

Communication 313/05 – Kenneth Good v Republic of Botswana**Rapporteur:****Summary of the Complaint**

1. The Complaint is submitted by INTERIGHTS, Anton Katz and Max du Plessis (Complainants) on behalf of Mr Kenneth Good (victim), against the Republic of Botswana (Respondent State).
2. The Complaint states that Mr Kenneth Good, an Australian national, teaching at the University of Botswana, had his employment terminated after his expulsion from Botswana on 31 May 2005.
3. It is submitted that in February 2005, in his capacity as Professor of Political Studies at the University of Botswana, the victim co-authored an article concerning presidential succession in Botswana. The article criticized the Government, and concluded that Botswana is a poor example of African Presidential succession.
4. The Complainants submit that, on 18 February 2005, the President of Botswana, exercising the powers vested in him by section 7(f) of the Botswana Immigration Act, decided to declare the victim an undesirable inhabitant of, or visitor to, Botswana. The victim was not given reasons for this decision, nor was he given any opportunity to contest it.
5. On 7 March 2005, the victim launched a constitutional challenge in the Botswana High Court. On 31 May 2005, the High Court dismissed the application ruling that Section 7 (f) of the Botswana Immigration Act relates to what the President considers to be in the best interest of Botswana, and Sections 11(6) and 36 of the same Act make the President's declaration unassailable on the merits.
6. On 31 May 2005, the victim was deported from Botswana to South Africa.
7. On 7 June 2005, the victim filed a notice and grounds of appeal in the Court of Appeal of the Republic of Botswana. On 27 July 2005, the Court of Appeal delivered a judgment dismissing the victim's appeal. The Court of Appeal held that the President, in making such declarations, is empowered to act in what he considers to be the best interest of the country, without judicial oversight.
8. The Complainants submit that the Court of Appeal is the highest judicial authority in Botswana. No further right of appeal or challenge lies from the decision of this court.

The Complaint

9. The Complainants allege that the Respondent State has violated Articles 1, 2, 7 (1) (a), 9, 12 (4), and 18 of the African Charter on Human and Peoples' Rights.

The Procedure

10. The Communication was received at the Secretariat of the African Commission on 24 November 2005.
11. During the 38th Ordinary Session held from 21 November to 5 December 2006, the African Commission was seized of the Communication.
12. On 15 December 2005, the Secretariat of the African Commission informed the parties accordingly and requested them to submit arguments on Admissibility. The Secretariat of the African Commission forwarded a copy of the Complaint to the Respondent State.
13. On 13 March 2006, the Secretariat of the African Commission received written submissions on Admissibility from the Complainants.
14. By Note Verbale dated 5 April 2006, the Secretariat forwarded a copy of the Complainants' submission on Admissibility to the Respondent State and reminded the latter to submit its arguments on the same.
15. On 18 April 2006, the Secretariat received an e-mail from one of the lawyers of the alleged victim requesting to be invited to make oral submission at the 39th Ordinary Session.
16. On 6 May 2006, the Secretariat received the submission on Admissibility from the Respondent State.
17. On 10 May 2006, the Secretariat of the African Commission received a letter from the Centre for Human Rights of the University of Pretoria submitting an *amicus curiae* brief.
18. On 20 May 2006, the Secretariat received further submission on Admissibility from the Respondent State.
19. At its 39th Ordinary Session, the African Commission considered the Communication and decided to defer it to its 40th Ordinary Session.
20. By Note Verbale and by letter dated 14 July 2006, the Secretariat notified both parties of the decision of the Commission and informed them that they can make further submission on Admissibility if they so wished.

21. On 3 October 2006, the Secretariat received a fax from the Complainants forwarding a copy of a letter of appeal addressed by the victim to the President of the Republic of Botswana, and the response of the Senior Private Secretary to the President.
22. On 4 October 2006, the Secretariat received the Complainants' response to the Respondent State's further submission on Admissibility.
23. On 7 November 2006, the Secretariat received a letter from the Respondent State requesting the Commission to purge the Complainants' additional submissions from the record because the State was not invited to make additional submission.
24. At its 40th Ordinary Session held in Banjul, the Gambia, from 15 to 29 November 2006, both parties were given audience before the Commission and the State requested to receive copy of the letter sent to the Complainants inviting further arguments, and to be given time to respond to the additional submissions made by the Complainants.
25. The Commission decided to defer consideration of the Communication to its 41st Ordinary Session and instructed the Secretariat to forward a copy of the above letter to the Respondent State.
26. By Note Verbale dated 12 February 2007, the Secretariat forwarded the above letter to the Respondent State and requested the latter to submit its observation on the same.
27. On 25 April 2007, the Secretariat received the response of the Respondent State on the Complainants' further submissions.
28. By Note Verbale dated 30 April 2007, the Secretariat acknowledged receipt of the Respondent State's response.
29. At its 41st Ordinary Session, the African Commission considered the Communication and decided to declare it Admissible.
30. By Note Verbale of 20 June 2007 and letter of the same date, both parties were notified of the Commission's decision.
31. On 2 October 2007 and 10 October 2007, the Secretariat received the Complainants' and Respondent State's submissions on the Merits, respectively.
32. By Note Verbale of 22 October 2007 and letter of the same date, the Secretariat acknowledged receipt of the Complainants' and Respondent State's submissions on the Merits and forwarded each other's submission to the other party.

33. At the 42nd Ordinary Session the Secretariat received the Complainants' response to the Respondent State's submissions on the Merits.
34. During the same 42nd Ordinary Session, the Respondent State raised a preliminary objection on the procedure of the Commission and the Commission decided to defer the Communication to allow the Secretariat prepare a decision on the preliminary objection.
35. By Note Verbale of 19 December 2007 and letter of the same date, the Secretariat informed both parties of the Commission's decision.
36. At its 44th Ordinary Session, the Commission dismissed the Respondent State's preliminary objections and requested that both parties submit within three months, their responses to the submissions of the other party.
37. By Note Verbale of 5 January 2009 and letter of the same date, both parties were informed of the Commission's decision and requested to make further submissions on the Merits within three months.
38. On 3 February 2009, the Respondent State requested for a month extension of time to make further submissions on the Merits.
39. By Note Verbale of 9 February 2009, the Secretariat granted the extension of time requested by the Respondent State.
40. By letter of 10 February 2009, the Complainant was informed of the extension of time granted to the Respondent State.
41. By a Note Verbale dated 27 March 2009, the Secretariat invited the Respondent State to forward its further submissions on the Merits.
42. On 7 November 2009, the Respondent State made a complaint regarding the procedures followed by the Secretariat in inviting the parties to make further submissions on the Merits.
43. On 8 April 2009, the Respondent State made further submissions objecting against the Commission's approach and application of the procedure laid down in Rule 119(2)(3) of Rules Procedure and requested the Commission to review its ruling.
44. By Note Verbale dated 14 April 2009, the Secretariat notified the Respondent State of the Commission's decision to take a decision on the Merits during its 45th Ordinary Session and further invited the State to make its submissions no later than 30 April 2009.
45. By a Note Verbale of 16 April 2009, the Secretariat informed the Respondent State that the latter's concerns and issues will be tabled before the Commission during its 45th Ordinary Session.

46. By a letter and Note Verbale of 7 December 2009, the Complainants and Respondent State were informed of the Commission's decision to defer consideration of the Communication to its 47th Ordinary Session.

The Law

Admissibility

Complainants' submission

47. The Complainants submit that the requirements set in Article 56 of the African Charter have been satisfied, as the author of the Communication has been identified and relevant details of the Communication have been provided to the Commission, including details of those individuals and organisations representing the victim. According to the Complainants, the Communication is compatible with the Constitutive Act of the African Union and with the African Charter. The Communication is presented in a polite and respectful language, and is based on information provided by the victim and on court documents, not on media reports. The Complainants state that the present Communication has not been submitted to any other international human rights body for investigation or settlement.
48. The Complainants claim that on 7 March 2005, the victim launched an application challenging the constitutionality of the Botswana Immigration Act. The application, which challenged the President's decision to expel him from Botswana, was dismissed by the High Court of Botswana in a unanimous judgment. They submit that the High Court in its judgment found that the President's declaration under Section 7(f) of the Immigration Act relates to what the President considers to be in the best interests of Botswana and Sections 11(6) and 36 of the same Act make the President's declaration unassailable on the merits.
49. The Complainants submit further that on 7 June 2005, the victim filed a notice and grounds of appeal to the Court of Appeal, in which he sought an order setting aside both the judgment appealed against and the decision of the President of 18 February 2005. On 27 July 2005, the Court of Appeal delivered a judgment dismissing the victim's appeal. The Court of Appeal held that the President in making such declarations is empowered to act in what he considers to be the best interests of the country, without judicial oversight and that the Parliament which decreed that the President's decisions are not subject to disclosure did not act *ultra vires* in doing so.
50. The Complainants aver that both Courts found that the President, in making his declaration that the victim was an "undesirable inhabitant or visitor to Botswana", is empowered to act in what he considers to be the best interests of the country, without judicial oversight. The Courts ruled that in terms of the Act, the President's decisions are not subject to disclosure or challenge in a court of law and he did not act *ultra vires*.

51. The Complainants submit that the Court of Appeal is the highest judicial authority in Botswana and no further right of appeal or challenge lies from the decision of this Court.
52. As a result of the above, the Complainants argue that all domestic remedies available in the Respondent State have been exhausted for the purpose of Article 56(5). They also submit that the Communication is brought before the Commission within three months of having exhausted such domestic remedies, pursuant to Article 56(6).

Respondent State's Submissions

53. In its submissions, the Respondent State challenges the Commission's existence and its competence to hear the case. Regarding the existence of the Commission, the Respondent State submits that the Commission was established within the Organisation of African Unity (OAU) and that the OAU ceased to exist in July 2001, and no provision was made for the continuance of the work of the Commission in the Constitutive Act of the African Union (AU) that took over from the OAU.
54. The State further submits that Article 5 of the Constitutive Act, which lists the AU Organs, does not mention the African Commission, and that the AU did not make use of the capacity vested in it under Article 9(1) (d) of the Constitutive Act to establish any other organ to bring the Commission back to existence. The Respondent State therefore concludes that the Commission has ceased to exist along with the OAU.
55. However, the Respondent State does not challenge the existence of the African Charter, which it considers a "mere instrument of noble ideals which unfortunately is devoid of any operational structures...".
56. With respect to the Commission's competence *rationae materiae* (subject matter of the Communication), the Respondent State holds that the Communication concerns immigration matters which are not part of the mandate of the Commission spelled out in Article 45 of the Charter. The State submits further that in terms of Article 13 of the Constitutive Act, it is the Executive Council which is responsible for immigration matters.
57. The Respondent State argues that in case the Commission finds itself to be in existence and to have jurisdiction over the matter, the Communication should notwithstanding be declared inadmissible for non-compliance with Article 56 of the African Charter.
58. It is the State's view that the Communication is not compatible with the African Charter. It submits that not all the elements of the Communication have been disclosed to the State, placing the latter "in an untenable position where it does not know the exact nature of the Complaint against it," and that therefore

- the Communication is irregular and/or non-compliant with Rule 104(e) as read with Article 56(2) of the African Charter.
59. The Respondent State also states that Article 23(1) of the African Charter recognises peoples' rights to national and international peace and security, and that Article 12(2) allows States Parties to restrict the right to freedom of movement by means of law for the "protection of national security, law and order..." The State holds that the interpretation of these provisions is that "States must be left alone and allowed to deal with matters of peace and national security". The Respondent State submits that the matter before the Commission involves national security and that the Commission has no competence over it.
 60. The Respondent State further submits that the decision to expel the victim was taken by the President in accordance with the law as required under Article 12(4) of the African Charter.
 61. The Respondent State argues that the victim's expulsion was confirmed by the courts and that the State has the obligation under Article 26 of the Charter to guarantee the independence of the judiciary and cannot interfere with their rulings.
 62. The Respondent State also states that the victim's appeal to courts in Botswana was dismissed with costs, which he has not yet paid, and that by instituting proceedings before the Commission he is just trying to escape his obligation in Botswana. The State concludes that the Communication is frivolous and vexatious, and that it should be rejected and held inadmissible.
 63. The Respondent State further submits that the victim did not avail himself of the possibility offered to him to resort to the President to review the decision expelling him. It is therefore the State's submission that local remedies have not been exhausted.
 64. For all the aforementioned reasons, the Respondent State prays the Commission to declare the Communication inadmissible.

