

# Commentary on communications decided by the African Commission on Human and Peoples' Rights in 2004

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## 1 INTRODUCTION

This note deals with the decisions handed down by the African Commission on Human and Peoples' Rights (ACHPR, the Commission) in 2004 as published in the *African Human Rights Law Reports*.<sup>1</sup> The note forms part of a series of comments on the Commission's case law published in the Forum section of *Law Democracy & Development*.<sup>2</sup>

The African Commission on Human and Peoples' Rights decided a total of 12 communications in 2004. Four communications were found to be inadmissible, while nine proceeded to a decision on the merits. In addition, one file was closed when the communication was withdrawn by the petitioner, as the issues raised in the petition appeared to be in the process of resolution within the domestic jurisdiction.<sup>3</sup> The decision on the first inter-state communication to be decided by the Commission is also covered in this commentary. *Democratic Republic of Congo (DRC) v Burundi, Rwanda & Uganda* was decided in 2003, but only published by the Commission in 2004.<sup>4</sup>

It is proposed to discuss the communications according to the issues that arise at the admissibility stage and thereafter at the merits stage.

## 2 ADMISSIBILITY

Article 56 of the African Charter on Human and Peoples' Rights (African Charter) sets out the criteria that communications must meet in order for

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1 The Reports can be downloaded from [http://www.chr.up.ac.za/centre\\_publications/ahrlr/ahrlr.html](http://www.chr.up.ac.za/centre_publications/ahrlr/ahrlr.html)  
2 Killander M 'Communications before the African Commission on Human and Peoples' Rights 1988–2002' (2006) 10(1) *Law, Democracy and Development* 101–117; Lim H & Ramarosan M 'Like a candle in the wind: Commentary on the communications decided by the African Commission on Human and Peoples' Rights' (2006) 10(2) *Law, Democracy and Development* 101–121.  
3 *B v Kenya* (2004) AHRLR 67 (ACHPR 2004)  
4 (2004) AHRLR 19 (ACHPR 2004)

them to be admissible.<sup>5</sup> The admissibility test consists of seven criteria. The criterion most often emphasised on by the Commission, and the basis on which the decisions of admissibility most often turn is the exhaustion of local remedies. In the Commission's decisions in 2004, the majority of findings of inadmissibility were grounded on the non-exhaustion of local remedies. In two cases, non-exhaustion of local remedies was alleged in addition to the non-fulfilment of other criteria.<sup>6</sup> With regard to decisions declared admissible, exhaustion of local remedies was contested in three cases, but complainants were able to successfully argue to the contrary.<sup>7</sup>

## 2.1 Exhaustion of local remedies

The complaint in *Miss A v Cameroon*<sup>8</sup> relates to the arrest and indefinite detention of persons, where no charges or trial is conducted soon after their arrest. The complainant alleged that the detainees had never been formally charged, never appeared in court and had never had access to a lawyer. Such indefinite detention tends to violate the right to liberty, the right to be promptly brought before a judicial officer and at least one of the tenets of the right to fair trial, that an arrested person should be tried within a reasonable time.<sup>9</sup> Several constitutions of African countries provide a maximum time (usually 48 hours) within which detained persons must be brought before a competent court.<sup>10</sup> The Constitution of Cameroon is, however, not one of these.

In the course of exchanging correspondence on the case, the state informed the Commission that the detainees had been acquitted for 'lack of criminal charges' and 'for non-proven facts'.<sup>11</sup> The position was confirmed by the complainant, who indicated the possibility of negotiating with the state on the is-

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- 5 African Charter art 56 'Communications relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they:
1. Indicate their authors even if the latter request anonymity,
  2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
  3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity,
  4. Are not based exclusively on news disseminated through the mass media,
  5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
  6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
  7. Do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.'
- 6 *Bakweri Lands Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004) and *B v Kenya* (n 3 above)
- 7 *Odjouriby v Benin* (2004) AHRLR 15 (ACHPR 2004), *Democratic Republic of Congo (DRC) v Burundi, Rwanda and Uganda* (n 4 above), *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004)
- 8 (2004) AHRLR 39 (ACHPR 2004)
- 9 African Charter arts 6, 7(1)(d)
- 10 Algeria, Benin, Cape Verde, Democratic Republic of Congo, Eritrea, Ethiopia, The Gambia (72 hours), Ghana, Kenya (24 hours, or for capital offences 14 days), Lesotho, Liberia, Malawi, Mali, Namibia, Nigeria (1 day or more depending on the distance of the competent court from the detention area), Seychelles (24 hours), Sierra Leone (72 hours, or for capital offences 10 days), Somalia, South Africa, Swaziland and Uganda.
- 11 Para 15

sue of compensation for the detentions.<sup>12</sup> The Commission held that the trial and subsequent acquittal of the detainees was evidence of the availability of local remedies and also that the communication had been submitted before these remedies had been exhausted,<sup>13</sup> even though the complainant did not disclose any efforts that had been made to exhaust local remedies.<sup>14</sup>

The Commission found that one avenue for redress that may have been open to the complainant was an application for *habeas corpus*, an order for the production of the detained persons before court. As it turned out, the trial and acquittal of the detainees was completed before the Commission considered the case on admissibility. Even though the complainant had stated in the complaint that the detainees had 'never been formally charged, they [had] never appeared in court and never had access to a lawyer',<sup>15</sup> the Commission noted that the case was submitted to the Commission while it was 'still before the courts'.<sup>16</sup> It is not clear where the Commission derived this fact from given the complainant's allegations. Further, while it is not evident that the complainant had exhausted all recourse available, the Commission's conclusion that the fact that 'the case was tried properly before a court of law shows the availability of local remedies' appears to be premature. The Commission has declared remedies to be 'available' where a petitioner can pursue the remedy without impediment.<sup>17</sup> If the complainant's allegation that the detainees were arrested and never arraigned before a court is true, it is a possibility that the only reason why the trial took place was because the Commission was seized of the matter. It is open to question whether this would be sufficient basis on which to declare that local remedies were available.

