacity' and 'mental incapacity' and found that the respondent state violated art 13(1) of the African Charter.[41] However, its concern is more to do with the lack of 'objective and reasonable criteria base on law' to prohibit political participation of metal patients rather than advocating a blanket application of the right.[42]

## 3. *Incommunicado* detention case: Zegveld and another v Eritrea[43]

The human rights situation is notoriously precarious in Eritrea. Various international human rights NGOs such as Amnesty International and Human Rights Watch have frequently expressed their concerns over violations of civil and political rights in Eritrea. In its regional overview 2003, Amnesty International criticized the Eritrea government for employing malicious prosecution and arbitrary arrests as a tool for political repression.[44] Arbitrary arrests and prolonged detentions without trial are rampant and journalists and human rights defenders are often harassed by the security force.[45] The present communication concerns a prolonged detention of 11 political leaders of Peoples Front for Democracy and Justice (PFDJ).

The communication was submitted by Dr Liesbeth Zegveld, an international lawyer, and Mr Mussie Ephrem who is an Eritrean citizen living in Sweden. The complainants alleged that 11 former Eritrean government officers were illegally arrested in September 2001 and detained for more than 18 months without being formally charged. It was further alleged that the detainees were refused access to their families or lawyers. The complainants made a request for *habeas corpus* to the Ministry of Justice of Eritrea but received no reply. The complainants alleged a violation of articles 2, 6, 7(1), and 9(2) of the African Charter.

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[36] Para 58; see *Media Rights Agenda v Nigeria* (2000) AHRLR 282 (ACHPR 2000) and *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000) for a discussion on 'cruel, inhuman or degrading punishment and treatment'.
[37] *Purohit* case, *supra* n 6, para 60.
[38] Para 59, see Media Rights Agenda v Nigeria, *supra* n 36.
[39] African Charter, art 13(1).
[40] *Purohit* case, *supra* n 6, para 75.
[41] Para 76.
[42] Para 76.
[43] *Zegveld and Another v Eritrea* (2003) AHRLR 72 (ACHPR 2003).
[44] Africa Regional Overview, *supra* n 1.
[45] As above; also see Human Rights Overview on Eritrea by Human Rights Watch, available at http://www.hrw.org/english/docs/2004/01/21/eritrea6987.htm [accessed on 9 June 2006].

The main issue in relation to the admissibility of the particular case was the exhaustion of local remedies. Article 56(5) of the African Charter requires complainants to have exhausted the local remedies before submitting communications to the Commission.[46] The complainants of the communication argued that their attempts to exhaust local remedies were met with indifference and their efforts brought no response from the Eritrean authorities.[47] The Commission's decision on the issue of exhaustion of local remedies in this particular communication reflects its continued effort to apply the rule to accommodate the realities in many African states. As Commission held in *Amnesty International and Others v Sudan*,[48] the local remedies should be exhausted as long as they are independent from political pressure.[49] It is noted in the African regional overview, the judiciary in Eritrea was undermined and heavily influence by the government.[50] Considering the above situation in Eritrea, the Commission refused to apply the rule of exhaustion of local remedy blindly. Despite the respondent state's argument that the delay of the hearing was due to the congested court schedule, the Commission held that the member state have the responsibility to bring a person detained before a competent court of law to ensure the person to be tried 'in accordance of national and international standard.'[51] The Commission further held that the state is required to provide 'an accessible, effective and possible remedy' to alleged victims at the domestic level.[52] Therefore, the Commission felt that in the present case, the complainants were prevented from exhausting local remedies; hence the case was declared admissible.

Concerning the request of the respondent state to reconsider its decision on admissibility, the Commission pointed out two things. First of all, the Commission noted that the respondent state had failed to present any new element on admissibility. The Commission took its inspiration from the Inter-American Court's decision in the *Velasquez* case[53], where the Inter-American Court decided that where the complainants raise the issue of non-availability of local remedies, the burden of proof will shift to the respondent state claiming non-exhaustion and it has an obligation to prove that local remedies are available and effective. Secondly, the Commission considered rule 118(2) of the African Commission's Rules of Procedure. The rule stipulates that the Commission may reconsider its decision declaring a communication inadmissible, when it is requested.[54] However, the rule 118(2) does not provide for the reconsideration of a decision declaring a communication admissible.[55]

On the issue of merits, the Commission seemed to be concerned with the interpretation and application of lawful restrictions ('claw back' clauses) of the rights