Response of the Complainants to the Respondent State's submission on Admissibility

65. The Complainants submit that the fact that the OAU ceased to exist does not affect the existence of the Commission, and that the latter continues to exist *de facto* and *de jure*. *De facto*, the work of the Commission was not hindered or suspended as a result of the coming into force of the AU Constitutive Act: it continued considering communications; holding sessions; undertaking visits to States Parties, including the Respondent State, which continues to collaborate with it. *De jure*, the AU Assembly, by its decision, ruled that the Commission "shall henceforth operate within the framework of the African Union" (Ass./AU/Dec.1 (1)).

66. The Complainants argue that the African Charter established the Commission and the fact that the African Charter is still in force, as the Respondent State did acknowledge, is tantamount to recognizing the existence of the African Commission.
67. With respect to the disclosure of documents to the State, the Complainants argue that the Communication is not based on media reports but on the information provided by the victim and on court documents, and that only two judgments have been enclosed because they are the only ones relevant at the particular stage of the proceedings and from the point of view of exhaustion of domestic remedies.
68. The Complainants also challenge the argument of the Respondent State that the Commission does not have jurisdiction over immigration matters. They submit that that Article 45(2) mandates the Commission to protect human rights generally, without leaving out the rights of immigrants or people facing deportation, noting that Article 12 of the Charter makes clear reference to migration.
69. The Complainants finally submit that the other points of the State's submission relate to the merits and should not be considered at this stage of the procedure, adding that the Communication meets all the admissibility requirements and should be declared Admissible.

Respondent State's reaction to the Complainant's response to its submissions

70. In an oral submission during the 40th Ordinary Session of the Commission, and by letter dated 22 March 2007, the Respondent State submitted that the additional submission on Admissibility by the Complainants should be purged from the record of proceedings because the invitation to make additional submission was a misuse of the procedure under Rule 119 of the Commission's Rules of Procedure. It is the Respondent State's view that no reason was given for inviting the Complainants to submit and that the letter was signed by a Finance and Administration Officer (FAO), who is not a member of the Commission, and in inviting the Complainants to submit, the FAO unlawfully participated in the deliberations or decisions of the Commission.
71. The Respondent State goes on to reiterate its statement that the Commission is an emanation of the Charter, which established it to work within the OAU. The dissolution of the OAU, the State submits, deprived the Commission of the legitimacy and authority as mechanism for the settling of disputes. According to the Respondent State, in the absence of an amendment to Article 30 of the African Charter to enable the Commission to operate within the AU, and without an AU decision integrating the Commission as an organ of the AU, the African Commission lacks legal basis to continue performing its mandate under the African Charter.

Decision of the Commission on the Respondent State's challenge of its existence and competence

72. Considering that the Respondent State contests the existence of the African Commission and its jurisdiction to hear the matter complained of, the Commission will deal with those two points before dealing with the Admissibility of the Communication.
73. Regarding the existence of the Commission, the Respondent State submits that the Commission was established within the OAU, and that the OAU ceased to exist in July 2001 and no provision was made for the continuance of the work of the Commission in the Constitutive Act of the African Union that took over from the OAU.
74. According to the Respondent State, Article 5 of the Constitutive Act, which lists the AU Organs, does not mention the African Commission, and the AU did not make use of the capacity vested in it under Article 9(1)(d) of the Constitutive Act to establish any other organ to bring the Commission back to existence. The Respondent State therefore concludes that the Commission has ceased to exist along with the OAU.
75. In terms of Article 30 of the African Charter, "An African Commission on Human and Peoples' Rights, ... shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa". It is the Commission's view that having been established by the African Charter, the termination of a treaty other than the Charter cannot affect its existence.
76. The Commission would like to emphasize that although it was established by the African Charter and not a direct emanation of the OAU Charter, it was operating within the framework of the OAU, the latter being the main political organisation on the continent. As an organisation working within the framework of the OAU, the Commission relied on the OAU for its funding and its staffing,⁵⁵ and for the execution of its decisions against Members States found to be in violation of the Charter.⁵⁶ With the coming into force of the Constitutive Act, all the "assets and liabilities" of the OAU "... and all matters relating thereto," including relevant institutions established within the OAU, were devolved to the AU.⁵⁷ That is why, the Heads of State and Government of the AU, at their first Ordinary Session held in Durban, South Africa, from 8 to 10 July 2002, accepted to take over the obligations the OAU used to bear *vis-à-vis* the African Commission. In its decision on the Interim Period, the Assembly of the African Union decided that "the African Commission on Human and Peoples' Rights and the African Committee of Experts on Rights

⁵⁵ Arts 41 & 44 of the African Charter on Human and Peoples' Rights adopted on 1981.

⁵⁶ Art 58 of the African Charter

⁵⁷ Constitutive Act of the African Union adopted on 11 July 2000, Art 33(1).

- and Welfare of the Child shall henceforth operate within the framework of the African Union.”⁵⁸
77. As a matter of fact, the AU assumed towards the Commission the same obligations as previously borne by the OAU. The AU appoints the 11 Members of the Commission, provides staff to the Secretariat, funds the day-to-day work of the Commission, and adopts the reports submitted by the Commission. Moreover, Member States of the AU (which are also States Parties to the African Charter), including the Respondent State, continue to cooperate with the African Commission, by submitting their reports under Article 62 of the Charter, by hosting sessions and missions of the Commission, and by actively participating in the communication procedures when complaints are brought against them before the Commission.
78. The Commission takes note of the fact that, although it challenges the existence of the Commission as a monitoring body, the Respondent State does not contest the existence of the Charter itself. The Commission observes that, unlike some other international human rights systems where the substantive rights and their monitoring bodies are dealt within two complementary but different instruments, in the African system, the same instrument, the African Charter, makes provisions for substantive rights and organises their monitoring mechanism.⁵⁹ Under the Charter, therefore, States Parties are not given the option of recognising the substantive rights without accepting the jurisdiction of the African Commission, which was established to promote and protect those rights.
79. The Commission concludes that the termination of the OAU Charter and subsequent dissolution of the OAU does not affect its existence. The Commission is still in existence and performs its activities within the framework of the AU.
80. Regarding the jurisdiction of the Commission over immigration matters, the Commission is of the view that there is no provision in the African Charter or in the Constitutive Act excluding the jurisdiction of the African Commission over such matters. The jurisdiction of the Commission is founded by Article 45 of the African Charter which reads: “The functions of the Commission shall be [to]: 2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.”
81. This provision should be read together with the relevant substantive provisions of the Charter to find out whether, under its protection mandate, the Commission has jurisdiction over a given matter. Regarding specifically immigration matters, Article 12 of the Charter states that:

⁵⁸ Decision on the Interim Period, Ass/AU/Dec.1 (I), para 2(xi)

⁵⁹ Part 1 of the African Charter is dedicated to “Rights and duties” and Part 2, to “Measures of safeguard”.

1. *“Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.*
 2. *Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.*
 3. *Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.*
 4. *A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.*
 5. *The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”*
82. It appears from the provision of Article 45(2), read together with Article 12, that the Commission has jurisdiction when some human rights related to immigration are involved. The mandate of the Commission in that case is to make sure that, immigration policies and practices do not infringe upon those rights. Hence, the Commission finds that it has jurisdiction over immigration matters.
83. The Commission is of the view that the competence given to it over immigration matters under Articles 45(2) and 12 of the Charter, does not overlap with the mandate of the Executive Council, under Article 13(1)(j) of the Constitutive Act, over the same matters because the two bodies do not perform the same kind of activity. While the Commission is an international quasi-judicial institution established to promote and protect the rights enshrined in the African Charter, the Executive Council is a political organ, which “coordinate[s] and take[s] decisions on policies in areas of common interest to the member states [of the African Union], including...nationality, residency and immigration matters”.⁶⁰
84. Having dealt with the preliminary objections raised by the Respondent State regarding the existence and jurisdiction of the Commission, the latter will now proceed to make a determination on the Admissibility or otherwise of this Communication.

⁶⁰ Art 13(1)(j) of the Constitutive Act of the African Union (the Commission’s emphasis).

The Commission's analysis on Admissibility

85. The Admissibility of Communications submitted before the African Commission in accordance with Article 55 is governed by the requirements of Article 56 of the African Charter. In terms of Article 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 requests anonymity,
 2. Are compatible with the Charter of the Organisation 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 Organisation 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 with the matter, and
 7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.”
86. The African Commission is of the view that this Communication establishes a *prima facie* violation of the provisions of the African Charter, and is compatible with both the Constitutive Act of the African Union and the African Charter. The African Commission also does not believe that there has been any use of a disparaging or insulting language against the Government of the Republic of Botswana or any of its institutions or the African Union.
87. Regarding the disclosure of documents, the Commission finds that the documents submitted by the Complainants in support of the claim sufficiently prove that the Communication is not based on fiction or on news disseminated by the mass media. The Commission concurs, therefore, that the condition of Article 56(4) has been met. The Commission also notes that all the documents submitted by the Complainants have been disclosed to the Respondent State.
88. The Commission recalls its established jurisprudence whereby the exhaustion of local remedies referred to in Article 56(5) ‘entails remedy sought from the courts of a judicial nature.’⁶¹ Such a judicial remedy shall be effective and shall

⁶¹ Communication 221/98 - *Alfred B. Cudjoe v Ghana* (1999) para 14.

