

Like a candle in the wind: Commentary on communications decided by the African Commission of Human and People's Rights in 2003*

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1 INTRODUCTION

The Africa regional overview 2003 prepared by Amnesty International presented a gloomy picture of the human rights situation in the region; widespread armed conflict, repression of civil and political rights, violence against women, failure to deliver justice to the most vulnerable in society.¹ However, there have been positive developments, such as the indictment of the then Liberian President Charles Taylor by the Special Court for Sierra Leone, which defy the culture of impunity in Africa. Despite continuing human rights violations and human suffering, a culture of human rights is slowly developing in Africa. The gradual development of a human rights jurisprudence by the African Commission of Human and People's Rights (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 with 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 deemed inadmissible. Two files were deemed inadmissible because of the withdrawal of the complaint,³ one due to loss of contact with the complainant,⁴ and three due to the non-exhaustion of local remedies.⁵ Substantive rights considered in admissible

* 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

2 Art 45 of the African Charter provides the 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 des Réfugiés Mauritanien au Senegal v Senegal* (2003) AHRLR 131 (ACHPR 2003); *Institute for human rights and*

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communications include non-discrimination, equality before the law, the right to a fair trial, freedom from torture, the right to liberty and security, and the right to collective peace and security. All the communications are reported in the African Human Rights Law Report 2003. The article is structured in the form of a case-by-case commentary. Each case is discussed in terms of its admissibility and merits.

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 the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by UN General Assembly in 1993,⁷ and the 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 this 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 deprived 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 were 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 had been violated.¹⁴

development in Africa (on behalf of Simbarakiye) v Democratic Republic of the Congo (2003) AHRLR 65(ACHPR 2003).

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 (fn 6 above) par 1.

10 Par 4.

11 Pars 5-6.

12 Pars 7-8.

13 Par 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 health; Art 18(4) Right of disabled and aged persons.

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) which requires complainants to exhaust local remedies before submitting a case before the Commission. The rationale 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 legal recourse to mental patients whose rights were violated. The respondent state, while conceding that under the LDA there was no provision for review or appeal procedures, argued that 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 a 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 an 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

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 *Purohit* case (fn 6 above) par 25; Also see *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) par 31.

17 *Institute for human rights in Africa v Democratic Republic of the Congo* (2003) AHRLR 65 (ACHPR 2003) par 26. Although the communication was declared inadmissible due to non-exhaustion of local remedies, the Commission took the opportunity to further expand 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 or effective.

18 *Ibid* par 26.

19 *Purohit* case (fn 6 above) par 36.

that article 6 of the African Charter had not been violated, because the article does not provide for the cases where a person is institutionalised 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, which states that '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 built into 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's obligation under 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 obligations 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 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 realisation 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 constitutes a

20 Par 68.

21 Par 64.

22 African Charter, art 6.

23 *Purohit* case (fn 6 above) pars 64-65.

24 Par 64.

25 Par 83.

26 Par 80.

27 Par 81; Art 18(4) of the African Charter provides that the aged and the disabled should have the 'right to special measures of protection'.

28 Substantive issues arising from the implementation of the ICESCR, General Comment No 14 (2000) The right to the highest attainable standard of health (Art 12 of the ICESCR), par 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' (2005) 6 *ESR* 4.

29 *Purohit* case (fn 6 above) par 84.

30 The Commission considered the issue of non-discrimination directly when determining whether the Gambia had violated articles 2 and 3, and indirectly when considering articles 5 and 13(1) of the African Charter.

violation of articles 2 and 3, which essentially deal with non-discrimination and equal protection before the law. Unfortunately, the Commission did not fully explore the issue with regard to people 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 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 people 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 argued that the mental patients detained under the LDA could bring claims under the tort law that and 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 could afford such legal recourse. Such can be viewed as discrimination based on 'social origin and fortune'³³ and such provisions fall short of international standards.³⁴ The Commission again emphasized the application of a principle of non-discrimination in respect of a right to enjoy a right to human dignity. The Commission emphasized that mentally disabled persons also have the right to enjoy a decent life and that their dignity should be protected and respected.³⁵ Determining whether the Gambia had violated article 5 of the African Charter, the Commission drew its inspiration from both its jurisprudence³⁶ 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' dehumanised and violated the 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 broadly as possible.³⁸ The principle of non-discrimination also sets the basis for interpreting article 13(1) of the African Charter. Article 13(1) provides 'every citizen' with the right to political participation which 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

31 Standard Rules (fn 8 above) par 17.

32 African Charter, art 2.

33 *Ibid.*

34 *Purohit* case (fn 6 above) at pars 52-53.

35 Par 60.

36 Par 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 (fn 6 above) par 60.

38 Par 59; see *Media Rights Agenda v Nigeria* (fn 36 above).

39 African Charter, art 13(1).

limited on the basis of the '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 has more to do with the lack of 'objective and reasonable criteria based on law' to prohibit political participation of mental patients than with advocating a blanket application of the right.⁴²

3 INCOMMUNICADO DETENTION CASE: ZEGVELD AND ANOTHER v ERITREA⁴³

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 concern over violations of civil and political rights in Eritrea. In its 2003 regional overview, Amnesty International criticised 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 the People's Front for Democracy and Justice (PFDJ).