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[46] Art 56(5) of the African Charter provides that 'communications… are sent after exhausting local remedies, if any, unless this procedure is unduly prolonged.'
[47] *Zegveld* case, *supra* n 43, para 25-27.
[48] *Amnesty International and Others v Sudan* (2000) AHRLR 297(ACHPR 1999).
[49] Para 31.
[50] Africa Regional Overview, *supra* n 1.
[51] *Zegveld* case, *supra* n 43, para 35.
[52] Para 39.
[53] *Velasquez Rodriguez v Honduras*, judgement of 29 July 1988, Inter-Am Ct HR (Ser C) 4 (1988) cited in *Zegveld* case, *supra* n 43, para 36.
[54] *Zegveld* case, *supra* n 43, para 45; Rule 118(2) of the African Commission's Rules of Procedure states that 'if the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.'
[55] Para 45.

enshrined in the African Charter. The Commission after considering the fact that the 11 persons were detained *incommunicado* since September 2001 and have never been formally charged, declared that the respondent state violated article 2, 6, and 7(1) of the African Charter. The Commission pointed out that although article 6 is not an absolute right, but the African Charter forbids arbitrary arrests and detention.[56] The Commission also expressed its concerns regarding *incommunicado* detention. The Commission is of the view that *incommunicado* detention is 'a gross violation of human rights' that can lead to other violations.[57] Furthermore, the Commission held that prolonged *incommunicado* detention, itself, could be 'a form of cruel, inhuman or degrading punishment and treatment',[58] which is prohibited under article 5 of African Charter.[59] Although the complainants did not allege the violation of article 5 of the African Charter in the communication, the Commission took the opportunity to contemplate the issue of detention and stated that 'all' detention should be conform to basic standard of human rights.[60] When determining whether article 9(2)[61] was violated or not, the Commission once again concerned with arbitrary restrictions of freedom of expression based on national laws that fall short of international human rights standards. The Commission conceded that the freedom of expression comes with duties and can be restricted based on laws,[62] but that 'any laws restricting freedom of expression must conform to international human rights norms and standards relating to freedom of expression.'[63] In the light of present case, the Commission found that the restrictions imposed by the respondent state violated not only the African Charter but also international human rights standards and norms.[64]

## 4. Political repression and violation of human rights during the first decade of President Umar Hassan al-Bashir's regime in Sudan: three illustrative cases

In 1989, Sudan was pushed into dictatorship when General al-Bashir took over power by a coup. He subsequently banned all political parties, controlled the Sudanese press in order to restrict the political space of his opponents. Sharia was imposed in northern Sudan in 1991.[65] During the first decade of al-Bashir's regime, arbitrary arrest and torture were used as a political tool to oppress the government's

[56] Para 52.
[57] Para 55.
[58] Para 55.
[59] Art 5 of the African Charter grants a right to dignity and prohibits 'all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.'
[60] *Zegveld* case, *supra* n 43, para 55; also see *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995), para 7. The Commission examines the condition of detention and decided that 'excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care' were in violation of article 5.
[61] Art 9(2) of the African Charter provides that every individual have to right to express and disseminate his opinions within the law.
[62] *Zegveld* case, *supra* n 43, para 59; Principle 11(2) of the Declaration of principles on freedom of expression in Africa reads, 'any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.'
[63] Para 60.
[64] Para 62.
[65] 'Omar Hasan Ahamad al-Bashir', available at http://en.wikipedia.org/wiki/Umar_Hasan_al-Bashir [accessed 9 June 2006].

opponents.[66] In 1999, a law which limited political 'associations' was enacted. Further, in December 1999, a state of national emergency was declared by presidential decree in Sudan, the parliament was disolved and the constitution was suspended. The three cases discussed below deal with the violations of a range of civil and political rights during that period, including violations stemming from political oppression as well as the imposition of Sharia.

### 4.1 *Law Office of Ghazi Suleiman v Sudan (I)*[67]

The case is a consolidation of two communications against Sudan. Both communications were brought in 1998 and 1999 on behalf of victims of alleged violations of articles 5, 6 and 7(1)(a), (b), (c) and (d) of the African Charter[68] by the government of Sudan. The first communication involved three persons who were arrested and jailed for conduct, which, according to the respondent state, amounted to terrorist activities that disturbed national peace and security. These three persons were held *incommunicado* without charges for two months, during which they were allegedly tortured. The second communication involved 26 civilians who were tried and convicted by a military court for having destabilised the constitutional system in Sudan.[69] Subsequent to an appeal to the Constitutional Court, the 26 civilians were pardoned and released on condition that they renounce their right to claim damages from the government. The complainant sought compensation for the violations before the Commission. The Commission was not satisfied with the contention that the release of the victims amounted to compensation.[70] It held that even if the situation in the country had improved, the government remained accountable for the acts of violations human rights obligations. The communications were held admissible under article 56(5) for exhaustion of local remedies in the first communication and ineffectiveness and non-accessibility of local remedies in the second.