- not be subordinated to the discretionary power of public authorities.⁶² The Commission has also affirmed on several occasions that it is not necessary, for the sake of meeting the condition of Article 56(5), to seek 'remedies from a source which does not operate impartially and have no obligation to decide according to legal principles.'⁶³
89. In the present Communication, the victim challenged the decision expelling him from Botswana before the domestic courts. His application before the High Court of Botswana was dismissed, as was a further appeal that he filed with the Court of Appeal, the highest judicial authority in Botswana. The Commission finds therefore that all local remedies have been exhausted. The Commission is of the view that the presidential review referred to by the Respondent State is not of a judicial nature and is subject to the discretionary power of the President, the very authority that ordered the expulsion of the victim. The Commission considers that such a remedy is not effective and the victim is not obliged to utilise it.
90. The Commission further finds that the other arguments⁶⁴ submitted by the State against the Admissibility of the Communication are based on substantive rights protected under the Charter, including the rights, the violation of which is complained of by the applicant, to such an extent that dealing with them at this stage of the procedure would be pushing the Commission to jump the gun to consider the Communication on the Merits. The Commission therefore will not pronounce on them but would rather deal with them at the appropriate stage.
91. From the above submissions, this Commission is of the view that the present Communication sufficiently complies with the requirements under Article 56, relating to the Admissibility of Communications before the African Commission and thus decides to declare the Communication Admissible.

The Merits

Respondent State's preliminary objection to the Commission's procedure

92. At the 42nd Ordinary Session of the Commission, the Respondent State raised a preliminary objection regarding the Commission's procedure in the handling of Complaints/Communications. The main thrust of the State's objection is that the Commission's procedure relating to the handling of Communications was not followed with regards to the present Communication. According to the State, Rule 119 of the Commission's Rules of Procedure was not respected,

⁶² Communication 48/90 - *Amnesty International v Sudan*, 50/91 *Comité Loosli Bachelard v Sudan*, 52/91 *Lawyers Committee for Human Rights v Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa v Sudan* (1999), para 31.

⁶³ Communication 87/93 - *The Constitutional Rights Project (In respect of Zamani Lakwot and 6 others) v Nigeria* (1995) para 8.

⁶⁴ Particularly the arguments raised by the Respondent State regarding the fact that the President made the decision in accordance with Article 12(4) of the Charter and that the expulsion order was confirmed by Botswana High Court and Court of Appeal and hence the State has the obligation not to interfere with the independence of the judiciary under Article 26 of the Charter, are arguments that go into the Merits of the case.

- and as a result, both parties to the Communication, the Respondent State and the Complainants, made submissions to the Commission at almost the same time, making it difficult to respond to issues raised by either party.
93. The Respondent State submits that the Commission had asked both parties to submit their arguments on the Merits, giving both parties the same deadline. Both parties sent their arguments to the Secretariat of the Commission at almost the same time, and the Commission then forwarded the submissions of either party to the other for comments, if any.
94. The Respondent State contends that this procedure deprives it from properly addressing the issues raised by the Complainants as it was not availed a copy of the Complainants' submission prior to the Respondent State making its own submission. In the words of the Respondent State 'it prejudices Botswana greatly in that the applicant has effectively been afforded an undue opportunity to strengthen his case, to the extent that the submissions filed by him raise very many new matters of fact and law which our arguments, as is to be expected, do not deal with'. The Respondent State concluded that the Complainants' supplementary submissions on the Merits be purged off the record.
95. Referring to Rule 119 of the African Commission's Rules of Procedure, the State maintains that it was supposed to have submitted first and the Complainants given the opportunity to reply within a time fixed by the Commission, in accordance with Rule 119 (3).
96. The Commission will thus, first deal with the preliminary issue raised by the Respondent State before proceeding to make a determination on the Merits of the Communication.

African Commission's decision on the preliminary objection

97. In the present Communication, after declaring the case Admissible at the Commission's 41st Ordinary Session, the Secretariat, by Note Verbale of 20 June 2007, and letter of the same date, informed both parties and requested them to submit their arguments on the Merits within three months from the date of notification. On 5 October 2007, the Secretariat received the Complainants' submissions on the Merits of the Communication. On 12 October 2007, the Secretariat received the Respondent State's submissions on the Merits. On 22 October 2007, the Secretariat forwarded the submissions of the Respondent State to the Complainants, and the Complainants to the Respondent State.
98. The purpose of requiring parties to make submissions to the Commission is so that they appreciate the concerns of each other and try to address them as best as they can. That is why the Commission adopted Rules of Procedure governing, among other things, the receipt and consideration of Communications.

99. Rule 119 of the Commission's Rules of Procedure seek to guide the Commission regarding the procedure to adopt after a Communication has been declared Admissible. In terms of Rule 119 (1) 'if the Commission decides that a Communication is admissible...its decision and text of the relevant documents shall as soon as possible, be submitted to the State Party concerned...The author of the communication shall also be informed of the Commission's decision...'. Rule 119 (2) provides further that the State Party ... shall within the ensuing three months, submit in writing to the Commission, ...measures it was able to take to remedy the situation'.
100. From the above two paragraphs of Rule 119, it is the view of the Commission that when a Communication is declared Admissible, both parties must be notified of the decision. While the African Charter obliges the Commission to submit its decisions and other relevant texts relating to its decision on Admissibility to the State Party, it simply requires the Commission to inform the author of the Communication. This presupposes that the Respondent State is the one that is expected to make submissions on the 'merits', to, in the words of the Charter, provide 'explanations or statements elucidating the issue under consideration and indicating, if possible, measures it was able to take to remedy the situation'.
101. This interpretation is supported when one turns to Rule 119 (3) which provides that 'all explanations or statements submitted by a State Party pursuant to the present Rule shall be communicated... to the author of the communication, who may submit in writing additional information and observations within a time limit fixed by the Commission.'
102. It is clear from the above, that after declaring a Communication admissible, both parties are informed of the decision, but the Respondent State is further requested to make submissions on the matter being considered. After the State would have submitted, then the submission is availed to the author of the Communication for his/her comments. The Respondent State seems to be satisfied that the Note Verbale of 20 June inviting it to make submissions on the Merits 'was the correct step'.
103. However, the Respondent State contends that if the Complainants were also invited to make submissions on the merits 'that was a defective step and clearly the Commission will be guilty of breaking its own procedural rules'.
104. The procedure of letting one party submit first and inviting the other to respond will give both parties the opportunity to address the issues or concerns of the other. This exchange of submissions between the State and the author of the Communication can continue until the Commission is satisfied that it has had enough information to make a decision on the matter.

105. The African Commission thus concurs with the Respondent State that when parties are asked to submit at the same time, it does not give both of them the opportunity to respond to issues that are raised by the other party.
106. This notwithstanding, the practice of the Commission is clear. Where it receives submissions from one party, it sends the same to the other party for their comments. Thus, even if the parties make submissions at the same time, the other party is not prejudiced in any way because they are still given an opportunity to respond to the submissions before the Commission can make a determination. This was the situation with respect to the present Communication.
107. The Secretariat received the State's submissions on 12 October 2007 and sent same to the Complainants on 22 October 2007. Thus, the Respondent State was sent the Complainant's submissions and the Complainants were sent the State's submissions, and both parties were entitled to send comments, if any.
108. Thus, even though Rule 119 was not followed to the letter, the Respondent State has not indicated how it was prejudiced by this lapse, to the advantage of the Complainants. The Respondent State has been given an equal opportunity to respond to the submissions of the Complainants just as the Complainants have been given an opportunity to respond to the State's submissions.
109. The Commission accordingly takes note of the fact that Rule 119 of its Rules of Procedure was not followed to the letter, and undertakes to ensure that it is complied with in the future. It holds that since the Respondent State has been given time to respond to the Complainants' submission, its argument that the Complainants' submissions on the matter be purged from the record cannot stand. The African Commission accordingly requests both parties to submit their responses, within three months, on the arguments made by either party.

Submissions on the Merits

Complainants' submissions on the Merits

110. The Complainants allege that the existence and application of the Botswana Immigration Act has violated Articles 1, 2, 7(1) (a), 9, 12(4) and 18 of the African Charter.

Alleged Violation of Article 1

111. With respect to the alleged violation of Article 1 of the African Charter, Complainants submit that the Charter was adopted and acceded to voluntarily by African States and that once ratified, States Parties to the Charter are legally bound by its provisions, adding that States wishing not to be bound ought to have refrained from ratifying.

112. The Complainants refer to Article 31 of the *Vienna Convention on the Law of Treaties* which states that “a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The Complainants also make reference to **Legal Resources Foundation v Zambia**⁶⁵ where the Commission stated that the African Charter must be interpreted holistically and all clauses must reinforce each other. The African Charter must also be interpreted, in light of international norms and consistently with the approach of the other regional and international human rights bodies.
113. The Complainants assert that the fact that the African Charter has not been incorporated into Botswana domestic law may preclude persons in Botswana from relying on the provisions of the Charter before local courts but does not affect recourse to the Commission under the African Charter. States are bound by their ratification of the African Charter whether monist or dualist and even where it revokes the domestic effect of the Charter.⁶⁶ Consequently, they argue, all the provisions of the African Charter addressed below indicate the Respondent State’s failure to respect the African Charter and to ensure its full implementation in violation of Article 1 of the same.

Alleged Violation of Articles 7(1)(a) & 12(4)

114. The Complainants allege that the victim was deprived by law from accessing information relating to the reasons for his being declared a threat to national security, which in turn denied judicial authorities the right to review the President’s decisions. Together, these denials, according to the Complainants, amount to a clear violation of the right to appeal to competent judicial organs, a situation that affects the right to be heard. In this regard, they contend that the right to be heard entails the right to challenge in a court of law, decisions that affect the individual’s fundamental rights.⁶⁷
115. Depending on Sections 7(f), 11(6) and 36 of the Botswana Immigration Act the Complainants aver that the courts that determined the victim’s application and appeal prior to and following his expulsion, found that he had no right to any information regarding the President’s decision, and that the courts had no power to question the reason for his expulsion and that there was no legal limit to the unfettered discretion of the President.
116. According to the Complainants, the victim was not afforded any meaningful opportunity to challenge his expulsion either by way of hearing before the expulsion order was made, or by way of appeal after the order was made. He was not provided with the reasons for his expulsion and was accordingly not afforded an opportunity to challenge those reasons or provide evidence which might contradict them. He was neither given any remedy in respect of the

⁶⁵ Communication 211/98 – *Legal Resources Foundation v Zambia* (2001) para 70.

⁶⁶ Communication 129/94 – *Civil Liberties Organization v Nigeria* (1998) paras 12 & 16.

⁶⁷ Communications 147/97 & 149/96 - *Jawara v The Gambia* para 74; Communication 151/96 - *Civil Liberties Organization v Nigeria* para 17.