The communication was submitted by Dr Liesbeth Zegveld, an international lawyer, and Mr Mussie Ephrem, 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.

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 argued that their attempts to exhaust local remedies were met with indifference and that their efforts brought no response from the Eritrean authorities.⁴⁷ The Commission's decision on the issue of exhaustion of local remedies

40 *Purohit* case (fn 6 above) par 75.

41 Par 76.

42 *Ibid.*

43 *Zegveld and Another v Eritrea* (2003) AHRLR 72 (ACHPR 2003).

44 Africa regional overview (fn 1 above).

45 *Ibid.*; also see Human rights overview on Eritrea *Human Rights Watch*, available at <http://www.hrw.org/english/docs/2004/01/21/eritrea6987.htm>.

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 (fn 43 above) at pars 25-27.

in this particular communication reflects its continued effort to apply the rule to accommodate the realities in many African states. As the 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 that the judiciary in Eritrea was undermined and heavily influenced by the government.⁵⁰ Considering the above situation in Eritrea, the Commission refused to apply the rule of the exhaustion of local remedies 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 has the responsibility to bring a person detained before a competent court of law to ensure that the person is tried 'in accordance with national and international standards'.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. Such state has the 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, 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 enshrined in the African Charter. The Commission, after considering the fact that the 11 persons were detained *incommunicado* since September 2001 and had never been formally charged, declared that

48 *Amnesty International and Others v Sudan* (2000) AHRLR 297(ACHPR 1999).

49 Par 31.

50 Africa regional overview (fn 1 above).

51 *Zegveld* case (fn 43 above) at par 35.

52 Par 39.

53 *Velasquez Rodriguez v Honduras*, judgment of 29 July 1988, Inter-Am Ct HR (Ser C) 4 (1988) cited in *Zegveld* case (fn 43 above) par 36.

54 *Zegveld* case (fn 43 above) par 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 Par 45.

the respondent state violated articles 2, 6, and 7(1) of the African Charter. The Commission pointed out that, although article 6 is not an absolute right, 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 could itself be 'a form of cruel, inhuman or degrading punishment and treatment',⁵⁸ which is prohibited under article 5 of the 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' detentions should conform to basic standards of human rights.⁶⁰ When determining whether article 9(2)⁶¹ was violated or not, the Commission once again concerned itself with arbitrary restrictions of freedom of expression based on national laws that fall short of international human rights standards. The Commission conceded that freedom of expression comes with duties and can be restricted by 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 the 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 assumed power through a coup. He subsequently banned all political parties and controlled the Sudanese press in order to restrict the political

56 Par 52.

57 Par 55.

58 Par 5.

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 (fn 43 above) par 55; also see *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995), par 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 has the right to express and disseminate his opinions within the law.

62 *Zegveld* case (fn 43 above) par 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 Par 60.

64 Par 62.

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 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 dissolved 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 Charter⁶⁸ 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 charge 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 destabilized 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 in violation of its 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.

65 'Omar Hasan Ahamad al-Bashir', available at http://en.wikipedia.org/wiki/Umar_Hasan_al-Bashir.

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.html.

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 (fn 67 above) pars 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.

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 the 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 the 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 are at all times responsible for acts of torture conducted in their territory, regardless of the identity of the perpetrators. It therefore held that the 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 the violation of article 6, the Commission found that arresting individuals and detaining them without charging them constitutes 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 the violation of article 7(1), the Commission carefully dissected the facts to subject them to the application of 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 were responsible for publicity aimed at declaring the suspects guilty of an offence before a competent court had established their guilt or innocence. 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 amounted to a violation of article 7(1)(c).⁷⁶ Finally, although the Commission protested 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

71 *Sudan (I)* (fn 67 above) pars 38-39.

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

73 Par 46.

74 Par 50.

75 Par 53.

76 See also *Amnesty International and Others v Sudan* (fn 48 above) 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.

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 their 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).

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 organisation in Sinnar, Blue Nile State. He was prohibited from travelling and was threatened by security officers. Furthermore, between 1999 and 2002, Mr Suleiman suffered several arrests and attacks on his office and person. The complainant alleged violations of articles 9, 10, 11 and 12 of the African Charter.⁸² It was also alleged that all such rights were suspended under the National Security Act 1994, as amended in 1996.⁸³

Determining the issue of admissibility, the Commission was again faced with the question of the exhaustion of local remedies. The Commission is of the view that the rule of the 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 the 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 the present case, the Commission considered the effectiveness and accessibility of the local remedies in Sudan under the particular circumstances of the alleged victim, Mr Suleiman. In its earlier decision, *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

78 The Commission confused terms at par 64 when it noted that 'the composition of the military court alone is evidence of impartiality.'