On the merits of the case, the Commission examined the obligations of states under articles 5, 6 and 7. Right from the start, the Commission stated that the obligations of states under articles 5, 6 and 7 are of an *erga omnes* nature and refuted the contention of the respondent state that domestic laws on national security take precedence over international law on individual's rights, including the African Charter.[71] The Commission therefore held that national emergency does not amount to an exception to the application of articles 5, 6 and 7. Regarding violation of article 5, the Sudanese government did not contest that acts of torture were conducted against the victims while they were in detention.[72] The Commission took the view that states

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[66] Rone J 'Human Rights Watch condemns summary trials of opponents' (1998) available at http://www.hrw.org/english/docs/1998/02/13/sudan104_txt.htm [accessed 9 June 2006].

[67] *Law Office of Ghazi Suleiman v Sudan* (*I)* (2003) AHRLR 134 (ACHPR 2003).

[68] Art 5 on the right to dignity, prohibition of torture and slavery; art 6 on the right to liberty and security; art 7 on the right to a fair trial.

[69] The 26 civilians were accused of inciting people to war or engaging to the war against the state, inciting opposition against the government and abetting criminal or terrorist organisations. In both cases, the manifestations were targeted at the then military regime in Sudan.

[70] *Sudan (I)* case *supra* n 67, para 39-40. The Commission consistently adopted this position, especially in cases involving allegations of torture. See also *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) cited in the decision.

[71] *Sudan (I) supra* n 67, para 38-39.

[72] The Commission conceded that detention incommunicado amounts to inhuman treatment for both the detainees and their families. See para 44.

are at all times responsible of acts of torture conducted on its territory, regardless of the identity of the perpetrators. It therefore held that obligations of states under article 5 are not limited to undertakings to hold accountable those who committed torture, but also and most importantly, to take preventative measures against acts of torture.[73] Failing such measures, the Commission found the government of Sudan to be in violation of article 5 of the African Charter. Regarding violation of article 6, the Commission found that arresting individuals and detaining them without charges constitute a *prima facie* violation of the right not to be illegally detained contained in article 6 of the African Charter.[74] The government of Sudan did not contest the facts in this regard. The Commission therefore found the respondent state to be in violation of articles 5 and 6 of the African Charter.

Regarding violation of article 7(1), the Commission carefully dissected the facts to apply them to article 7(1). Accordingly, the Commission found a violation of article 7(1)(a) on the basis that the victims had to renounce their right to appeal upon being pardoned. The Commission also emphasised that civilians should not be tried by a military court, even during times of national emergency.[75] Further, the Commission found a violation of article 7(1)(b) on the basis that some state officers carried out publicity aimed at declaring the suspects guilty of an offence before a competent court established their guilt. Furthermore, on the contention that the victims were refused legal representation, the Commission found that refusing the victims the right to be represented by the lawyer of their choice amounts to a violation of article 7(1)(c).[76] Finally, although the Commission voiced against the procedural irregularity of civilians being tried by a military court,[77] it proceeded to consider the competence, independence and impartiality of the military court in this case. Accordingly, the Commission found that the composition of the military court alone, in this case a majority of active military officers appointed by the President, was a clear indication of the lack of impartiality of the military court.[78] The impartiality of the panel of judges was undermined by them being under military regulations during a military regime but also because they did not receive adequate legal training and qualifications.[79] The same position was held in *International Pen and Others (on behalf of Ken Saro-Wiwa) v Nigeria*.[80] The Commission did not deem it necessary to further consider the independence of the military court. It found a violation of article 7(1).

[73] Para 46.
[74] Para 50.
[75] Para 53.
[76] See also *Amnesty International and Others v Sud*an *supra* n 48 and *Civil Liberties Organisation v Nigeria* (2000) AHRLR 186 (ACHPR 1995).
[77] See also the Commission's Resolution on the Right to a Fair Trial and Legal Aid in Africa adopted in 2003.
[78] The Commission made a confusion of terms at para 64 when it noted that 'the composition of the military court alone is evidence of impartiality.'
[79] See *Media Rights Agenda v Nigeria supra* n 36 cited by the Commission.
[80] *International Pen and Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

### 4.2 Law Office of Ghazi Suleiman v Sudan (II)[81]

The communication was filed by a law firm based in Khartoum on behalf of Mr Ghazi Suleiman. In January 1999, Mr Suleiman was invited to give a public lecture to a human rights organization in Sinnar, Blue Nile State. He was prohibited from traveling and threatened by security officers. Furthermore, between 1999 and 2002, Mr Suleiman suffered several arrests and attacks on his office and persons. The complainant alleged violations of articles 9, 10, 11 and 12 of the African Charter.[82] It was also alleged that all such rights have been suspended under the National Security Act 1994, as amended in 1996.[83]