- violations of his rights. These decisions and the underlying provisions of Sections 11(6) and 36 of the Immigration Act, according to the Complainants, are inconsistent with basic principles of due process enshrined in Article 7 of the African Charter.
117. The Complainants aver that any decision passed “in accordance with the law” as provided under Article 12(4) of the African Charter should fulfil the following three requirements: one, it should be provided in a clear and accessible law to offer predictability and to guard against arbitrariness; two, it “...must be made by a court or an administrative authority on the basis of a law affording protection against arbitrary expulsion through the establishment of corresponding procedural guarantees”⁶⁸. In relation with this they refer to the Commission’s decision in **Modise v Botswana**⁶⁹ where the Commission stated that “in accordance with law” requires not only strict conformity with national law, but also with the principles of the African Charter and other international norms. Third, he contends that the procedural guarantees under Article 12(4) enshrine the right to meaningful judicial oversight of administrative decisions.
118. With regard to the issue of national security, the Complainants submit that while the victim’s case raises no genuine issue of “national security”, it is noted that, even where such legitimate concerns do arise, they do not provide a basis to set aside the rights protected in the African Charter. They argue that while legitimate security concerns can be taken into account in interpreting the African Charter, they cannot erode the essence of the rights protected, including the right protected under Article 12(4). The Complainants refer to **Commission Nationale des Droits de l’Homme et des Libertes v Chad**⁷⁰ where the Commission stated that the African Charter does not allow States Parties to derogate from their treaty obligations even during emergency situations. They also refer to **Amnesty International v Zambia**⁷¹ where the Commission found a violation of Article 12(4) where the national court did not consider Zambia’s obligations under the African Charter and failed to rule on the ground that the Complainant was likely to ‘endanger peace and good order in Zambia’. According to the Commission, ‘there was no judicial inquiry on the basis in law and in terms of administrative justice for relying on this ‘opinion’ of the Minister of Home Affairs for the action taken’.
119. The Complainants contend that the President did not give reasons for the victim’s deportation, neither did he explain or justify his decision and considerations of national security. The President, according to the Complainants, applied a law which afforded him an apparently limitless power to make a declaration which has the effect of causing an individual to become “a prohibited immigrant”. This power is attended by a blanket denial of

⁶⁸ Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) 226.

⁶⁹ Communication 97/93 – *John K Modise v Botswana* (2000) para 83.

⁷⁰ Communication 74/92 – *Commission Nationale des Droits de l’Homme et des Libertes v Chad* (1995) para 21.

⁷¹ Communication 212/98 – *Amnesty International v Zambia* (1999) para 33

information as to the basis for its exercise. A law of this breadth and potentially all encompassing scope, the Complainants argue, lacks the clarity and precision required of 'law'. They further state that its terms and the lack of procedural oversight render it a recipe for arbitrariness, as demonstrated by the current case.

120. The High Court and Court of Appeal, the Complainants submit, both supported the view that this exercise of Presidential power is not subject to any judicial review based on Sections 7(f), 11(6) and 36 of the Act. Accordingly, 'national security' issues such as terrorist attacks globally do not bear even the remotest relation to the victim's case and this is a clear example of arbitrariness disguised as national security, and of national security being invoked in an attempt to preclude all scrutiny and to circumvent the Respondent State's human rights obligations.
121. The Complainants therefore claim that Articles 7(1) and 12(4) of the Charter were violated by denying the victim the opportunity to be heard in respect of the decision to expel him, either prior to or after his expulsion.

Alleged Violation of Article 9

122. The Complainants submit that the comments of the victim in the article "Presidential Succession in Botswana: No Model for Africa", were opinions expressed in the course of his functions as Professor of Political Science at the University of Botswana, that these comments were academic in nature and related to the functions of government in a democratic society. Such critique, they argue, was an inherent aspect of the exercise of the victim's functions as an academic in the field, who was not only entitled but effectively compelled by his discipline to be prepared, where appropriate, to write critically about government issues. As political speech, related to his academic functions, it was speech deserving of protection in line with the norms of an open and democratic society, any restriction of which could only be justified in the most exceptional circumstances.
123. The Complainants further submit that although considerable emphasis has been placed by the Respondent State on national security as a justification for restricting the victim's rights, his expulsion was patently not related to any national security threat but to the suppression of political analysis and criticism. They submit that the measured academic papers of the victim did not contain ideas that incited violence, or amount to hate speech that may have necessitated some restriction of his freedom of expression. According to the Complainants, the measures were clearly aimed at preventing the victim or others like him, from expressing critical political views and/or were punitive in nature and that his expulsion did not pursue any legitimate aim.
124. The Complainants aver that the complete absence of any reasons given to the victim, the Court or – thus far – the Commission, also makes it impossible to conduct a necessity and proportionality analysis of measures adopted, and

leads inevitably to the conclusion that the interference cannot be justified within the law.

125. They also allege that the Respondent State has failed to show the nature of the alleged national security threat posed, or to proffer arguments as to why the deportation could be justified as proportionate in severity and intensity to the publication of an academic paper. Had there been any such security issue, such that the curtailment of freedom of speech may have pursued a legitimate aim, the Complainants submit, there would have been an alternative, less onerous and more proportionate means of protecting those interests. The deportation can, according to them, in such circumstances, never be justified as necessary or proportionate.
126. The Complainants further submit that Section 36(2) of the Botswana Immigration Act⁷² prevented the victim from receiving information as to the grounds on which he was declared a prohibited immigrant or visitor to Botswana. The denial of such information, according to them, violated his right to receive information, in particular the reasons underpinning his expulsion which directly contradicts the requirements of Article 9(1).

Alleged Violation of Article 18

127. The Complainants submit with respect to Article 18 that the expulsion of the victim has a drastic impact on the victim's family life and daughter, as the family home in Botswana was his only home established for 15 years. He was forced to separate from his daughter Clara, then 17 year old minor, who was not in a position to follow him given the critical stage of her studies. This separation, according to the Complainants, gravely affected her as she was very close to her father, who obviously could not return to visit her.
128. By reiterating Botswana's obligation to protect the family, the Complainants argue that any interference with the right to family can only be justified by a complete absence of any real pressing social need to expel the victim from Botswana, and the Respondent State has not shown that the victim's expulsion could be justified by a pressing need to protect public order or national security.
129. The Complainants recall that the victim had been a law abiding resident for 15 years and had played an important role in bringing up his daughter. Despite this fact, there is no indication that the impact of the expulsion order on him or his daughter and their family life was in any way taken into account, still less minimized, by authorities when they deported him. On the contrary, the Respondent State denied him an opportunity to finalise arrangements for his daughter before being expelled, as he was arrested immediately after the High Court's decision and expelled later that day. The hasty way of his deportation,

⁷² This provision reads as "No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court".

in the circumstances of the case, according to the Complainant, amounted to a gratuitous interference with his right to family life.

Alleged Violation of Article 2

130. The Complainants claim that the crux of the case lies in the fact that the victim held and expressed political views that were critical of the political establishment in the Respondent State, and specifically of Presidential Succession. They submit that had it not been for the nature of his political opinions, his rights under the Charter would not have been violated, adding that his political views singled him out for discriminatory treatment at the hands of the authorities.
131. They aver that the victim did not hold a position where he had access to sensitive material of potentially damaging nature to national security and he was not required to adopt a politically neutral position as, perhaps a civil servant may have been, and even in such cases, it has been held that such differential treatment is generally not acceptable.⁷³
132. The Complainants in conclusion urge the Commission to adopt strict scrutiny of discrimination on the grounds of political opinion, given that pluralism and diversity are fundamental ingredients of any democratic society. They further urge the Commission to demand very weighty reasons to be given to justify different treatment on the basis of political opinion, by taking into consideration that no reasons have been provided by the Respondent State in this matter.
133. The Commission notes that the arguments raised in the *amicus curiae* brief submitted by the Centre for Human Rights of the University of Pretoria are already reflected in the submissions of the Complainants.

Respondent State's Submissions on the Merits

134. The Respondent State submits that the victim at no stage during the proceedings at the High Court of Botswana or before the African Commission alleged bad faith on the part of the Government of Botswana, but merely attacks the process by which he was declared a prohibited immigrant.
135. The State contends that the essence of the Complainants' argument is the failure of the Government of Botswana to abide by its treaty obligations, which taken to its logical end, implies bad faith on the part of the government. Though not disputing the commitment of the Charter to human rights, the Respondent State contends that this does not imply a blanket application of the principle of *pacta sunt servanda* under international law as provided in Article 26 of the Vienna Convention of the Law of Treaties which provides that '*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*'.

⁷³ Concluding Observations on Germany (1997) UN doc. CCPR/C/79Add.73 para 17.

136. According to the Respondent State, the exception to this principle is that no automatic duty attaches to parties, more specifically Botswana, to carry out all the provisions of the Charter. They aver that when States concluding an agreement do not have in mind the creation of legal obligations, but aim only to declare some common intent, the principle of *pacta sunt servanda* does not apply.
137. In support of its argument, the Respondent State submits that a close scrutiny of paragraphs 3, 4 and 10 of the preamble to the African Charter reveal that parties did not intend creating legal obligations in drawing up the Charter.
138. The Respondent State further states that Botswana is a sovereign state guided by principles of democracy and has since independence striven to protect, maintain and promote human rights values, a reflection of which is mirrored in Section 3 of its Constitution. It argues further that the Charter has no force of law in Botswana as its provisions do not form part of the domestic law until they are passed into law by Parliament. According the Respondent State, as a sovereign State it is up to Botswana as well as other parties to the African Charter, to determine the nature of its domestication policy. In doing so, it submits, Botswana is guided by attitudes of its citizens to the quality of fundamental rights and freedoms as contained in Section 3 of the Constitution which they are not dissatisfied with.
139. The Respondent State further contends that for the legislative, executive and judicial organs of a State Party, a treaty is infrequently assessed in the hierarchy of legal norms applicable in the domestic legal order and as a consequence, treaties are sometimes deemed inapplicable if they conflict with the constitutional provisions of a state. Thus, in Botswana, treaties do not confer enforceable rights on individuals until passed into law by Parliament. However, they may be used as an aid to construction of laws including the Constitution.
140. Accordingly, the Respondent State submits that it does not automatically follow that a party to a treaty which fails to observe its provisions acts in bad faith. The Respondent State rejects the proposition that the Government of Botswana acted in bad faith in respect of the present Communication for the following reasons:
141. First, the right to life, liberty, fair and expeditious trial and the freedom of conscience are provided for in Sections 4 to 16 of the Constitution of Botswana. The State argues that the advent of the African Charter neither added nor subtracted from the existing legal arrangements in Botswana with respect to the fundamental rights and freedoms the Complainants claim Botswana has failed to domesticate. The State further states that these fundamental rights and freedoms are indistinguishable from the articles allegedly violated by Botswana under the Charter and that the victim has