79 See *Media Rights Agenda v Nigeria* (fn 36 above) cited by the Commission.

80 *International Pen and Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

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 (fn 81 above) par 6.

84 Par 29; also see *Jawara v The Gambia* (fn 16 above) par 30.

85 *Institute for Human Rights in Africa v DRC* (fn 17 above) par 28.

86 *Amnesty International* case (fn 48 above).

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 to 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 had been violated. Relying on article 60 of the African Charter, the Commission drew inspiration from international jurisprudence.⁹¹ The Commission carefully considered the value of freedom of expression and tried to find a balance between necessary restrictions based on law and arbitrary restrictions. Drawing from the Inter-American Court's 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 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 the standards and principles of international human rights. The Commission found that the arbitrary and excessive restrictions placed upon 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.

4.3 *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 behaviour consisted of girls kissing, wearing trousers, dancing with men, crossing legs with men, and sitting and talking with boys, which were

87 *Amnesty International* case (fn 48 above) par 37 cited in *Sudan (II)* case (fn 81 above) par 30.

88 *Sudan II* case (fn 81 above) par 36.

89 Par 35.

90 Par 34.

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 (fn 78 above) par 52.

93 Par 53.

94 *Curtis Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003)

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 punishment 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 the application or limitation 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, the application of which cannot be precluded by 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 punishment.⁹⁸ It concluded that although 'ultimately whether an act constitutes inhuman degrading punishment or punishment depends on the circumstances of the case',

[t]here 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.

95 See *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).

96 *Curtis Doebller* case (fn 94 above) par 37.

97 Par 41.

98 At par 38, the Commission referred to the case of *Tyrer v United Kingdom* (2 EHRR 1 (1979-80)).

99 Par 37.

100 Par 42.

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 BACKWARDS TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: *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 Sections 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 have been hanged in the country.¹⁰⁴ The latest execution was conducted in April 2006.¹⁰⁵ The execution of Ms Bosch, a South African national, drew attention to the practice of the 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-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 the 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 for 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

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 are reprinted in Heyns C (ed) *Human rights law in Africa* (2004) 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>.

105 *Ibid.*

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).

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 as 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 person is sentenced to death.¹¹⁰ The Commission did not find it necessary to address the question whether the 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

Concerning 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 victim's family of 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 did not find any extenuating circumstances because Ms Bosch 'involved considerable effort and careful planning'¹¹² in preparing the murder. No violation was found on the basis 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

107 *Interights and Others v Botswana* (fn 101 above) par 26.

108 *Ibid.*

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* (fn 81 above).

111 Chenwi argues that this decision of the Commission could open a 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.

112 *Interights and Others v Botswana* (fn 101 above) par 36.

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 sufficient notice amounts to, 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.¹¹³ One would have expected the Commission to set further minimum standards that states imposing death sentences must respect, besides the requirement for respect of due process. Furthermore, the Commission did not find any violation of article 1 of the African Charter.

With regard to 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 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 CONTRADICTIONARY DECISION ON *LOCUS STANDI* : THE CASE OF ASSOCIATION POUR LA SAUVEGARDE DE LA PAIX AU BURUNDI v KENYA, RWANDA, TANZANIA, UGANDA, ZAIRE AND ZAMBIA¹¹⁴

The crisis in the Great Lakes region culminated in 1994 with the Rwandan genocide. Although peace was re-established in the country, killings of Tutsis and Hutus persisted in the neighbouring country of 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

¹¹³ See also Chenwi (fn 111 above).

¹¹⁴ *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Botswana, Tanzania, Uganda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003).

taken at the Summit of the Great Lakes Region held in Tanzania to sanction the unconstitutional change of government in 1996 in Burundi. The Commission agreed 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 the Commission acknowledged 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. Rather, it 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 perpetrated in Burundi aggravated 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

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.

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 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 whether 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 had conducted on-site investigations at the time of the event. The allegations of violations of article 23(2)(b) of the Charter 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

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 (fn 114 above) par 72.

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, 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 (fn 114 above) par 75.

122 Par 76.

123 See Olinga (fn 116 above) 430.

124 *Sudan (I)* case (fn 68 above).

7 A CONFUSING DECISION ON ADMISSIBILITY UNDER ARTICLE 56(7) OF THE AFRICAN CHARTER: *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 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 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 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 preferred 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 in considering 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 *Embaga Mekongo v Cameroon*,¹³⁰ it enunciated:

125 *Interights (on behalf of Pan African 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.

127 *Interights v Ethiopia and Eritrea* case (fn 125 above) par 46.

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 seeking of 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 *Embaga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995).

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, should the Claims Commission 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 rely exclusively on the submissions 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.

8 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 were 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

131 *Interights v Ethiopia and Eritrea* (fn 125 above) par 59.

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

133 Par 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>.

135 See *Sudan (II)* case (fn 81 above).

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.

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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.