Determining on the issue of admissibility, the Commission was again faced with the question of exhaustion of local remedies. The Commission is of the view that the rule of exhaustion of local remedies under article 56(5) is one of the most important conditions for admissibility of the communication.[84] However, the Commission argued in *Institute for Human Rights in Africa v DRC* that the rule of exhaustion of local remedies has never been applied *ipso facto* for receiving a communication.[85] The Commission has developed an extensive jurisprudence around the issue and has consistently applied the rule with full regard to realities in various African states. In present case, the Commission considered the effectiveness and accessibility of the local remedies in Sudan under the particular circumstance of the alleged victim, Mr Suleiman. In its earlier decision in *Amnesty International and Others v Sudan*[86], the Commission interpreted the requirement provided in article 56(5) as 'the exhaustion of all domestic remedies, if they are of a judicial nature, are effective and are not subordinate to the discretionary power of the public authorities.'[87] Considering the political situation in Sudan, the Commission decided that exhausting local remedies, in this particular case, would be an unjustifiably long process and the effectiveness of the result would also be questionable.[88] Furthermore, the Commission noted that the National Security Act of 1994, which prohibits any legal action or appeal against the decisions taken under the law, violates the right to an appeal provided under article 7 of the African Charter.[89] The right of an appeal, the Commission rightly stated, is another 'determinant for the fulfillment of the requirement of exhaustion of local remedies.'[90] For the above reasons, the communication was declared admissible.

The Commission was asked to consider whether articles 9, 10, 11, and 12 have been violated. Relying on article 60 of the African Charter, the Commission drew its

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[81] *Law Office of Ghazi Suleiman v Sudan (II)*, (2003) AHRLR 144 (ACHPR 2003).
[82] African Charter, Art 9 Right to information; Art 10 Right to free association; Art 11 Right to assembly; Art 12 Freedom of movement.
[83] *Sudan ( II)* case *supra* n 81, para 6.
[84] Para 29; Also see *Jawara v The Gambia supra* n 16, para 30.
[85] *Institute for Human Rights in Africa v DRC supra* n 17, para 28.
[86] *Amnesty International* case *supra* n 48.
[87] *Amnesty International* case *supra* n 48, para 37 cited in *Sudan (II)* case *supra* n 81, para 30.
[88] *Sudan II* case *supra* n 81, para 36.
[89] Para 35.
[90] Para 34.

inspirations from international jurisprudence.[91] The Commission carefully considered the value of freedom of expression and tried to find the balance between necessary restrictions based on law and arbitrary restrictions. Drawing from the Inter-American Court and European Court of Human Rights' decisions, the Commission declared that Mr Suleiman's speech, which promotes human rights and democracy, 'is of a special value to society and deserving of special protection.'[92] Although articles 9, 10, 11, and 12 which are allegedly violated by the respondent state are not absolute rights and the limitations are provided within the provisions, the Commission stated that the laws restricting those rights should conform to standard and principles of international human rights standards. The Commission found that the arbitrary and excessive restrictions placed up on such rights constitute violations of articles 9, 10, 11, and 12 by the respondent state. Furthermore, the Commission argued that frequent arrests, detentions and threats also constitute a violation of article 6 of the African Charter.[93] The Commission found the violation of articles 6, 9, 10, 11, and 12 of the African Charter.

### *4.2 Curtis Doebbler v Sudan[94]*

In this communication, eight Sudanese students were arrested and convicted in 1999 for having violated 'public order'. The communication was brought before the Commission on their behalf by an American lawyer Their behaviours comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting and talking with boys, which were contrary to article 152 of the Sudanese Criminal Code. All eight students were sentenced to fines and lashes. The punishments were carried out immediately after the verdict and sentencing by the court of first instance. The complainant alleged violation of article 5 of the African Charter on the basis that the punishment was disproportionate as the acts for which the students were punished constituted minor offences. The complainant sought reparation for the violations. The communication was declared admissible on the basis that local remedies were inaccessible because the victims had no legal representation.

On the merits of the case, the Commission considered whether the punishments administered to the eight students constituted cruel, inhuman and degrading punishment contrary to article 5 of the African Charter. Referring to an earlier decision,[95] the Commission affirmed that article 5 should be interpreted 'to encompass the widest possible array of physical and mental abuses'.[96] The Commission avoided delving into the question of application or limitations of human rights standards in Sharia because none of the parties invited it to do so.[97] Conversely, it ordered that the Sudanese Criminal Law be amended to take into account Sudan's obligations under the African Charter, thus making clear the supremacy of the African Charter over domestic laws, including Sharia. The Commission therefore held that human rights are universal standards which application cannot be precluded by

[91] Article 60 of the African Charter provides that the Commission 'shall draw inspiration from international law on human and peoples' rights…'
[92] *Sudan (II)* case, *supra* n 78, para 52.
[93] Para 53.
[94] *Curtis Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003)
[95] See *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).
[96] *Curtis Doebbler* case *supra* n 94, para 37.
[97] Para 41.