In the *Bakweri Land Claims Committee v Cameroon*,<sup>18</sup> where the alienation of land which would result in the extinguishment of title was at issue, the non-exhaustion of local remedies, which had been raised in addition to other objections to admissibility, ultimately was the basis on which the decision of inadmissibility of the communication was made. The complainant from the outset acknowledged the non-exhaustion of local remedies, but sought to justify this non-exhaustion by relying on the exception 'unless it is obvious that this procedure is unduly prolonged' as stipulated in article 56(5);<sup>19</sup> as well as the Commission's jurisprudence against application of the exhaustion of local remedies rule where it was impractical or undesirable to do so.<sup>20</sup> The justification consisted in illustrating the futility of taking the matter through the court process in Cameroon<sup>21</sup> because of the perceived lack of impartiality within the judiciary.

12 Paras 20–21

13 Para 25

14 Paras 9, 11

15 Para 3

16 Para 25

17 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 32

18 See (fn 6 above).

19 Para 24

20 *Ibid*, citing *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 37

21 *Bakweri Land Claims Committee v Cameroon* (fn 6 above) para 26

The Commission has often stated that the exhaustion of local remedies is necessary, *inter alia*, so that the state respondent in the communication has notice of the allegations made against it. Bringing a complaint to the domestic adjudicative mechanisms also ensures that the Commission is not placed in the position of a court of first instance. The Bakweri Land Claims Committee (BLCC) explained at length that all the attempts made to petition the government on this issue constituted sufficient notice of its existence. Further, that the discretionary manner in which judicial decisions are adhered to or not, as well as the extraordinary powers the President of Cameroon wields over the judiciary, was ample evidence of the impracticability of pursuing local remedies.<sup>22</sup> The lack of progress from the various efforts attempted to resolve the complaint, it was argued, 'suggest[s] that remedies either do not exist or cannot be effective in the complainant's situation and in any event, their application is being increasingly prolonged'.<sup>23</sup>

In response to these explanations, the Commission reiterated that while the requirement under article 56(5) should be interpreted liberally to allow all cases in which the complainants have attempted to exhaust local remedies, the attempt to exhaust local remedies consists in approaching local or national judicial bodies.<sup>24</sup> The complainants had repeatedly attempted to obtain redress through political/administrative means, but had not once approached the courts for resolution. The Commission found, rightly so, that it could not rely on the complainant's subjective assessments of the independence or otherwise of the judiciary to conclude the unavailability of effective remedies in Cameroon.

The wisdom of this position was illustrated in *Kenya Section of the International Commission of Jurists and Others v Kenya*,<sup>25</sup> where the complainants were apprehensive that they would not get a hearing in court due to the nature of their complaint and the perceived partiality of the judiciary. These fears were subsequently allayed when the complainants were granted standing before the domestic courts contrary to their expectations.

The facts of the case were that the Kenya Section of the International Commission of Jurists constituted a panel of eminent jurists from the Commonwealth to examine the judiciary, and subsequently presented the panel's views to the Constitution of Kenya Review Commission (CKRC), established by the Constitution of Kenya Review Act, and mandated with the task of collecting and collating the views of Kenyans, and facilitating the review of the Constitution. The views expressed by the eminent panel cast the judiciary as lacking in independence, incompetent and corruption-ridden, and as failing to inspire the confidence of Kenyans. Recommendations were made as to how the situation of the judiciary could be improved.

After publication of the CKRC's report, two judges, one a High Court judge and the other a Justice in the Court of Appeal commenced judicial review

22 Paras 24–37

23 Para 36

24 Para 55

25 (2004) AHRLR 71 (ACHPR 2004)

proceedings seeking to quash 'the decision and/or proposals actual or intended and/or recommendations of the CKRC ... concerning and touching on the Kenyan judiciary'.<sup>26</sup> Leave was granted for the judicial review, which leave acted as an order barring further proceedings on matters which were the subject of the review. The complainants argued that this amounted to denying Kenyans a new constitution that offered full protection of their human rights. They alleged a violation of articles 1, 7(1)(a) and 9(2) of the African Charter.<sup>27</sup>

The respondent state challenged the admissibility of the communication on the grounds that the complainants had not exhausted local remedies. On their part the complainants alleged that the circumstances of the case rendered the exhaustion of local remedies 'impossible and inordinately convoluted because the judiciary [was] compromised and severely lacking in independence'.<sup>28</sup> They further alleged that they could not expect a fair hearing from the judiciary, since the matter had been precipitated by members of the judiciary arguably representative of the whole judiciary.<sup>29</sup> The complainants expressed scepticism at being admitted as interested parties in order to challenge the suit, and also doubted the likelihood of enforcement of their rights before the Court of Appeal, given that one of the applicants for judicial review on behalf of the judiciary was a judge of the Court of Appeal.<sup>30</sup>

Subsequent to making these submissions, the complainants approached the High Court in Kenya and were granted leave to join the suit as interested parties. The respondent state also took measures to investigate allegations of unethical conduct within the judiciary, providing an opportunity for the complainants to pursue local remedies. This eventuality illustrates clearly the merits inherent in the position that the Commission adopted; against accepting a complainant's mere apprehension as to the ineffectiveness of local remedies as reason to exempt exhaustion of these remedies.<sup>31</sup>

In the case of *Interights & Another v Nigeria*<sup>32</sup> the Commission delivered a finding of inadmissibility for non-exhaustion of local remedies, following a lack of response by the complainants to repeated requests for written submissions on admissibility.<sup>33</sup> The lack of response was interpreted as a failure to show whether local remedies had been exhausted. Loss of contact with the complainant has in previous cases been reason for a finding of inadmis-

26 Para 9

27 Para 14. Art 1 (state parties undertaking to recognise rights in the Charter and to take measures to give effect to rights); art 7(1)(a) (appeal to competent national organs against acts violating rights); art 9(2) (freedom of expression and opinion).