- benefited from these provisions for the 15 uninterrupted years during which he was present in Botswana.
142. Second, the State submits that the victim's conduct as evident by the court papers precludes him from seriously alleging bad faith. The court papers, the Respondent State submits, indicate that one leg of the victim's legal challenge sought a declaration that his rights under Sections 3, 5, 7, 11 and 12 of the Constitution of Botswana had been contravened as a consequence of his being declared a prohibited immigrant. Accordingly, the State submits that if the victim in so doing recognises, that the aforementioned sections do confer on him these rights and freedoms, then he is being disingenuous by asserting in the same breath that the Botswana Government failed to give effect to the same fundamental rights and freedoms he claims does not exist.
143. Third, the Respondent State submits that while the victim indicated before the courts in Botswana that he does not allege bad faith on the part of the Government of Botswana in declaring him a prohibited immigrant, but merely queries the process by which the decision was reached, by invoking Articles 1, 2, 7,9,12, 15 and 18 of the African Charter and alleging that Botswana is bound to observe and apply these provisions, the Complainants place on him (the victim) the burden of proving that Botswana had acted in bad faith by failing to observe these provisions, which it has failed to discharge satisfactorily.
144. With respect to alleged violations of Article 12(4), the Respondent State contends that the requirement that the expulsion of non – nationals from the territory of a State Party must be done 'according to law' refers to the domestic law of Botswana. In support of this assertion, the State explains that the Botswana Immigration Act of 1966 came into effect on the same day as the Constitution, i.e. on 30 September 1966, an indication, the State contends, that the framers of the Constitution had knowledge of the provisions of the Act. The evidence of this awareness lies in the fact that Section 14(1) of the Constitution provides for freedom of persons within Botswana to move freely, enter and reside, as well as immunity from expulsion from Botswana.
145. The Respondent State adds that Section 14(3) provides that nothing done under the authority of any law, that is to say, the domestic law of Botswana, shall be held to be inconsistent or in contravention of the provisions to the extent that such law makes provision for the imposition of restrictions of freedom of movement on any person who is not a citizen of Botswana. Thus, the State asserts that 'authority of the law', in the present circumstance, refers to the Botswana Immigration Act and that therefore, the 'protection of law' referred to in Section 3 of the Constitution, is subject to such limitations contained in the domestic law of Botswana which is not inconsistent with Article 12(4) of the Charter.
146. These, the Respondent State claims, are those limitations that are necessary in the public interest as well as those contained in Section 11(6) and 36 of the

- Immigration Act. According to the State, public interest includes the peace and stability of the country and the well being of the people, and national security means the security of the people of Botswana.
147. The State submits that the preclusion of a right of appeal inevitably requires the need to debate the information and grounds upon which the President formed his decision to declare a person a prohibited immigrant, implies that such information and grounds are not to be disclosed. The consequent prohibition of courts from inquiring into the adequacy of those grounds also implies a non-disclosure of those grounds. According to the State, it is not in the public interest to disclose the grounds or information for declaring a person a prohibited immigrant, more so, where the President's decision is based on national security or is made in the national interest and that his reason for such decisions should neither be open to public disclosure nor subject to scrutiny by courts.
148. In support of its position the Respondent State cites the United Kingdom as an example of a country in the "so-called civilised world" supporting the ouster of jurisdiction of courts on immigration issues. They refer to two decisions of the English Courts to this effect, viz: **R (Farrakhan) v Secretary of State for Home Department**⁷⁴ and **Secretary of State for Home Department v Rehman**,⁷⁵ which according to State, support the position that decisions on issues of national security should be entrusted to the Executive and not the judiciary.
149. The State concludes by stating that executive action under Section 7(f) of the Botswana Immigration Act rests in the President who is elected by voters and that the Botswana Parliament has enacted that information and grounds upon which the President has taken a decision are protected from disclosure.

Complainant's response to the Respondent State's Submissions on the Merits

150. The Complainants submit in response to the State's submission that it is misplaced for the State to focus on bad faith as a criteria for determining a State Party's compliance with the African Charter. According to the Complainants, what is in issue for determination by the Commission, is whether Botswana has fulfilled its international obligations, not whether it acted in bad faith.
151. The Complainants state that the Government of Botswana ratified the Charter on 17 July 1986 and by doing so, unreservedly agreed to implement its provisions and since then, it has taken no action to relieve itself of any of its obligations under the Charter either by withdrawal from it or by entering reservations. Quoting the decision of the Commission in **International Pen**

⁷⁴ [2002]4 ALL ER 289

⁷⁵ [2002] 1 ALL ER 122.

- (On behalf of Saro-Wiwa) v Nigeria**⁷⁶ the Complainants add that any State which did not wish to abide by the provisions of the Charter ought to have refrained from ratifying it.
152. The fact that Botswana as a dualist country is yet to incorporate the Charter into its domestic law, according to the Complainants, may preclude persons within Botswana from relying on it in domestic courts but does not affect their right to recourse to the Commission under the African Charter. A state, whether dualist or monist, according to the Complainants, is bound by the ratification of the Charter even where it revokes the domestic effect of the Charter.⁷⁷
153. Contrary to the Respondent State's claim that the rule of law is based on fundamental rights and freedoms as set out in its Constitution and that "treaties are sometimes deemed inapplicable if they conflict with Constitutional provisions of the State", the Complainants assert that principles of international law dictates that the Respondent State cannot invoke the provisions of its domestic law as justification for its failure to perform a treaty obligation.⁷⁸ Accordingly, the Complainants aver that what the Commission needs to consider is not whether the Charter is applicable in Botswana, but whether the rights enshrined in the Charter are respected domestically i.e. whether law and practice in Botswana conform to the obligations under the Charter. The responsibility of the Commission is to examine the compatibility of a State law and practice with the Charter.⁷⁹
154. The Complainants argue that limitations to the victim's right to fair trial, whereby he was prevented from hearing before the expulsion order or appealing the expulsion order, is an inappropriate attempt to circumvent the rule of law and protection of fair trial rights. They submit that critical academic comments on matters of the political governance of a State is an essential element of, and not a threat to democracy and security. The Complainants add that even if the case did in fact raise national security issues, the Respondent State's assertion that executive decisions about national security are outside the scope of domestic or regional judicial review lacks support in the African regional human rights system. They contend further that although legitimate security concerns ought to be taken into account in interpreting the Charter, it must not erode the essence of the rights protected by the Charter including article 12(4). They further state that the jurisprudence of the Commission has been to the effect that the rights contained in the Charter are non-derogable, thus even threat of war, international or national, political instability or any

⁷⁶ Communications 137/94, 139/94, 154/96 and 161/97 - *International PEN and Others (on behalf of Ken Saro-Wiwa Jr) v Nigeria* (1998) para 116.

⁷⁷ Communication 129/94 - *Civil Liberties Organization v Nigeria* (1995) para 12 & 16.

⁷⁸ Art 27 Vienna Convention on the Law of Treaties 1969 states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This rule is without prejudice to Art 46, Treaty Series, vol 1155, 331.

⁷⁹ Communication 211/98 - *Legal Resource Foundation v Zambia* (2001) para 68.

- other kind of emergency, cannot be invoked to justify any derogation from the right to fair trial.⁸⁰
155. The Complainants submit that the State selectively and wrongly relies on decisions of the English Courts in support of its assertion that national security matters are not decisions for the courts, adding that subsequent decisions to those cited by the Respondent State, for example **A(FC) & Others v Secretary of State**⁸¹ and **Secretary of State for Home Department v JJ and FC and Others**⁸² have found that the British Government's response to national security issues, especially its response to terrorism amounted to a violation of human rights. They add that contrary to the conclusions drawn by the Respondent State that the judiciary must turn a blind eye to executive decisions on national security issues, these recent cases of the British House of Lords, emphasize the increased importance of the courts in such instances. They cite the decision of the Supreme Court of Canada in **Charkaoui v Canada**⁸³ where it was held that the principle of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process. Therefore, they assert that while domestic law and practice may vary from State to State, the Respondent State's arguments as to the practice of national courts cannot withstand scrutiny.
156. With regards the Respondent State's contention that the refusal to disclose the grounds relating to the desirability of a person's presence on national security grounds is based on the public interest, the Complainants submit that were the present case based on genuine national security issues, there are several measures which could have been taken to guarantee the right to fair hearing without necessarily precluding all judicial oversight. The Complainants argue that less intrusive measures as private sessions, provisions of a "judicial peep", redaction, limited access as a means of protecting sensitive information and evidence are often used, and could have been used by the Government of Botswana in the instant case.
157. By refusing to consider the basis of the President's decision and invoking national security as a ground for non-disclosure of information, which led to the victim's expulsion, the Complainants aver that the Government unlawfully divested the courts of any role in the judicial process.
158. The Complainants conclude by stating that national security may not be used to shield State action from the necessary scrutiny and accountability. Whilst conceding that extreme security measures may be necessary in extra ordinary circumstances, the test of determining whether such measures are warranted must be subject to meaningful judicial oversight to protect the fundamental right of due process of the individual concerned and the rule of law.

⁸⁰ Amnesty International v Zambia, para 33.

⁸¹ [2004] UKHL 56, para42, 80.

⁸² [2007] UKHL 45 para 27,105.

⁸³ [2007] 1 S.C.R 350,

The Commission's decision on the Merits

159. In this Communication the African Commission is called upon to determine whether the expulsion of the victim by the Respondent State following the President's invocation of the powers invested in him in a domestic legislation – the Botswana Immigration Act – is a violation of the victim's rights guaranteed under the African Charter, in particular, the rights guaranteed under Articles 1, 2, 7(1)(a), 9, 12(4) and 18 as alleged by the Complainants. The Commission will accordingly proceed to analyse each of the Articles of the Charter alleged by the Complainants to have been violated by the State.

Alleged Violation of Article 7(1)(a)

160. The Complainants submit that the decision of the President to expel the victim from the country relying on Sections 7(f), 11(6) and 36(a) of the Botswana Immigration Act, and the decisions of both the High Court and the Court of Appeal that the President's action was not subject to review violated the basic principles of due process of law enshrined under Article 7 of the African Charter, in particular Article 7(1)(a).

161. Article 7(1)(a) of the Charter provides that “every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”.

162. In terms of Article 7(1)(a) anyone who feels that his or her rights have been violated is entitled to take the case before appropriate national organs, including the courts. In doing so the position or status of the victim or that of the alleged perpetrator is of no relevance. That is to say, any person whose rights have been violated, including by persons acting in their official capacity, should have an effective remedy by a competent judicial organ, and the right to have one's cause heard is to be enjoyed without discrimination of any kind.

163. States Parties to the African Charter thus have the duty to ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status. Thus, non-nationals are entitled to the enjoyment of this right just as do nationals.

164. In **Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe**⁸⁴ the Commission held that the right to have one's cause heard also requires that the matter has been brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is

⁸⁴ Communication 284/2003; See Communication 294/2004 - *Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic Of Zimbabwe*, paras 103 - 108; and Communications 279/03 – *Sudan Human Rights Organisation v The Sudan*; 296/05 – *Centre on Housing Rights and Evictions v The Sudan*, para 180-185.

- competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person...⁸⁵.
165. In the present Communication, the victim has not been convicted by a Court of law, but has been expelled from the Respondent State by an order of an executive organ – the President of the Republic – relying on a domestic legislation which gives him powers to declare a person as a prohibited immigrant without giving any reason.
166. In terms of Sections 7(f) of the Botswana Immigration Act “any person who, in consequence of information received from any source deemed by the President to be reliable, is declared by the President to be an undesirable inhabitant of or visitor to Botswana, shall be a prohibited immigrant.” Section 11(6) of the same Act provides further that: “No appeal shall lie ... against any notice that the person is a prohibited immigrant by reason of any declaration by the President under Section 7(f) and no court shall question the adequacy of the grounds for any such declaration”, and Section 36(a) provides that “No person shall have the right to be heard before or after a decision is made by the President in relation to that person under this Act. (b) No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court.”
167. Further to the expulsion order, the victim took his case to the Botswana High Court and the Court of Appeal. Both courts rejected his application on the ground that Sections 16(6) and 36(a) of the Botswana Immigration Act prevent them from reviewing the decision of the President.
168. Can it be argued that the victim’s right to have his cause heard by a competent national organ was violated?
169. The right to be heard requires that the Complainant has unfettered access to a tribunal of competent jurisdiction to hear his case. It also requires that the matter be brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person. Where authorities put obstacles on the way which prevent victims from accessing the competent tribunals or which oust the jurisdiction of judicial organs to hear alleged violations of human rights, they would be denying victims of human rights violations the right to have their causes heard.
170. In *Recontre Africaine pour la Defense des Droits de l'Homme v Republic of Zambia*,⁸⁶ the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, denied victims the opportunity to establish the legality of their expulsions in the courts. Similarly, in **Zimbabwe**

⁸⁵ Id, para 173.

⁸⁶ *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia*.

- Human Rights NGO Forum v Zimbabwe**⁸⁷, the African Commission noted that the protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. The Commission added that ‘If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard.’
171. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man⁸⁸ provides in Article XVIII that every person has the right to "resort to the courts to ensure respect for [their] legal rights," and to have access to a "simple, brief procedure whereby the courts" will protect him or her "from acts of the authority that ... violate any fundamental constitutional rights....".
172. In the present Communication, the victim was not prevented from accessing the Courts. As a matter of fact both the High Court and the Court of Appeal of the Respondent State heard his case but ruled that the Botswana Immigration Act, in particular, Sections 11(6) and 36(a) thereto, does not allow the Courts to review the decision of the President. In other words, the Act ousts the jurisdiction of the Courts to entertain the matter.
173. This Commission is of the view that an ouster clause, be it through a military decree or an Act of Parliament has the same effect of preventing national judicial organs from entertaining alleged human rights violations, thus denying victims of human rights abuses the right to have their causes heard. In **Constitutional Rights Project v Nigeria**,⁸⁹ the Commission held that ‘while punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of [the Charter], to foreclose any avenue of appeal to competent national organs ... clearly violates Article 7(1)(a) of the African Charter, and increases the risk that even severe violations may go unredressed’.
174. The Respondent State argues that the limitations under Sections 11(6) and 36 of the Immigration Act are necessary in the public interest, and public interest, according to the State, includes ensuring peace, stability and the well-being of the Botswana people and the country's national security. The State concludes that it would therefore not be in the public interest to disclose or debate before a court of law the information and grounds upon which the President formed his decision. Accordingly, the reasons for the President's decision should

⁸⁷ Communication 245/2002 - *Zimbabwe Human Rights NGO Forum v Zimbabwe* .

⁸⁸ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁸⁹ Communication 87/93 – *Constitutional Rights Project v Nigeria*

- neither be open to public disclosure nor be the subject of scrutiny by the courts.
175. Can a victim's right to have his cause heard be limited or derogated upon for 'public interest'? The answer to this is NO. The right to a fair trial, which includes the right to have one's cause heard, to be informed of reasons and to seek appropriate remedy, is an absolute right that cannot be derogated from in any circumstance.⁹⁰ This position is reiterated by the Commission in its 'Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa' where it has made it very clear that no circumstances whatsoever, not even cases of public emergency, justify any derogations from the right to fair trial.⁹¹
176. In **Amnesty International v Zambia**⁹² where the Complainant, among others, was deported from Zambia because he was considered by the authorities to be 'a danger to peace and good order ...' and was denied access to courts, the Commission held that the Zambian Government by denying the Complainant of the right to appeal his deportation order has deprived him of a right to fair hearing which contravenes Article 7(1)(a) of the Charter and international human rights laws.
177. Where a government has reason to believe that a citizen or a non-national legally within its territory poses a threat to national security, it should bring evidence before the courts against the person. Not doing so may lead to the possibility of abuse where individuals can be detained or expelled on mere suspicion of being security threats.
178. In **Constitutional Rights Project v Nigeria**,⁹³ the Commission stated that 'while [it] is sympathetic to genuine attempts to maintain public peace, it must note that all too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of the government to operate without such checks as the judiciary can usually perform'. This is especially true with respect to the present Communication where there is a law which gives too broad power to the executive and prohibits courts from checking the use of such broad powers. The Commission in its decisions has time and again stressed on the need of judicial oversight over executive decisions particularly on issues of deportation. For instance, the Commission has found a violation of Article 7(1) of the Charter when the Rwandan Government expelled refugees in Rwanda

⁹⁰ African Commission on Human and Peoples' Rights (ACHPR) Principles and Guidelines on the Rights to Fair Trial and Legal Assistance in Africa (DOC/OS(XXX)247

⁹¹ Id, R.

⁹² Amnesty International v Zambia, para 61.

⁹³ Communication 143/95, 150/96 – *Constitutional Rights Project and Another v Nigeria* (1999) para 33.

- without giving them the opportunity to be heard by the national judicial authorities.⁹⁴
179. In the present Communication, after the order from the President to expel the victim, the latter challenged the said order in the High Court and Court of Appeal. Both Courts declined to examine the merits of the case citing Sections 11(6) and 36(a) of the Botswana Immigration Act which prohibits them from doing so. The refusal of the Courts to review the President's decision foreclosed any avenue available to the victim to seek remedy. Thus, while the victim was able to access judicial organs to have his cause heard, the ouster of the jurisdiction of the organs made that access illusory as the organs have been prevented by law from entertaining the victim's grievance. It therefore means that as far as the victim's case is concerned, there is no competent national judicial organ within the Respondent State, as a tribunal which is competent in law to hear a case that has been given that power by law and has jurisdiction over the subject matter and the person. In the present case, the High Court and the Court of Appeal have not been given that power and consequently do not have jurisdiction over the subject matter.
180. The Commission is of the view that Sections 11(6) and 36(a) of the Botswana Immigration Act which prohibit a review of the President's decision absolves all judicial organs of competence in the matter thus depriving victims whose rights are threatened or actually violated by the President's decision from being heard by the judicial organs to protect their rights. This kind of arrangement does not only violate Article 7(1)(a) of the African Charter but also threatens the independence of the judiciary guaranteed under Article 26.

Alleged Violation of Article 9

181. The Complainants allege violation of Article 9 of the African Charter arguing that the comments expressed by the victim in the article he published, that is, "Presidential Succession in Botswana: No Model for Africa", were opinions expressed in the course of his functions as Professor of Political Science at the University of Botswana, and these comments were academic in nature and related to the functions of government in a democratic society. They submit that such critique was an inherent aspect of the exercise of his functions as an academic in the field, who was not only entitled but effectively compelled by his discipline to be prepared, where appropriate, to write critically about government issues. As political speech, related to his academic functions, it was speech deserving of particular protection in line with the legal authorities referred to above, and restriction of which could only be justified in the most exceptional circumstances. The Complainants submits that the expulsion of the victim was not based on security concerns but rather to suppress his political analysis and criticism. The Complainants aver further that the complete absence of any reasons given to the victim, the Court or – thus far –

⁹⁴ Communication 27/89, 46/91, 49/91, 99/93 – *Organization Mondiale Contre La Torture and Others v Rwanda* (1996) para 35.

- the Commission, also makes it impossible to conduct a necessity and proportionality analysis of measures adopted, and leads inevitably to the conclusion that the interference cannot be justified within the law.
182. The Complainants also submits that Section 36(a) of the Botswana Immigration Act⁹⁵ prevented the victim from receiving information as to the grounds on which he was declared a prohibited immigrant or visitor to Botswana. The denial of such information according to the Complainants violates the right to receive information which contravenes the requirements of Article 9(1).
 183. The Respondent State in its submissions did not address the alleged violation of Article 9.
 184. The Commission will accordingly proceed to analyse the submission of the Complainants to ascertain whether Article 9 of the Charter has indeed been violated.
 185. Article 9 of the African Charter states that: ‘1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law’. Thus, under this provision there are two rights protected: the right to information and freedom of expression; and the Complainants allege the violation of both rights.
 186. The right to information, which also forms part of freedom expression, is a widely recognized right in international and regional human rights law. Article 19 of Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) protect freedom of expression and hence the right to information. In these two instruments freedom of expression is defined to include one’s right to hold opinions, to seek, receive and impart information and ideas without interference or restrictions of any kind through any media. The same approach is adopted by the three major regional human rights instruments.⁹⁶
 187. So, there seems to be an international consensus among states on the content of the right to freedom of expression. This consensus similarly extends to the need to restrict the right to freedom of expression to protect the rights or reputation of others, for national security, public order, health or morals. Freedom of expression is not therefore an absolute right, it may be restricted for the reasons mentioned above but such restrictions should be necessary and have to be clearly provided by law. The Commission made it clear in its ‘Declaration of Principles on Freedom of Expression in Africa’ that ‘any

⁹⁵ This provision reads as “No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court”.

⁹⁶ See Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 9 of the African Charter on Human and Peoples’ Rights (ACHPR), and Article 13 of the American Convention on Human Rights.

- restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society'.⁹⁷
188. Though in the African Charter the grounds of limitation to freedom of expression are not expressly provided as in the other international and regional human rights treaties, the phrase 'within the law' under Article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation. In **Malawi African Association and Others v Mauritania**,⁹⁸ the Commission stated that 'the expression 'within the law' must be interpreted in reference to international norms' which, among others, can provide grounds of limitation on freedom of expression.
189. It should as well be noted that 'the only legitimate reasons for limitations of the rights and freedoms recognized in the African Charter are found in Article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.⁹⁹ Hence it can be said that national security or public interest are recognized as justifiable grounds to limit freedom of expression under the African Charter.
190. In the present Communication, could it be said that by expelling the victim for allegedly publishing an academic article critical of the government, and by refusing to give reasons for his expulsion violate Article 9 of the Charter? Freedom of expression under the Charter has two main arms – the right to receive information and the right to express and disseminate opinion. The Complainants submit that the State has violated both arms.
191. With respect to the first arm, the Complainants argue that Section 36(a) of the Botswana Immigration Act deprived the victim from getting the information and/or reasons on the grounds on which he was expelled from the country, and deny courts of the power to seek such information on his case. Section 36(a) of the Act states that "No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court". The Respondent State argues that the non-disclosure of such information or reason before courts or any other organ is necessary in order not to endanger the national security of the country.
192. The information referred to under Section 36(a) of the Act is what the victim was seeking to be able to prepare his defence and seek appropriate remedy in Court to protect his rights. Without such information the victim would be

⁹⁷ African Commission on Human and Peoples' Rights (ACHPR), Declaration of Principles on Freedom of Expression in Africa 2002.

⁹⁸ Communication 54/91, 61/91, 98/93, 164/97, 210/98 – *Malawi African Association and Others v Mauritania* (2000) para 102

⁹⁹ Communication 140/94, 141/94, 145/95 – *Constitutional Rights Project and Other v Nigeria* (1999) para 41.