religious and cultural particularism. It logically flowed from the reasoning of the Commission that human rights obligations are universal. The Commission therefore referred to the jurisprudence of the European Court of Human Rights to define international standards pertaining to cruel, inhuman and degrading punishments.[98] It concluded that although 'ultimately whether an act constitutes inhuman degrading punishment or punishment depends on the circumstances of the case',[99]

> [t]there is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state-sponsored torture under the Charter and contrary to the very nature of this human rights treaty.[100]

The Commission therefore held that the prohibition of torture, cruel inhumane and degrading punishment and treatment contained in article 5 of the Charter creates an obligation *erga omnes*. The Commission found Sudan to be in violation of article 5 of the African Charter and 'requested' the government of Sudan to amend its criminal law to comply with its obligations under the African Charter.

The state of emergency was lifted in Sudan in July 2005, except in the unsettled areas of Darfur. However, the human rights situation in Sudan has worsened with the on-going conflict in Darfur.

## 5. A step backward towards the abolition of the death penalty in Africa: the case of *Interights and Others (on behalf of Mariette Sonjaleen Bosch) v Botswana*[101]

Botswana is one of the 23 African countries that still retain and inflict the death penalty.[102] Section 4(1) and 7(2) of the Constitution of Botswana recognise the death penalty as an exception to the right to life and a sentence that a court of law can impose.[103] Since Botswana's independence in 1966, 39 people were hanged in the country.[104] The latest execution was conducted in April 2006.[105] Ms Bosch's execution, a South African national, drew attention on the practice of death penalty in Botswana, which drastically contrasts with that of her neighbour.[106]

Ms Bosch was convicted and sentenced to death by hanging for murder by the High Court of Botswana. The decision of the High Court was later upheld by the Court of Appeal of Botswana, the highest court in the country. The communication to the Commission was submitted by Interights and two United Kingdom and Botswana-

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[98] At para 38, the Commission referred to the case of *Tyrer v United Kingdom* (2 EHRR 1 (1979-80)).
[99] Para 37.
[100] Para 42.
[101] *Interights and Others (on behalf of Mariette Sonjaleen Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).
[102] See Chenwi L 'Towards the abolition of the death penalty in Africa. A human rights perspective' (2005) LLD thesis, University of Pretoria, unpublished at 33. See also Van Zyl D 'The death penalty in Africa' (2004) 4 *African Human Rights Law Journal* 1-16 at 2.
[103] Excerpts of Botswana's Constitution is reprinted in Heyns C (ed) (2004) *Human Rights Law in Africa* 908-917.
[104] See Gabotlale B 'Death penalty: five years after Bosch, nothing changed in Botswana' (2006), available at http://www.ipsnews.net/news.asp?idnews=33275 [accessed 9 June 2006].
[105] *Supra.*
[106] In the case of *S v Makwanyane* (1995 (3) SA 391) in 1995, South Africa's Constitutional Court found the death penalty to be inconsistent with the Constitution (s 11(2) of the 1993 Interim Constitution which prohibited cruel, inhuman and degrading treatment or punishment).

based advocates on behalf of the victim. Ms Bosch was executed soon after the Court of Appeal's decision, despite a request by the Commission to stay the execution pending its decision. The communication alleged violation of articles 1, 4, 5 and 7(1)(b) of the African Charter. It was found to fulfil the requirement of exhaustion of local remedies prescribed in article 56(5), and was thus declared admissible.

On the allegation of violation of article 7(1)(b), the complainant submitted that in the High Court and in the Court of Appeal, the judges wrongly put the onus of proof on the accused, thus obliging her to prove that someone else was responsible of the killing. This, according to the complainant, constituted a violation of the right to be presumed innocent until proven guilty by a competent court. The complainant further argued that this misdirection of both courts affected the outcome of the trial and therefore violated article 4 of the Charter. In this regard, the Commission held that '[a] breach of article 7(1) of the Charter would only arise if the conviction had resulted from such misdirection.'[107] It found that the Court of Appeal corrected the error of the High Court when it 'meticulously evaluated the evidence and came to the only conclusion possible',[108] that is Ms Bosch's culpability for the murder. The Commission therefore found that in this particular case, justice was properly rendered by the Botswana courts. Article 7(1)(b) was therefore not violated. Consequently, in view of the finding that due process was respected in convicting Ms Bosch, the Commission concluded that the victim was not arbitrarily deprived of her life and article 4 of the Charter was not violated. The fairness, or lack of it, of the clemency procedure was considered irrelevant because the exercise of clemency by a head of state is discretionary; only judicial trials can be challenged for arbitrariness. Ms Bosch was given an opportunity to have her cause heard and it was only that trial that could be challenged to be arbitrary. The Commission did not find the death penalty to be a *prima facie* violation of the Charter.[109] It only ascertained that Ms Bosch's trial was properly conducted so as to avoid that an innocent is sentenced to death.[110] The Commission did not find it necessary to address the question as to whether failure of the Botswana government to respect its request to stay execution violated articles 1, 4 and 7(1) of the Charter. It simply accepted the argument that the respondent state never received the request and therefore was not aware of it.[111]