28 Para 34

29 *Ibid.*

30 Para 37

31 Para 42

32 (2004) AHRLR 102 (ACHPR 2004)

33 Para 16

sibility.<sup>34</sup> There is no consistency as to how many attempts should be made to contact the complainant or what time period should be allowed before the complaint is declared inadmissible.<sup>35</sup> Given the telecommunication challenges that exist on the continent, it may be useful for the Commission to set out guidelines to be followed before a communication is declared inadmissible for loss of contact.

In several cases, the complainants were found to have exhausted local remedies and, therefore, their cases were admitted. In *Odjouoriby v Benin*,<sup>36</sup> the complaint was against the judiciary, which institution, according to the Commission, should be approached for the exhaustion of local remedies. The complainant alleged that an appeal filed with the Appeal Court in September 1995 had not been disposed of by the time the Commission was seized of the matter in April 1997. The complainant therefore found himself alleging the same set of facts as both a violation of his rights, as well as the basis for exemption from exhausting local remedies.

In the absence of any rebuttal by the respondent state, the Commission accepted that the procedure for exhausting local remedies was unduly prolonged and as such the complaint was admissible. Even after receiving supplemental information on the case and subsequent steps that had been taken to prosecute the case, the Commission still held the respondent state responsible for the administration of justice in Benin. This was in keeping with the Commission's jurisprudence that stipulates that the onus is on the state to show that local remedies had not been exhausted.<sup>37</sup> The same rationale formed the basis on which the complaint in *Women's Legal Aid Centre (on behalf of Moto) v Tanzania* was declared admissible.<sup>38</sup> The state did not refute the allegation that the complainant was precluded from approaching the Court of Appeal of Tanzania.

The question of exhaustion of local remedies in the *Democratic Republic of Congo (DRC) v Burundi, Rwanda and Uganda*,<sup>39</sup> case was held not to arise because the violations took place within the territory of the complaining state and as such domestic remedies did not exist.<sup>40</sup> The rationale often stated by the Commission for the exhaustion of local remedies is the need to bring the violations to the attention of the violating state through its judicial organs.<sup>41</sup>

34 See *Union des Scolaires Nigériens and Another v Niger* (2000) AHRLR 176 (ACHPR 1994); *Buyingo v Uganda* (2000) AHRLR 320 (ACHPR 1995); *Baes v Zaire* (2000) AHRLR 72 (ACHPR 1995); *Committee for the Defence of Human Rights (on behalf of Madike) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Dumbuya v The Gambia* (2000) AHRLR 103 (ACHPR 1995); *Dioumessi and Others v Guinea* (2000) AHRLR 130 (ACHPR 1995); *Joana v Madagascar* (2000) AHRLR 141 (ACHPR 1996); *Interights (on behalf of Sikunda) v Namibia* (2002) AHRLR 21 (ACHPR 2002); *Woods and Another v Liberia* (2003) AHRLR 125 (ACHPR 2003); *Aigbe v Nigeria* (2003) AHRLR 128 (ACHPR 2003).

35 Compare several reminders in *Interights and Another v Nigeria* and *Union des Scolaires Nigériens and Another v Niger* with two reminders in *Committee for the Defence of Human Rights (on behalf of Madike) v Nigeria* and *Dumbuya v The Gambia*.

36 See (fn 7 above).

37 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996).

38 (2004) AHRLR 116 (ACHPR 2004).

39 See (fn 4 above).

40 Para 63.

41 See *Jawara v The Gambia* (fn 17 above).

In this case, the judicial systems of Burundi, Rwanda and Uganda would have no jurisdiction to address violations within the territory of DRC.

In line with the Commission's jurisprudence in cases where mass violations of human rights had taken place,<sup>42</sup> the communication brought on behalf of Sierra Leonean refugees against Guinea, was declared admissible.<sup>43</sup> Domestic remedies were deemed unavailable due to the life-threatening situation that refugees found themselves in. The fact of violations affecting a large number of refugees, as well as the mass deportations of refugees made it impracticable to exhaust domestic remedies.

The complainants in *Interights & Others v Mauritania*<sup>44</sup> case approached the Commission to contest the proscription of the main opposition political party in Mauritania. The party was allegedly dissolved by the authorities citing action taken by the party's leadership that was damaging to the good image and interests of the country and the incitement of Mauriticians to violence and intolerance, threatening public order, peace and security.

Although the political party contested this action in the Administrative Chamber of the Supreme Court, the respondent contended that there was the possibility of applying for a review of the unfavourable decision made by the Court, and as such, the complainants had not exhausted local remedies. The Commission held that the remedies expected to be exhausted are 'the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice'.<sup>45</sup> Revision of judgment was considered a remedy of exceptional nature as it exists only if certain set-out conditions are met.<sup>46</sup>

The non-exhaustion of local remedies continues to be the prominent stumbling block to the admissibility of cases before the African Commission. The Commission's jurisprudence has amply elaborated on what is meant by local remedies, what is entailed in exhausting them and what the exceptions are to the rule. The communications discussed above have applied this jurisprudence. On the one hand, the cases illustrate the difficulties that complainants encounter in their efforts to find redress at the domestic level, often the frustrations emanating from the judiciary which is central to exhausting local remedies. On the other hand, the importance of attempting to exhaust domestic remedies is highlighted in the number of cases where no efforts were made by the complainant, only to subsequently find that the state was prepared to resolve the issue without the communication going to hearing. The Commission, by insisting on the exhaustion of local remedies in these cases, in accordance with its jurisprudence, maintained its position as a supranational body and not a court of first instance.