- working on mere speculation. It is because of that speculation that the victim sought the intervention of the Courts to review the decision of the President and seek reasons for his expulsion. Unfortunately, for the victim, Section 36(a) also prohibits the disclosure of such information in any court.
193. The right to receive information, especially where that information is relevant in a trial for the vindication of a right, cannot be withheld for any reason. Withholding such information from a victim could compromise court proceedings and put at risk the right of the victim. In a criminal trial, the right to receive information is as important as the right to be informed of the reasons of one's arrest and detention within a reasonable period of time. The information as well as the reasons are necessary to enable the accused prepare their defence. It makes a mockery of justice and the rule of law for a person legally admitted to a country to all of a sudden be told to leave against his will and he/she is not given reasons for the expulsion.
194. The right to be informed of the reasons of the actions taken against anyone is recognised universally. It forms part of the right to fair trial and as such is one of the rights which have been distinctly categorized by the Commission as a right that cannot be derogated from at any time and whatsoever the circumstances might be.¹⁰⁰ This in effect means even if there is a state of emergency in a country that threatens the security of a nation, a person's right to be informed of the charges, in this case, the grounds of his expulsion, cannot be suspended/derogated from. This notion is reaffirmed in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information which states that "Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law including, but not limited to the right to be promptly informed of the charges and supporting evidences against him/her".¹⁰¹ In **Amnesty International v Zambia**¹⁰² the Commission held that the fact that the Complainants were not provided with any reasons for their deportation order except the general allegation that their presence in the Zambia was likely 'to endanger peace and good order' means that the right to receive information as guaranteed under Article 9(1) of the Charter was denied to them.
195. In the present Communication, the victim was refused information regarding the reasons for his expulsion, and attempts to get this information through the Courts also proved futile. The African Commission is of the view that Section 36(a) of the Botswana Immigration Act is incompatible with Article 9(1) of the African Charter, and the inability of the victim to receive the information sought because of the restrictions under the Act resulted in a violation of his right under Article 9(1) of the Charter.

¹⁰⁰ ACHPR, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, C(b)(iii) & R.

¹⁰¹ Article 19, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996) Principle 20.

¹⁰² Amnesty International v Zambia, para 41.

196. The second arm of Article 9 of the African Charter deals with the right to express and disseminate one's opinion. The Complainants claim that the scholarly article of the victim entitled "Presidential Succession in Botswana: No Model for Africa" is the main reason for his expulsion. This, the Complainants allege, is a violation of the victim's right to freedom of expression in general and political and academic freedom in particular. The Respondent State made no submissions on this particular assertion by the Complainants. As a result, the Commission will analyse the allegation of the Complainants based on the information at its disposal.
197. The African Commission underscored the place of political expression in freedom of expression in **Amnesty International v Zambia**¹⁰³ when it stated that freedom of expression is a fundamental human right, essential to an individual personal development, political consciousness and participation in the public affairs of a country. The European Court of Human Rights has similarly stressed the importance of freedom of expression and further indicated the degree of tolerance expected for the respect and protection of this right. In **Handyside v. the United Kingdom**, the Court opined that freedom of expression "constitutes one of the essential foundations of such a (democratic) society, one of the basic working conditions for its progress and for the development of every man. [...] It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."¹⁰⁴
198. A higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials. In this regard the European Court has held that politicians may be subject to stronger public criticisms than private citizens.¹⁰⁵ The African Commission has also indicated in its Declaration of Principles on Freedom of Expression in Africa that 'public figures shall be required to tolerate a greater degree of criticism'.¹⁰⁶
199. In the opinion of the Commission the article that was published by the victim is a purely academic work which criticizes the political system, particularly presidential succession in Botswana. There is nothing in the article that has the potential to cause instability, unrest or any kind of violence in the country. It is not defamatory, disparaging or inflammatory. The opinions and views expressed in the article are just critical comments that are expected from an academician of the field; but even if the government, for one reason or

¹⁰³ Amnesty International v Zambia, para 54.

¹⁰⁴ (5493/72) [1976] EHRC 5 (7 December 1976) para 49.

¹⁰⁵ Lingens v. Austria (9815/82) [1986] ACHR 7 (8 July 1986) para 28 and Oberschlick v. Austria (11662/85) [1991] ECHR 30 (23 May 1991)

¹⁰⁶ ACHPR, Declaration of Principles on Freedom of Expression (2002) XII(1)

- another, considers the comments to be offensive, they are the type that can and should be tolerated. In an open and democratic society like Botswana, dissenting views must be allowed to flourish, even if they emanate from non-nationals.
200. The lack of any tangible response from the State on how the article poses a threat to the State or Government leaves the Commission with no choice but to concur with the Complainants that the said article posed no national security threat and the action of the Respondent State was unnecessary, disproportionate and incompatible with the practices of democratic societies, international human rights norms and the African Charter in particular. The expulsion of a non-national legally resident in a country, for simply expressing their views, especially within the course of their profession, is a flagrant violation of Article 9(2) of the Charter.

Alleged violation of Article 12(4)

201. The Complainants submit that the expulsion of the victim constitutes a violation of Article 12(4) of the African Charter. Article 12(4) provides that ‘A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law’. According to the Complainants, the victim was legally resident in the Respondent State and the manner in which he was expelled does not meet the standards set in the Charter. The Respondent State on the other hand defends its actions by stating that the expulsion of the victim was done ‘in accordance with the law’ as required under Article 12(4). According to the Respondent State the phrase ‘in accordance with the law’ in Article 12(4) means in accordance with the domestic law of Botswana and according to Section 14(3) of the Constitution of Botswana nothing done under the authority of any law, that is, the domestic law of Botswana, shall be held to be inconsistent with or in contravention of the section, to the extent that such law makes provision for the imposition of restriction on freedom of movement (which according to the State, includes freedom from expulsion from the country) of any person who is not a citizen of Botswana.
202. The Respondent State further argues that the authority of the law refers to the Botswana Immigration Act and the ‘protection of the law’ as it appears in Section 3¹⁰⁷ and is subject to such limitations as contained in the domestic law of Botswana which is thus not inconsistent with Article 12(4) of the Charter.

¹⁰⁷ Section 3 of the Botswana Constitution provides that: Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his her race, place of origin, political opinions, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest to each and all of the following, namely: - a) life, liberty, security of the person and the protection of the law; b) freedom of conscience, of expression and of assembly and association; and c) protection for the privacy of his or her home and other property and from deprivation of property without compensation;the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to those limitations of that protection as are

203. In addressing this issue the first point that has to be dwelled on is, what does the phrase “in accordance with the law” under Article 12(4) of the Charter refers to? It refers to the domestic laws of States Parties to the African Charter. Under this provision each and every State Party has the power to expel non-nationals who are legally admitted into their territory. However, in doing so the Charter imposes an obligation on States Parties to have laws which regulate such matters and expects them to follow it strictly. This contributes towards making the process predictable and also helps to avoid abuse of power.
204. Botswana accordingly has a law in place which regulates immigration matters including the deportation of non-nationals who are legally admitted into its territory. To this extent therefore Botswana has met its obligations under Article 12(4) of the Charter. But the mere existence of the law by itself is not sufficient; the law has to be in line with not only the other provisions of the Charter but also other international human rights agreements to which Botswana is a party. In other words, Botswana has the obligation to make sure that the law(in this case the Botswana Immigration Act) does not violate the rights and freedoms protected under the African Charter or any other international instrument to which Botswana is a signatory.
205. In this regard, the Commission in **Modise v Botswana**¹⁰⁸ ruled that ‘while the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards’. International human rights norms and standards require states to provide non-nationals with the necessary forum to exercise their right to be heard before deporting them. In line with this requirement the African Commission in **Union Inter Africaine des Droits de l’Homme and Others v Angola**¹⁰⁹ recognized the challenges that are faced by African countries that might push them to resort to extreme measures like deportation in order to protect their nationals and economies from non-nationals. The Commission however stated that, whatever the circumstances might be such measures should not be taken at the expense of human rights. The Commission further stated that ‘it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law’.

contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

¹⁰⁸ Communication 97/93 - *John K. Modise v Botswana* (2000) para 84.

¹⁰⁹ Communication 159/96 - *African Commission Union Inter Africaine des Droits de l’Homme and Others v Angola* (1997) paras 16 & 20.

206. In the same vein, the Commission in *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*¹¹⁰ ruled the deportation of individuals including their arbitrary detention and deprivation of the right to be heard a flagrant violation of the Charter.
207. Similarly, in the present case, the deportation of the victim without being provided with a chance to be heard is justifiable neither on the basis of domestic laws nor with the pretext of national security.
208. Based on the above analysis the Commission is of the view that the existence and application of Sections 11(6) and 36 of the Botswana Immigration Act has violated Articles 7(1) and 12(4) of the African Charter.

Alleged Violation of Article 18

209. The Complainants state that the expulsion of the victim had a drastic impact on his family life and daughter as the family home in Botswana was his only home established for 15 years. He was forced to separate from his daughter Clara, then 17 years old, who was not in a position to follow him given the critical stage of her studies. This separation, he submits, gravely affected her as she was very close to her father, who obviously could not return to visit her. They submit further that the victim was denied an opportunity to finalise arrangements for his daughter before being expelled, as he was arrested immediately after the High Court's decision and expelled later that day. The hasty way of his deportation, in the circumstances of the case, the Complainants conclude amounted to a gratuitous interference with his right to family life.
210. In its submission, the Respondent State does not address this allegations made by the Complainants.
211. Article 18 of the African Charter provides that: '1. The family shall be the natural unit of society. It shall be protected by the State which shall take care of its physical health and moral. 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community'.
212. Article 18 of the Charter imposes a positive obligation on the State towards the family. The State has the obligation to assist the family towards meeting its needs and interests and to protect the same institution from abuse of any kind by its own officials and organs and by third parties. In exercising the positive obligations, the State exercises a negative obligation which is to refrain from violating the rights and interests of the family.
213. In the present Communication, the sudden deportation of the victim with no justification, knowing fully that he will be separated from his minor daughter

¹¹⁰ Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia, para 31.

- who was living with him runs counter to the protection States are required to give to the family under Article 18. There is nothing to justify the deportation, there is nothing to show that the Respondent State took measures to provide a safety net to the daughter after the deportation of the victim, and the hasty manner in which the deportation was carried out means adequate arrangements could not be made for the victim's daughter. The victim was given only 56 hours to make his own arrangements for his departure. For a person who has legally stayed in the country for 15 years, 56 hours is clearly inadequate to make sufficient family arrangements, especially for a female minor who has no other relative in the country.
214. This attitude of ignoring the interest of the family during the deportation process was condemned by the Commission in **Modise v Botswana**¹¹¹ where the Commission found a violation of Article 18(1) of the Charter as the deportation order deprived the Complainant of his family, and his family, of his support. In **Amnesty International v Zambia**¹¹², the Commission held that the forcible deportation of political activists and expulsion of foreigners was in violation of the duties to protect and assist the family, as it forcibly broke up the family unit.
215. Based on the above, the Commission is of the view that the deportation order and the way it was executed violated Article 18(1) and (2) of the Charter.