On the allegation of violation of article 5, the complainant alleged on the one hand that the imposition of the death penalty constituted a disproportionate sentence given the circumstances of the case and on the other that the failure of the government of Botswana to notify the victims' family on the date and time of execution constituted a cruel, inhuman and degrading punishment and treatment. The Commission held that extenuating circumstances should be found in relation to the state of mind of the accused at the time of commission of the crime. The Commission

[107] *Interights and Others v Botswana supra* n 101, para 26.
[108] *Supra.*
[109] The African Charter does not prohibit the death penalty. The European Convention for the protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights did not originally contain any prohibition of the death penalty either but that was later altered by the adoption of protocols to the conventions.
[110] The Commission took the same position in *International Pen and Others (on behalf of Ken Saro-Wiwa) v Nigeria supra* n 81.
[111] Chenwi argues that this decision of the Commission could open door for abuse by states. See Chenwi L 'What future for the death penalty in Africa? An appraisal of the case of *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana*' (2005) 12 *Amicus Journal* 13-15.

did not find any extenuating circumstances because Ms Bosch 'involved considerable effort and careful planning'[112] in preparing the murder. No violation was therefore found on the account that the death penalty constituted a disproportionate sentence. The Commission did not pronounce itself on the issue of reasonable notice for the reason that the respondent state was not given sufficient time to prepare counter-arguments on the issue and it would have therefore been unfair for the respondent state to deal with its substance. The Commission merely quoted the standards set in other jurisdictions, without mentioning whether in the specific case these were respected. Most importantly, the Commission failed to clarify what amounts to sufficient notice in cases involving the death penalty when Ms Bosch was executed 60 days after the decision of the Court of Appeal of Botswana. It is regrettable that on this issue the Commission gave more importance to procedure than to substance in the case.[113] One would have expected the Commission to, besides the requirement for respect of due process, set further minimum standards states imposing death sentences must respect. Furthermore, the Commission did not find any violation of article 1 of the African Charter.

With regard the death penalty, the Commission's position has so far been consistent. The death penalty is not a *prima facie* violation of articles 4 and 5 of the African Charter. Article 4, according to which no person should be arbitrarily deprived of his life is violated only if due process in the imposition of a death sentence is not respected. It is regrettable that despite the fact that the Commission noted the current trend of abolition of the death penalty, it did not find that the very retention of the death penalty itself constitutes a violation of the right to life and the right to be free from cruel, inhuman and degrading treatment under the African Charter. It used a weak language to encourage all states party to the Charter to 'take all measures to refrain from exercising the death penalty.' The African Commission's Resolution Urging the States to Envisage a Moratorium on the Death Penalty of 1999 is an encouraging step towards the abolition of the death penalty in Africa. However, as the guardian of human rights in Africa, the Commission needs to take a stronger stance against the death penalty, including through legally binding decisions.

## 6. Contradictory decision on *locus standi* : the case of *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia*[114]

The crisis in the Great Lakes region epitomised in 1994 with the Rwandan genocide. Although peace was re-established in the country, killings of Tutis and Hutus were still persisting in neighbouring country Burundi. This communication was brought before the Commission by the *Association pour la Sauvegarde de la Paix au Burundi* (Association for the Preservation of Peace in Burundi), a non-governmental organisation based in Belgium. The communication pertains to the alleged violation of the Charter resulting from the embargo imposed on Burundi by the respondent states between 1996 and 1999, following the coup d'état led by Major Pierre Buyoya in 1996. The resolution to impose an embargo on Burundi was taken at the Summit of the Great Lakes Region held in Tanzania to sanction the unconstitutional change of

[112] *Interights and Others v Botswana supra* n 101, para 36.
[113] See also Chenwi *supra* n 111.
[114] *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Botswana, Tanzania, Uganda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003).

government of 1996 in Burundi. The Commission accepted to be seized of the communication at its 20th session in October 1996 but only decided on the merits of the case at its 33rd session in May 2003, long after the embargo was lifted in 1999. The *Association pour la Sauvegarde de la Paix* claimed that the embargo imposed on Burundi constituted a violation of articles 4, 17(1), 22 and 23(2)(b) of the African Charter and articles 3(1), (2) and (3) of the OAU Charter.[115] The complainant sought reparation for the damages incurred due to the embargo. The communication was submitted before the adoption of the Constitutive Act of the African Union and the Declaration on Unconstitutional Change of Government, but decided after their adoption.