42 *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (fn 37 above)

43 *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004)

44 See (fn 7 above).

45 *Interights and Others v Mauritania* (fn 7 above) para 27

46 Paras 28, 29

## 2.2 Other admissibility criteria

Other than the exhaustion of local remedies, the African Charter prescribes that communications may be admissible upon fulfilment of certain other criteria. Of these other criteria, the Commission decided on objections relating to the presence of insulting language in the communication, consideration of the complaint by another international body, and submission of complaint within reasonable time. In addition, one communication was found inadmissible due to loss of contact with the complainant.<sup>47</sup>

The state's objection to admissibility based on article 56(3) in the *Bakweri* case, alleged that the suspicions of the judiciary's lack of independence amounted to insulting and disparaging language, and on that basis the communication should be declared inadmissible.<sup>48</sup> Though the Commission has encountered this objection in various communications,<sup>49</sup> it is yet to clearly delineate what constitutes disparaging and/or insulting language as contemplated by article 56(3). In *Ilesanmi v Nigeria* the Commission found that disparaging and insulting language must be aimed at 'undermining the integrity and status of the institution bringing it into disrepute'.<sup>50</sup> In the *Bakweri* case, the complainant's allegations of partiality and lack of independence were considered to be mere allegations and an expression of the complainants' perspectives as to how successful their claim would be in local courts. This did not amount to disparaging or insulting language.<sup>51</sup>

The objection relating to article 56(7) was dismissed on the grounds that though the complaint had been submitted to the UN Sub-commission, it was not decided on the merits.<sup>52</sup> The lack of a decision obviates reliance on article 56(7), whose underlying principle is the *ne bis in idem* rule, the prevention of double jeopardy.<sup>53</sup>

In *Rabah v Mauritania*<sup>54</sup> the contention that the communication was submitted after an unduly long time after the exhaustion of local remedies, was raised in the dissenting opinion of Commissioner Yasir Sid Ahmad El Hassan. Commissioner El Hassan argued that the Commission should have considered that it took the complainant six years after the conclusion of his case in the Supreme Court in Mauritania before he submitted his communication to the Commission.<sup>55</sup> This unreasonable delay contravened article 56(6) of the African Charter. Further, the events around which the communication arises took place in 1975 before Mauritania ratified the African Charter in

47 *Interights and Another v Nigeria* (fn 32 above)

48 *Bakweri Land Claims Committee v Cameroon* (fn 6 above) para 38

49 See e.g. *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997); Communication 268/2003 *Ilesanmi v Nigeria* Eighteenth Activity Report 2004–2005 Annex III.

50 *Ilesanmi v Nigeria* (fn 49 above) para 35

51 *Bakweri Land Claims Committee v Cameroon* (fn 6 above) para 48

52 Para 53

53 Para 52

54 (2004) AHRLR 78 (ACHPR 2004)

55 Para 41. The African Charter does not stipulate a time within which the complaint should be brought before the Commission after exhaustion of local remedies.

June 1986.<sup>56</sup> The majority decision examined only the exhaustion of local remedies, indeed the respondent was requested to comment on only this aspect of admissibility.<sup>57</sup>

In the inter-state communication brought by DRC, the respondents' first challenge to admissibility was brought on a procedural issue.<sup>58</sup> Uganda and Rwanda alleged that the decision by DRC to address the complaint to the Commission rather than to them and the Secretary General of the OAU was fatal to the admissibility of the claim.<sup>59</sup> The Commission disagreed as to the fatality of the omission and declared the procedure was meant to promote conciliation and was discretionary, thus, DRC was not under any obligation to follow it.<sup>60</sup> Further, the respondent states were duly informed by the Commission of the complaint against them, another purpose to be achieved by the procedure. As such, the option exercised by DRC to bypass the conciliation stage was not fatal to the admission of the complaint, as article 49 of the Charter allows for this possibility.

The Commission further confirmed its jurisdiction over humanitarian law issues arising in the complaint by citing article 60 and 61 of the African Charter, as well as the right to international and national peace and security affirmed in article 23.<sup>61</sup>

It is apparent that other admissibility criteria are not as often raised as the requirement to exhaust local remedies, and are not as elaborately discussed by the Commission. As emerges from the dissenting opinion in the *Rabah* case, a preoccupation with the local remedies rule may also overshadow the consideration of other admissibility criteria, and the Commission should guard against this.<sup>62</sup>

### 3 DECISIONS ON MERIT

The communications decided on the merits covered a range of alleged violations of rights. In six of the seven cases decided on merits, the Commission found that the respondent states had violated provisions of the African Charter. This section will discuss some of the issues arising from the Commission's decisions.

#### 3.1 Evidence

The Commission is a quasi-judicial body whose findings to communications are not binding on states. The nature of the Commission, including the part-time status of the members, the time allocated to meetings and consideration

56 The Commission has held communications to be inadmissible where the cause of action arose before the African Charter entered into force for the respondent state, and there is no continuing violation subsequent to entry into force. See e.g. *Njoka v Kenya* (2000) AHRLR 132 (AHRLR 1995); *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

57 *Rabah v Mauritania* (fn 54 above) para 14

58 *Democratic Republic of Congo (DRC) v Burundi, Rwanda and Uganda* (fn 4 above)

59 Para 54

60 Paras 57–58

61 Para 65

62 See (fn 57 above).

of communications, as well as its administrative capacity all impinge on its ability to thoroughly investigate the issues raised in cases brought before it. However, it is not clear how evidence submitted to the Commission affects the decisions made. The Commission has previously stated that its role is not to evaluate the facts, but rather to see that the process followed does not violate the Charter or the state's own law.<sup>63</sup> The seemingly contradictory stance with regard to evidence is illustrated in the cases below.