Alleged Violation of Article 2

216. The Complainants claim that the victim was expelled simply because he held and expressed political views that were critical of the political establishment in the Respondent State, and specifically of Presidential Succession. They submit that but for the nature of his political opinions, his rights under the Charter would not have been violated, insisting that it is his political views that singled him out for discriminatory treatment at the hands of the authorities. The Complainants urge the Commission to adopt strict scrutiny of discrimination on the grounds of political opinion, given that pluralism and diversity are fundamental ingredients of any democratic society.
217. Article 2 of the African Charter provides that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'.
218. The principle of non-discrimination is a fundamental principle in international human rights law. All international and regional human rights instruments and almost all countries' constitutions contain provisions prohibiting discrimination.

¹¹¹ Modise v Botswana, para 93.

¹¹² Amnesty International v Zambia, paras 58 – 59.

- The principle of non-discrimination guarantees that those in the same circumstances are dealt with equally in law and practice.
219. The test to establish whether there has been discrimination has been well settled. A violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed. These requirements have been expressly set out by international human rights supervisory bodies, including the European Court of Human Rights¹¹³, the Inter-American Court of Human Rights¹¹⁴ and the Human Rights Committee¹¹⁵.
220. In the present Communication, the Complainants claim that the victim was singled out for expulsion simply because of his political opinion. The Commission has reaffirmed the protection extended under the Charter to the principle of non-discrimination particularly on the basis of political opinion in **Amnesty International v Zambia**¹¹⁶ where it held that Article 2 imposes 'an obligation on the ... Government to secure the right protected in the African Charter to all persons within its jurisdiction irrespective of political or any other opinion'. This was reiterated in the Commission's decision in **Recontre Africaine pour la Defense des Droits de l'Homme v Zambia**.¹¹⁷
221. Thus, discrimination on the bases of political opinion, on which the allegations of the Complainants is based, is one prohibited ground of discrimination under the Charter. The Complainants claim that the political views of the victim, which were critical of the political establishment in the Respondent State, singled him out for discriminatory treatment at the hands of the authorities.
222. To determine whether the way the victim was treated by Botswana authorities was discriminatory or not, the allegation has to be weighed against the three tests set above: – was there equal treatment? If not, was the differential treatment justifiable? Was the aim of the difference in treatment proportionate to the aim sought and means employed? These three benchmarks are cumulative requirements and hence the non-compliance with any of the three requirements makes a treatment discriminatory.
223. Here it should be reiterated that difference in political opinion and to be able to express it openly without fear of any kind is one of the pillars of democracy and hence should be protected and should not form the basis for different treatment. In the present case had the victim not expressed a political opinion which criticized the Government, he would not have been deported from the

¹¹³ Marckx v Belgium (6833/74) [1979] ECHR 2 (13 June 1979)

¹¹⁴ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para 57.

¹¹⁵ General Comment No. 18, Non-Discrimination CCPR (1989) para 13.

¹¹⁶ Amnesty International v Zambia, para 52.

¹¹⁷ Recontre Africaine pour la Defense des Droits de l'Homme v Zambia, paras 21 & 22.

- country. Had he written an article which supports presidential succession in Botswana, he would not have been subjected to the treatment he received from the authorities and courts. Therefore, it could be concluded that the only reason why the victim was expelled was because he had a different political opinion on the way presidential succession should take place in Botswana. Apparently he is treated differently from people who support the way presidential succession is taking place in Botswana. Therefore, it is the view of the Commission that the victim was treated differently because of his political opinion.
224. Was there any justification for the Respondent State in treating the victim differently? National security seems to be the only response that is given by the State. The Commission subscribes to the principle of justifiable and positive discrimination, including different treatment of persons for national security reasons. However, in the present Communication, the State has not demonstrated how the action of the victim became a national security threat and how his action could be a threat. If the aim sought cannot be identified and justified, as it seems to be the case in the present Communication, then it means that the means employed was not proportional.
225. The Commission therefore concludes that the action of the Respondent State violated the principle of non-discrimination under Article 2 of the African Charter.

Alleged Violation of Article 1

226. Article 1 of the African Charter requires Member States to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative or other measures to give effect to them.
227. The Complainants submit that the violation of the Charter illustrates the Respondent State's failure to respect the Charter and to ensure its full implementation. The Respondent State on its part contests this interpretation and submits that the Charter does not impose any binding duty on States Parties thereto, as the drafters of the Charter did not intend it to be a binding document; and the Charter has no force of law in Botswana and its provisions do not form part of the domestic law of Botswana until they are passed into law by Parliament.
228. The African Charter is a legally binding agreement signed and ratified by 53 African States, and this makes it a treaty as defined under international law, and thus it is regulated by the rules of international law.¹¹⁸ According to the rules of international law, a State can express its consent to be bound by a treaty by ratification. Consent to be bound here means agreeing (committing oneself) to respect, protect and fulfil the provisions of a treaty.

¹¹⁸ See the 1969 Vienna Convention on the Law of Treaties.

229. Article 2(1)(b) of the Vienna Convention on the Law of Treaties reads: "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.¹¹⁹ Ratification is therefore a formal commitment in addition to the signature, normally required by multilateral treaties. This is an action by a state, normally conducted once necessary domestic legislation or executive action has been completed. This can also be the case in a situation whereby the state endorses a preceding signature and signifies its intention to comply with the specific provisions and obligations of the treaty. In the period between signature and ratification, a state is provided with an opportunity to reconsider its obligations under the treaty concerned. After ratification a state is formally bound by the substantive provisions of the treaty. At the AU, ratification is completed by a formal exchange or deposit of the treaty with the Chairperson of the African Union Commission, and in case of the UN, with the Secretary General of the UN.
230. A State is also allowed under international law to make reservations not to be bound with one or more provisions of a treaty unless the reservation is prohibited by the treaty or the treaty specifically prohibits the reservation that is intended to be made by the State or the reservation goes against the very purpose and object of the treaty.¹²⁰
231. The Respondent State is one of the few African countries which have shown its commitment to the Charter by ratifying it in 1986. In ratifying the Charter the Respondent State did not and has still not made reservations of any kind. Therefore, it has the obligation to respect, protect and fulfil all the provisions of the Charter without any exceptions. During ratification, if its intention was not to be bound by the Charter as a whole then it should have refrained from ratifying the Charter or it should have withdrawn following the proper procedures. Or if it wanted not to be bound by certain provisions of the Charter it should have formally made its reservations during ratification. But in the absence of any of these the legal presumption is that it is bound by the Charter and hence is expected to comply with the provisions of the same.
232. In **International Pen and Others v Nigeria**¹²¹ the African Commission restated this point when it observed that 'the African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A State not wishing to abide by the Africa Charter might have refrained from ratification'. The Commission is of the opinion that Botswana is no exception to this rule and hence it is bound by the provisions of the African Charter. The State's argument that the drafters of the Charter did not intend the latter to be a binding document cannot stand, because had African leaders not intended the Charter to be legally binding,

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Communications 137/94, 139/94, 154/96 & 161/97 - *International Pen and Others v Nigeria* (1998) para 116.

- they could have adopted a declaration which under international law is generally not a legally binding document.
233. The Respondent State makes reference to certain paragraphs of the preamble of the Charter to support its argument that the Charter was not meant to be binding. In the first place, it should be noted that preambles are generally not considered as a substantive part of legal texts and by no means can be given the same weight as the provisions of a Charter. If the need arises to interpret such it should be done in light of the object and purpose of the treaty. The Commission has also stressed the point that the Charter should be interpreted as a coherent whole with each provision being interpreted in light of other provisions.¹²² It would be wrong therefore to single out the preamble of the Charter and try to give the meaning it was never intended to have in the Charter as a whole.
234. Therefore, the Commission finds that the Charter is a binding document and Botswana, as a State Party thereto, has an obligation to comply with its provisions.
235. The Respondent State also argues that the Charter has no force of law in Botswana as the later is a dualist State.
236. The fact that a State is monist or dualist cannot be used as an excuse for not complying with its treaty obligations. On the question of when or whether international human rights instruments should be implemented at domestic level, there has for a long time been raging debates in the application of international laws within domestic context. Of the two theories on when international law should apply, Botswana subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law, except where it is in conflict with domestic law.
237. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state Courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states that “it is within the proper nature of the judicial process and well established functions for national Courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law”¹²³.

¹²² Legal Resource Foundation v Zambia, para 70.

¹²³ Bangalore Principles on the Domestic Application of International Human Rights Norms, Judicial Colloquium held from 24 – 26 February 1988, Bangalore, India, Principle 7.

238. That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. In *Sarah Longwe v. International Hotels*, Justice Musumali of the Zambian High Court stated that "... ratification of such (instruments) by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this Court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute"¹²⁴.
239. It is also a well established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations.¹²⁵ In **Legal Resource Foundation v Zambia**¹²⁶ the Commission reiterated this point when it held that 'international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on State Parties'.
240. The Commission was established to make sure that the acts of the executive, legislative and judicial branches of States Parties are compatible with the provisions of the Charter. Therefore, the fact that the provisions of the Charter are not domesticated into the laws of Botswana does not bar the Commission from assessing the compatibility of Botswana laws and executive actions with the provisions of the Charter.
241. In **Jawara v The Gambia**¹²⁷ the Commission was categorical when it stated that if a State Party fails to recognise the provisions of the African Charter, there is no doubt that it is in violation of Article 1 of the same. Article 1 of the African Charter thus imposes a general obligation on all States Parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights. As such, any finding of violation of those rights constitutes violation of Article 1.
242. The Commission however has no power to rule on the Constitutionality or otherwise of the laws, executive actions or judicial decisions of States Parties and thus is not going to make any pronouncement on the constitutionality of the provisions of the Botswana Immigration Act or any of the actions of the authorities.

Decision of the Commission

243. For the above reasons, the Commission finds that Botswana has violated Articles 1, 2, 7(1)(a), 9, 12(4) and 18(1) & (2) of the African Charter.
244. **The Commission recommends:**

¹²⁴ Sara H. Longwe v International Hotels (Zambia) 1993 4LRC 221

¹²⁵ Art 27 of Vienna Convention on the Law of Treaties

¹²⁶ Legal Resources Foundation v Zambia, para 60

¹²⁷ Jawara v The Gambia, para 46.

- (i) that the Respondent State provides adequate compensation to the victim for the loss and cost he has incurred as a result of the violations. The compensation should include but not be limited to remuneration and benefits he lost as a result of his expulsion, and legal costs he incurred during litigation in domestic courts and before the African Commission. The manner and mode of payment of compensation shall be made in accordance with the pertinent laws of the Respondent State; and
- (ii) The Respondent State should take steps to ensure that Sections 7(f), 11(6) and 36 of the Botswana Immigration Act and its practices conform to international human rights standards, in particular, the African Charter.

Done in Banjul, The Gambia, at the 47th Ordinary Session of the African Commission on Human and Peoples' Rights held from 12 - 26 May 2010.