On the issue of *locus standi*, the Commission noted that 'the authors of the communication were in all respects representing the interests of the military regime of Burundi', which, and the Commission acknowledged it, was a clear indication that the 'communication appropriately falls under inter-state communications (articles 47 to 54).' However, the Commission resolved to consider the communication under article 55 of the Charter for 'the interests of the advancement of human rights'. The decision of the Commission to consider the communication as an individual complaint has been criticised because it seems to assume that inter-state complainants constitute a less effective mechanism for the advancement of human rights.[116] The Commission therefore declared the communication to be admissible on the basis of article 56(5) that no local remedies exist in Burundi because the national courts of Burundi have no jurisdiction over the respondent states.

The Commission did not address individually each provision allegedly violated by the respondent states. It rather considered whether the imposition of the embargo on Burundi constituted a violation of the Charter. The Commission found that the embargo was imposed as a 'collective action … to address a matter within the region that could constitute a threat to peace, stability and security.'[117] Between 1975 and 1996, the six coups successfully were perpetrated in Burundi contributed to aggravate the volatile situation in the region. The Commission did not consider the legality of the embargo according to the argument that undemocratic changes of governments constitute a massive violation of human rights. One could argue that through this position, the Commission implicitly set as a standard in the African system that non-compliance with human rights obligations does not justify the imposition of sanctions on states. The Commission rather based its enquiry on the argument that the embargo was imposed in reaction to a threat to peace, security and stability in the region, which is permitted under chapter VII of the Charter of the United Nations.[118] The Commission further found that 'no breach attaches to the procedure adopted by the states concerned' to impose the embargo.[119] The Commission was satisfied that there was no violation of the Charter. It did not deem it

[115] Art 4 of the African Charter on the right to life; art 17(1) on the right to education and art 23(2)(b) on the prohibition to allow subversive and terrorist activities on one's territory. Art 3 of the OAU Charter on the principle of non-interference in the internal affairs of states.

[116] See Olinga A 'The embargo against Burundi before the African Commission on Human and Peoples' Rights (Note on Communication 157/96, *Association for the Preservation of the Preservation of Peace in Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*) (2005) 5 *African Human Rights Law Journal* 424-432.

[117] Art 23 of the Charter protects the right to collective peace and security.

[118] Art 4(h) of the Constitutive Act of the African Union (adopted in 2000, entered into force in 2001) later provided that the Union can interfere in the internal affairs of a member state in grave circumstances.

[119] *Association pour la Sauvegarde* case *supra* n 114, para 72.

necessary to consider whether the respondent states had alternatives to the imposition of the embargo on Burundi. Neither did it address the question as to whether the imposition of the embargo was effective in realising the objective it sought to achieve.

However, the Commission considered if the embargo had adverse effects on the rights of the complainant, in which case the action would have been illegitimate. In addition to the limits of economic sanctions defined by the Committee on Economic, Social and Cultural Rights,[120] the Commission added that

> [s]anctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of.[121]

Based solely on the submissions of the respondent states, the Commission declared itself 'satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made.'[122] The Commission was also satisfied that a committee was put in place to monitor regularly the situation in Burundi. As a result, the Commission did not find any violation of the Charter. The conclusions the Commission arrived at were exclusively based on the submissions of the complainant and the reactions of the respondent states. The rights of the people on the ground could have been better protected if the Commission conducted on-site investigations at the time of the event. The allegations of violation of article 23(2)(b) of the Charter should have also deserved an on-site investigation.[123] This is even more important taking into account the Commission's position that the obligations of the state are not extinguished although the situation had improved.[124]

## 7. Confusing decision on admissibility under article 56(7) of the African Charter: the case of *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v Ethiopia and Eritrea*[125]

The war over boundaries between Ethiopia and Eritrea took place from May 1998 to June 2000. On 12 December 2000, the belligerents agreed to a comprehensive peace agreement and binding arbitration of their disputes under the Algiers Agreement.[126] As part of the peace agreement, the Ethiopian-Eritrean Claims Commission was created by the peace agreement between the two countries to address 'the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported'.[127] The body is bound by the peace agreement to apply the rules of international law.

The two communications were consolidated and considered jointly by the Commission. They were submitted on behalf of the Ethiopians and Eritreans who

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[120] See General Comment 8 of the United Nations' Committee on Economic, Social and Cultural Rights: sanctions should be flexible, effectively monitored and should not be excessive nor disproportionate or indiscriminate and should not seek to achieve ends beyond their legitimate purpose. On this issue, the Commission wrongly quoted the Human Rights Committee.

[121] *Association pour la Sauvegarde* case *supra* n 114, para 75.

[122] Para 76.