In *African Institute for Human Rights & Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* the complainants alleged that following a speech by the President of Guinea on 9 September 2000, widespread violations of human rights were perpetrated against Sierra Leonean refugees living in Guinea.<sup>64</sup> The President in his speech allegedly proclaimed that Sierra Leonean refugees should be arrested, searched and confined to refugee camps. In apparent response to this speech, Guinean soldiers and civilians committed violations that included looting and extortion of refugees; violence ranging from beatings, rapes, shootings; arrests and detention without just cause; widespread rape of Sierra Leonean women and humiliating searches of both men and women; and forcible return of the refugees to Sierra Leone where they faced the ravages of civil war.<sup>65</sup> The complainants produced as evidence of their allegations, several affidavits by victims of the acts of discrimination against Sierra Leonean refugees.

Guinea responded to the complainant's allegations by invoking the right to defend its territorial integrity, the responsibility for which is vested in the President of the Republic. The respondent rejected the allegation that Sierra Leonean refugees were discriminated against, stating that the President's speech and measures resorted to by the state were not targeted against Sierra Leoneans.<sup>66</sup> The respondent state was critical of the evidence by witnesses and victims of violations insisting that further evidence of alleged incidents should be produced.<sup>67</sup>

The Commission, in reaching a decision, appears to have avoided the question of adequacy of evidence that was the cornerstone of the respondent's submissions. The respondent contested in particular that Guinean soldiers were involved in shootings in front of the Sierra Leone Embassy building.<sup>68</sup> Guinea also requested that the complainants provide a transcript of the President's speech in order to prove incitement.<sup>69</sup> The Commission's general response was that 'submissions before the Commission led it to believe that the evidence and testimonies of eyewitnesses reveal that these events took place immediately after the speech of the President of the Republic of Guinea on 9 September 2000'.<sup>70</sup> The Commission then proceeded to find the respondent

63 See *Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997) paras 60, 61.

64 See (fn 43 above).

65 Paras 1-7

66 Para 55

67 Paras 61-66

68 Paras 63-64

69 Para 55

70 Para 73

in violation of articles 2, 4, 5, 12(5) and 14 of the African Charter and article 4 of the OAU Convention Governing the Specific Aspects of Refugees in Africa of 1969.<sup>71</sup>

The Commission focused more on linking the speech to the violations and took for granted that the evidence placed before it was factual. This raises the question of standard of proof and to what lengths a complainant should go to provide evidence of violations before the Commission. The Commission passed up an opportunity to deliberate and pronounce on this issue.

In *Interights & Others v Mauritania*, the Commission was implicitly invited on the basis of the evidence submitted to decide where the line should be drawn between competing rights.<sup>72</sup> The purpose for which the complainants adduced evidence was to show that although the state did not approve of being criticised, the exercise of the party's freedoms of expression and association was not a threat to the state security. The Commission agreed with the respondent that the acts attributed to the complainant could have jeopardised the rights of individuals and the collective security of the state, but there is no discussion as to the basis on which this decision is arrived at. The impression given as a result is that the Commission did weigh the evidence adduced, but is not forthcoming on what factors were considered.

In the case of *DRC v Burundi, Rwanda & Uganda*, violations of looting of the natural resources of the complainant state were found on the basis of evidence that the Commission had (but presumably not presented by the parties).<sup>73</sup> The Commission did not confine itself to the evidence presented by the parties to come to its conclusions, rather it pro actively utilised relevant information submitted to the UN Security Council.<sup>74</sup>

### 3.2 Limitations to rights

The complainants in the case of *Interights & Others v Mauritania*, alleged violations to articles 1, 2, 9(2), 10(1), 13 and 14 of the Charter.<sup>75</sup> The Commission considered the evidence proffered by the complainant, as well as that of the respondent and eventually made its decision by assessing the extent to which rights should be limited. The Commission avoided dwelling at length on whether on the facts presented before it, the complainants had indeed taken action 'damaging to the good image and interests of the country and the incitement of Mauritians to violence and intolerance, threatening public order, peace and security' as alleged by the state. It would appear as though this was the thrust of the evidence adduced before it; the complainants seeking to show that the statements and actions by the party leaders were not cal-

71 Para 74. Art 2 (non-discrimination); art 4 (inviolability of the human being); art 5 (dignity, physical and moral integrity, prohibition against exploitation and degradation particularly slavery); art 12(5) (mass expulsion of non-nationals); art 14 (property); art 4 OAU Refugee Convention (non-discrimination)

72 See (fn 7 above).

73 See (fn 4 above) para 91.

74 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of the Congo 12 April 2001 S/2001/357.

75 See (fn 7 above). Art 1 (recognition of rights, duties and freedoms); art 2 (non-discrimination); art 9(2) (opinion); art 10(1) (association); art 13 (participate in government); art 14 (property).

culated to incite the citizens of Mauritania; and the respondent attempting to prove the converse. The Commission without giving reasons, stated that the state was right in contending that 'the attitudes or declarations of the leaders of the dissolved party could indeed have violated the rights of individuals, the collective security of the Mauritians and the common interest ...'.

In making its decision, the Commission chose to focus on how far states may limit rights. From the Commission's jurisprudence, article 27(2) of the Charter is considered to be the general limitation clause.<sup>76</sup> States should not also use their national legislation by virtue of 'claw back' clauses to deprive rights provided in the Charter of meaning. Limitations to rights in order to conform to the provisions of the Charter, should be imposed 'with due regard to the rights of others, collective security, morality and common interest, ... based on a legitimate public interest and should be strictly proportionate with and absolutely necessary to the sought after objective'.<sup>77</sup> The Commission found that the respondent had at its disposal various other sanctions without resorting to the dissolution of the party. As such, it had violated article 10(1) of the Charter.<sup>78</sup>

A similar observation was made in *Prince v South Africa*<sup>79</sup> where the Commission found that the state's restriction on the complainant's right to freedom of religion was justified in that 'the right to hold religious beliefs should be absolute; the right to act on those beliefs should not'.<sup>80</sup> Referring to article 27(2) of the Charter, the Commission reiterated that rights could be limited, as long as such limitations were founded in legitimate state interest and were strictly proportionate and absolutely necessary to achieve the ends intended. The limitations imposed on the right to freedom of religion were found to conform to this standard. No violations were found in respect of the rights to occupational choice, dignity or culture, because the complainant could choose to accommodate the restrictions placed on the use of cannabis for the greater good of the society.

### 3.3 Findings incongruent with alleged violations

It is intuitively expected that the Commission would find for or against violations of alleged rights, and that these violations would be alleged against a state. In the case of *Rabah v Mauritania*,<sup>81</sup> the complainant alleged that he and his family were forcefully evicted from their ancestral domicile by one Mohammed Ould Bah who claimed ownership to the land on which the complainant lived, on the basis that the complainant's mother had donated the land before her death. The complainant alleged that the claim that Mohammed Bah had over the land was that the complainant's mother was Mohammed Bah's slave. The complainant used the judicial system in Mauritania to vindicate his claim to no avail. He then wrote to the highest authorities

76 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 66

77 *Interights and Others v Mauritania* (fn 7 above) para 79 (footnotes omitted)

78 Para 85

79 (2004) AHRLR 105 (ACHPR 2004)

80 Para 41

81 See (fn 54 above).

including the President of the Republic contesting what he perceived as the state's support for slavery. The complainant thus alleged *inter alia* violation of his right to non-discrimination, equality, physical and moral integrity, dignity and the prohibition of slavery.<sup>82</sup> The Commission found that without an explanation of why the land was allegedly donated to Mohammed Ould Bah, the complainant's right to property was violated.<sup>83</sup>

This is an interesting conclusion reached by the Commission particularly since the violator of the complainant's right to property is presumably Mohammed Ould Bah and not the respondent, also since there was no explicit allegation of a violation of this right in the first place.<sup>84</sup> The complainant alleged discrimination in the enjoyment of rights, such as the right to property.<sup>85</sup> Assuming that the Commission did in reality intend on finding a violation of the complainant's right to property, it is arguable that the Commission was, in effect, acting as a court of appeal from the decisions of the domestic courts. Concluding on the basis of inadequacy of evidence, that the dispossession of property was a rights violation was tantamount to reviewing the decisions of the domestic courts.<sup>86</sup> It is not clear what the Commission is alluding to, when it mentions that the complainant lost the case at the domestic level due to 'a weak judicial system and not on the basis of the practice of slavery or slave-like practices', particularly because the Commission acknowledged that the complainant received all fair trial guarantees.<sup>87</sup> The Commission failed to address itself to the alleged violations of other rights in the Charter, which if they had dealt with, may have provided a stronger basis on which to hold the state accountable.

The dissenting opinion focuses on the majority's analysis of the issues in the communication and the admissibility of the communication. On the substance of the claim, Commissioner El Hassan dissented with the majority for several reasons. The allegation that the dispossession of property was a consequence of slavery was not made in the proceedings at the domestic level. The Commission's reliance on a translated summary of the documents may have led to the Commission's failure to take note of this, as well as accepting the complainant's allegations as fact. Entertaining new allegations in the communication placed the Commission in the position of a court of first instance. Commissioner El Hassan also took issue with the fact that the complainant did not allege a violation of article 14 on which the decision of the majority was based. His argument was that the courts in Mauritania could not lawfully restrain the complainant's mother from donating her property to a person of her choice, and a reason why such a donation takes place cannot be demanded in the absence of a legal prohibition on such a donation.

82 The complainant alleged violations of art 2 (non-discrimination); art 3 (equality); art 4 (inviolability of the human being); art 5 (dignity, physical and moral integrity, prohibition against exploitation and degradation particularly slavery); art 6 (liberty and security); art 7 (right to have one's cause heard – impartiality of courts); art 8 (conscience); art 9 (information, opinion); art 11 (assembly).

83 Para 31

84 Para 3

85 Para 17

86 See *Njoku v Egypt* (fn 63 above).

87 *Rabah v Mauritania* (fn 54 above) para 28

Often, it is difficult to follow the legal reasoning behind decisions the Commission arrives at; for example, in this case, it is not explicit in the decision how the Commission came to the conclusion that there was no violation of the rights alleged by the complainant, but the right to property, not specifically alleged, had been violated, simply because no reason for bequeathing the property to one person as opposed another was evident. The Commission should not hesitate to make findings against the complainants and for states where the evidence proffered does not support a finding of violation.

### 3.4 Interpretation of international treaties

The Commission found in the inter-state communication that Rwanda and Uganda had perpetrated violations against DRC and civilians in the part of the DRC territory that they had occupied.<sup>88</sup> The respondent states were found to have violated the principle of non-interference in the internal affairs of another state; the failure to maintain international peace and security; and the violation of the right of the people of DRC to self-determination. The Commission recommended that adequate reparations be paid for and on behalf of the victims of the atrocities committed.

In deciding this case, the Commission called to aid the interpretation clauses, articles 60 and 61, of the African Charter for guidance on peace and security issues, as well as humanitarian law principles. The Commission used the international law instruments it cited to draw principles of international law and establish their violation (where possible) simultaneously, with violations of the African Charter. Where acts committed did not expressly violate a Charter right, the Commission inferred violation nonetheless through invoking articles 60 and 61 of the Charter.<sup>89</sup> In this way the Commission exploited the utility of articles 60 and 61 to illustrate the extent to which the respondent states had acted inconsistently with their international law obligations (in this case the Geneva Conventions and Additional Protocols), even where no express violation of the Charter could be found on a particular set of facts.