[123] See Olinga *supra* n 116 at 430.

[124] *Sudan (I)* case *supra* n 68.

[125] *Interights (on behalf of Pan Africain Movement and Citizens for Peace in Eritrea) v Ethiopia and Eritrea* (2003) AHRLR 74 (ACHPR 2003).

[126] 'Eritrean – Ethiopian war', available at http://en.wikipedia.org/wiki/Eritrean-Ethiopian_War [accessed 9 June 2006].

[127] *Interights v Ethiopia and Eritrea* case *supra* n 125 para 46.

suffered the consequences of the war between the two countries and, *inter alia*, the massive expulsions and detentions of civilians from each country by the other and massive home-evictions. The Commission considered the question as to whether the communications should be considered as an inter-state complaint governed by articles 47-54 or as an individual complaint governed by articles 55-57. Both states were of the view to maintain them under the procedures of article 55. The complainant alleged violation of articles 1, 2, 3, 4, 5, 6, 7(1), 12(1), (2), (4) and (5), 14, 15, 16 and 18(1) of the African Charter.[128] The Commission declared the communications to be admissible under article 56(5) for non-existence of domestic remedies available to the complainants because of the massive nature of the violations.[129]

However, the Commission grappled with article 56(7) of the Charter to consider whether the case was already being considered by another international body, namely the Ethiopian-Eritrean Claims Commission as contended by both parties. In reality, the Commission did not apply the provisions of article 56(7) but rather decided that for practical reasons, the Ethiopian-Eritrean Claims Commission would be better suited to handle the matters raised by the complainant. Indeed, and referring to its decision in *Embga Mekongo v Cameroon*,[130] it enunciated:

> In principle the appropriate remedy of those claims submitted to the Claims Commission should be monetary compensation. However, it is also within the Claims Commission's mandate to provide other types of remedies that are acceptable within international practice. It is probable that the African Commission will reach a decision finding the respondent states in violation of the rights of the individuals on whose behalf Interights is acting. However, as was the case in *Mekongo v Cameroon*, the African Commission would certainly be constrained in awarding compensation and may have to refer this matter to the Claims Commission and at which point the matter would certainly be time barred.[131]

The Commission therefore declined to decide on the merits of the case. It misleadingly gave the impression that the communications could still be reconsidered by the Commission in the event the Claims Commission does not fully address the human rights violations alleged by the complainant in the communications. This is contrary to the provisions of article 56(7) of the African Charter, more so after the Commission noted that the Claims Commission is bound to apply international law in its proceedings. In the case of *Njoku v Egypt*,[132] the Commission held that communications are inadmissible under article 56(7) of the African Charter only if they 'have been settled' by another international body.[133] One should therefore understand that the Commission will not consider the matter settled if the violations of human rights have not been fully addressed. However, the Commission is not equipped to assess whether the alleged human rights violations were effectively addressed. The hearings of the Claims Commission are held *in camera* unless the parties agree otherwise.[134] The Commission will exclusively rely on the submissions

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[128] Art 1 on states' obligations under the African Charter; art 2 on the prohibition of discrimination; art 3 on the right to equality; art 12 on the freedom of movement and seek asylum; art 14 on the right to property; art 15 on the right to work; art 16 on the right to health; art 18 on the right to family life.

[129] The Commission referred to its position in *Rencontre Africaine Pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHRPR 1996).

[130] *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995).

[131] *Interights v Ehiopia and Eritrea supra* n 125, para 59.

[132] *Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997).

[133] Para 56.

[134] See art 13(5) of the Rules of Procedure of the Claims Commission, available at http://www.pca-cpa.org/ENGLISH/RPC/EECC/Rules%20of%20Procedure.PDF [accessed 9 June 2006].

made to it by both respondent states on the process before the Claims Commission and on the decision of the Claims Commission the respondent states would have submitted to it to assess whether the people who claim that their rights have been violated have been adequately compensated.

## 7. CONCLUSION

So far, the jurisprudence of the Commission has developed mostly through the individual complaint mechanism. A wide array of rights, including the right to health, collective peace and security and a challenge to the death penalty have been dealt with by the Commission in 2003. The Commission used a broad interpretative approach to promote the aims and spirit of the African Charter, which in exceptional cases, led it to find violations beyond the allegations of the complainant.[135] However, the question of implementation and compliance with the Commission's decisions remains a major impediment to the Commission's fulfilment of its mandate.[136] Like a candle in the wind, the Commission is facing a massive challenge in developing a culture of human rights in Africa. However, it is certainly not fading before the backlog of communications and overwhelming human rights violations on the continent.

[135] See *Sudan (II)* case *supra* n 81.

[136] On the lack of implementation of the decisions by the Commission see Louw L *An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights* (2005) LLD thesis, University of Pretoria, unpublished.