The use of articles 60 and 61 not only as an aid to establishing principles of international law, but further, as a basis for inferring violations of instruments other than the Charter is innovative, but also casts the net wide, in that the Commission did not consider the ratification status of the states *vis-à-vis* the instruments it considered to be 'special international conventions' within the meaning of the Charter. The implication of this is that states can be found to have violated rights enshrined in instruments that they have not ratified on the basis of articles 60 and 61 of the African Charter.<sup>90</sup>

88 *Democratic Republic of Congo (DRC) v Burundi, Rwanda and Uganda* (fn 4 above)

89 The besieging of the hydroelectric dam in Lower Congo province is found to be a violation of The Hague Convention (II) with Respect of the Laws and Customs of War on Land, art 23 and therefore by invoking article 60 and 61, are in violation of the African Charter. *DRC v Burundi and Others* (fn 4 above) para 84.

90 *cf African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (fn 43 above) para 41 where the Commission finds a violation of the OAU Convention Governing the Specific Aspects of Refugees in Africa of 1969, but specifically mentions that Guinea has ratified this and other relevant treaties.

The findings of the Commission are in tandem with similar conclusions reached by the International Court of Justice which delivered its judgment against Uganda on 19 December 2005.<sup>91</sup> The ICJ found Uganda in violation *inter alia* of the principle of non-use of force in international relations and the principle of non-intervention; in violation of its obligations under international human rights law and international humanitarian law; in violation of obligations owed to the DRC under international law in relation to the plundering of its natural resources; and that Uganda was under an obligation to make reparation to the DRC for injury caused.

### 3.5 African Commission *vis-à-vis* Domestic Courts

The African Commission being an international adjudicatory body insists on considering communications only after domestic legal remedies have been exhausted. This is in recognition of the sovereignty of states and their prerogative to an opportunity to redress alleged violations within their territory before external intervention. The Commission restated its supervisory role at the supranational level in the case discussed below.

#### 3.5.1 *Prince v South Africa*<sup>92</sup>

This communication alleged the violations of the complainant's rights to dignity, conscience and religion, work and culture,<sup>93</sup> emphasising the interrelatedness of what are often referred to as first and second generation rights. The complainant belonged to the Rastafari religion and claimed that the use of cannabis was an integral part of the practice of this religion. When he applied to the Law Society of the Cape of Good Hope for registration of a contract of community service in order to qualify as an attorney, as part of the legal requirement, he disclosed two previous convictions for possession of cannabis and his intention to continue using cannabis as part of his religious observance. He was, as a result, denied registration of his contract for not being a 'fit and proper person' to be admitted as an attorney.

The complainant made a case for exemption from the laws that criminalised possession and use of cannabis in order to accommodate the use of cannabis for religious purposes. He claimed that by proscribing the use of cannabis, the relevant law brings within its scope use of the drug for legitimate religious purposes, thereby infringing on rights. He was not advocating for a complete lifting of the ban on cannabis, rather a reasonable allowance of its use for genuine religious purposes.

The state in response emphasised that placing limitations on rights did not necessarily mean that those rights were not available to the complainant. The limitations placed on the right to freedom of religion in this case were reasonable and legitimate and did not infringe on the right further than was necessary. The state denied that the limitations to this right denied the com-

91 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* International Court of Justice Judgment of 19 December 2005

92 (Fn 79 above)

93 Arts 5, 8, 15 and 17(2) of the Charter

plainant the right to take part in the Rastafarian cultural life. With regard to professional choice, it was submitted that the complainant's choice not to adhere to the relevant laws were what resulted in the denial of registration. Attorneys were obliged to uphold and obey the law.

With regard to the general consideration of the case, the respondent was of the view that it had been carefully considered by the domestic judicial system, the case having reached the Constitutional Court of South Africa, the highest court able to determine constitutional issues. The respondent urged the Commission in its decision to bear in mind the role of tribunals at the international level (including the Commission) *vis-à-vis* the national courts, that this role should be 'subsidiary, ... narrower and supervisory ... in subsequently reviewing a state's choice of action against standards set by the provisions of the African Charter'.<sup>94</sup> The margin of appreciation doctrine was also invoked by the state, claiming that a certain level of discretion should be afforded to the state in the implementation and application of human rights standards and norms, based on the state's familiarity with the dynamics of its society.<sup>95</sup> To contradict, therefore, the decision of the national courts in this case would lead to conflicts between the national and international legal systems.

The Commission acknowledged that the principles of subsidiarity and the margin of appreciation doctrine were relevant to its work of giving effect to Charter rights. However, it disagreed with the narrow scope of its role as perceived by the respondent, seeing such a narrow scope as having the effect of ousting the Commission's mandate. The Commission cited the requirement for the exhaustion of local remedies, as well as the latitude afforded in some provisions of the Charter through which states could limit rights, as manifestations of the two principles in the Commission's work.

The express recognition of the subsidiarity principle and margin of appreciation doctrine in the work of the Commission presents it with an opportunity to further develop the rules which guide the application of these principles. It is evident from the Commission's response to these issues, that the lines are hazy that demarcate the supervisory mandate of the Commission from the sphere within which national courts operate. The Commission is also evidently, and to its credit, prepared to robustly defend what it perceives as its mandate to monitor and oversee the implementation of the African Charter. However, it failed to clearly enunciate what that mandate entails in relation to these principles and therefore set straight the uncertainty as to the extent of discretion allowed to states.

### 3.6 Fair trial

The cases below illustrate the Commission's role at the international level of ensuring that the rights in the Charter are upheld within national jurisdictions even where it means delving into domestic court procedure.

<sup>94</sup> Para 37

<sup>95</sup> *Ibid.*

### 3.6.1 *Odjouoriby v Benin*<sup>96</sup>

The complainant alleged that he was denied justice by virtue of the prolonged duration which a case had been pending at the Appeal Court in Cotonou. The Commission found a violation of article 7(1)(d) of the African Charter, which protects the right to be tried within a reasonable time.<sup>97</sup> The complainant alleged that an appeal filed with the Appeal Court in September 1995 had not been disposed by the time the Commission was seized of the matter in April 1997. It is interesting that the Commission applied this article to civil proceedings in this case, whereas the article is more often applied in criminal proceedings. The Commission elected not to determine whether there was a violation to the right to property, which was the subject matter of the proceedings in the Court of Appeal, as this would have amounted to the Commission pre-empting a decision by the national courts on the issue.

### 3.6.2 *Interights & Others v Mauritania*<sup>98</sup>

The Commission assessed the arguments of the parties with a view to establishing whether the right to a fair trial had been violated by the state. The complainant alleged that the proceedings violated the right of appeal, the principle of *audi alteram partem* and the final judgment did not sufficiently legally justify the dissolution of the party. The state on its part argued that it had complied with article 7(1)(a) of the Charter because the competent national organ to determine matters concerning political parties was the Administrative Chamber of the Supreme Court. The Supreme Court is the highest authority in Mauritania and, therefore, no appeal lies to any other court. On the issue of hearing, the state alleged that the complainants had the opportunity to present their written or oral submissions before the court, an opportunity they did not take advantage of. The Commission, in the result, held that the complainant's right to a fair trial had not been violated.<sup>99</sup>

### 3.6.3 *Women's Legal Aid Centre (on behalf of Moto) v Tanzania*<sup>100</sup>

In this case the Commission was faced with the task of pronouncing on whether court procedure met the standards set in the African Charter. The complainant, Sophia Moto, approached the Commission after a civil suit she had filed at the High Court of Tanzania was dismissed without a hearing when neither she nor her advocate appeared before the court on the date set for hearing. A review of this decision came to naught, and by applying for review of the order in the same court, she was precluded from appealing the dismissal decision to the Court of Appeal of Tanzania. She alleged that this procedure of dismissal denied her the right to have her case heard, as well as her right to property which was the substantive issue in her civil suit.<sup>101</sup>

96 (Fn 7 above)

97 *Odjouoriby v Benin* (fn 7 above) para 30

98 (Fn 7 above)

99 Para 47

100 (Fn 38 above)

101 African Charter art 7 (right to be heard); art 14 (property)

The complainant alleged that she was not at any time issued with summons or a notice of hearing and thus, she was unaware of the hearing date. Her advocate was present at the setting of the hearing date but failed to advise her of that date. By dismissing the case for non-appearance she was being punished whereas the mistake that led to non-appearance was attributable to her counsel. The complainant thereby suffered a violation of her right to have her suit heard as well as her right to matrimonial property vindicated.

The respondent state was of the view that the court could not be faulted for dismissing the suit since the complainant's legal representative was present at the setting of the date. The complainant had grounds to proceed against her attorney for the failure to appear in court on the hearing date, rather than placing the blame on the courts. The court acted within the provisions of the Civil Procedure Code and it was rather the complainant who had failed to follow procedure. The respondent stated that the complainant had failed to adduce evidence on her right to property though the right to property is recognised by the state.

The Commission was of the view that although the Civil Procedure Code allowed for the dismissal of a suit for non-appearance, the relevant provisions did not impose a mandatory duty on the courts to dismiss such suits, and in addition the provisions allowed for the plaintiff to contest such dismissal and have it set aside. The decision to dismiss the suit without hearing it resulted in uncertainty over the complainant's rights which were to be determined in the suit. Procedural rules were held to be central to the realisation of substantive laws and, therefore, for rights to be given effect, procedures had to be applied in a just manner. The Commission perceived its role as supervisory over procedures that states have enacted. Should these procedures not facilitate the enjoyment of rights, the state would be found in violation.

Accordingly, Tanzania was found in violation of article 7(1)(a); failure to ensure the right to a hearing due to procedural rules where discretion was exercised contrary to the requirements of the African Charter and the rules of natural justice. The Commission urged Tanzania to apply its rules of procedure without fear or favour and allow the complainant to be heard on appeal.

### 3.7 Administrative capacity

Some of the pervasive criticisms of the African Commission relate to its weak administrative capacity, resulting in part from the lack of adequate funding. The reach of this particular weakness is evident in the outcome of communications, and should provide impetus for correction to eliminate negative outcomes on the administration of justice.

Underlying the issues raised in the dissenting opinion in *Rabah v Mauritania*, is the question of the capacity of the Commission to work in Arabic (one of the working languages of the Commission) the language in which most of the communication documents were submitted.<sup>102</sup> The dissenting opinion

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102 (Fn 54 above)

states that the Commission worked only on an inaccurately translated summary of part of the documents.<sup>103</sup>

#### 4 CONCLUSION

The communications decided in 2004 by the African Commission exposed a variety of issues that point to the need for the Commission to strengthen both its consideration of substantive questions as well as administrative capacity to handle cases, as the latter has an impact on the former. In admitting complaints the exhaustion of local remedies has been shown to be by far the most prominent criterion for admission, but it should not overshadow the development of jurisprudence on other criteria. The Commission also needs to make clear its position on evidence, whether and to what extent it will verify facts, since these facts invariably form the crux of cases, and failure to give evidence due consideration may result in the miscarriage of justice. The weighing of evidence obviously needs to be balanced with the Commission's role at the international level and the caution it must exercise so as not to appear as an extension of the domestic legal system. The utilisation of the interpretation clauses in the African Charter to find violations of other international treaties similarly needs to be further elaborated on in particular to delimit the extent to which the clauses are useful. As it is now, it appears that states can be found in violation of rights enshrined in treaties that they have not ratified.<sup>104</sup>

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103 Paras 33, 45

104 Compare with art 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights provides that the court shall have jurisdiction over disputes submitted to it concerning the interpretation and application of *inter alia* 'any other relevant human rights instrument ratified by the states concerned'.