

233/99 - Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) / Ethiopia

And

234/99 - Interights (on behalf of Pan African Movement and Inter Africa Group) / Eritrea

Rapporteur:

26th Session: Commissioners Badawi and Johm
27th Session: Commissioners Badawi and Johm
26th Session: Commissioners Badawi and Johm
27th Session: Commissioners Badawi and Johm
28th Session: Commissioners Badawi and Johm
29th Session: Commissioners Badawi and Johm
30th Session: Commissioners Badawi and Johm
31st Session: Commissioner Johm
32nd Session: Commissioner Johm
33rd Session: Commissioner Johm

Summary of Facts

1. The Complainant alleges that sometime in the second quarter of 1998 there was an international armed conflict between Eritrea and Ethiopia that led to the beginning of active hostilities between the two countries.
2. During this period it is alleged by the Complainant that thousands of persons of Ethiopian nationality were expelled from Eritrea, either directly or constructively by the creation of conditions in which they had no choice other than to leave Eritrea. In particular, over 2,500 were forcibly expelled and dumped at the border where there was ferocious fighting and heavily infested with anti-personnel land mines.
3. It is also alleged that between June 1998 and July 1999, more than sixty one thousand people of Eritrean ethnic descent who are legal residents or citizens of Ethiopia were deported from Ethiopia. Most of these are urban deportees.
4. The Complainant asserts that in both cases, thousands of persons of Ethiopian origin and those of Eritrean origin were arrested and interned in Eritrea and Ethiopia respectively under harsh conditions with no visitation rights for their families, no food, clothing and toilet facilities for extended periods of time.
5. The Complainant alleges that some Ethiopian women and young girls were tortured and raped in the affected areas by Eritrean soldiers.

6. The Complainant also alleges that most of the deportees were subjected to cruel, inhuman and degrading treatment. Furthermore, the governments of Eritrea and Ethiopia arbitrarily deprived most of the deportees their property.
7. Specifically in the case of those persons deported by the government of Eritrea, some deportees were forced to work without salaries in exchange for protection. Yet others were forced out of their rental accommodation, suffering forcible eviction and homelessness as a result.
8. While in the case of those persons deported by the government of Ethiopia, the deportees, prior to their deportation were required to transfer their rights over their property in Ethiopia by a power of attorney to a legal agent. In compliance with this, husbands often designated their wives as their legal agents, only to find that their wives were given a month or two to sell their properties and were then deported a week or two after they were told to sell. In effect, the deportation was accompanied in most cases by an expropriation of the property of the deportees. In some cases some deportees also had their rental properties taken over. Some bank accounts were frozen, and some savings books were destroyed, making it impossible for the deportees or their designated agents to gain access to such savings.
9. The Complainant claims that while effecting the said deportations, parents and children were forcibly separated without any provision for the care, feeding, and housing of the children. As at the time of submission of the complaints, neither parents nor children can travel across the Eritrean-Ethiopian border and even telephone communication is impractical.

Complaint:

10. The Complainant alleges violations of Articles 1, 2, 3, 4, 5, 6, 7 (1), 12 (1), (2), (4) and (5), 14, 15, 16 and 18(1) of the African Charter.

Procedure

11. The complaint lodged by Interights against Eritrea and Ethiopia was received at the Secretariat of the African Commission on 5th October 1999.
12. At its 26th ordinary session held in Kigali, Rwanda, the African Commission decided to be seized of communications 233/99 and 234/99 and requested the Parties to furnish it with additional information on its admissibility in accordance with Article 56 of the Charter.
13. On 17th January 2000, the Secretariat conveyed the above decision to the parties and forwarded a copy of the summary of the communication and the original text of the complaint together with the documents attached thereto.
14. On 30th April 2000, during the 27th ordinary session of the African Commission, the Allard K. Lowenstein International Human Rights Law Clinic at the Yale Law School in

the United States submitted an *amicus curiae* brief to the African Commission on the complaint brought against Ethiopia.

15. At its 27th ordinary session held in Algeria, the African Commission heard the representatives of the parties on the admissibility of the case. It declared both communications admissible and requested parties to submit their arguments on the merits. The various parties were informed accordingly of the decision of the African Commission.
16. At its 28th ordinary session held in Cotonou, Benin, the African Commission heard both parties.
17. At its 29th ordinary session held in Libya, the African Commission heard both parties and decided to consolidate **Communications 233/99 and 234/99**. The African Commission deferred consideration both communications on the merits to the 30th Ordinary Session and invited parties to the communication 233/99 and 234/99 to submit arguments for the purpose of clarifications in terms of Rule 104 of the Rules of Procedure of the African Commission -:
 - a. On the desirability or otherwise of considering the communications under the provisions of Articles 47-54 of the African Charter on Human and People's Rights on communications between States and to follow the procedure laid down there-under;
 - b. On the extent to which matters covered by the complaint are the subject of the Peace Agreement between the Government of Democratic Federal Republic of Ethiopia and the Government of State of Eritrea signed in Algiers on 12th December 2000, including the mechanism for the consideration of claims by individuals in either State whose citizenship may be in dispute [Article 5(8)];

And in the alternative -:

- c. Indicate the relevance or otherwise of Article 56(7); and
 - d. Whether a final decision on the merits at this stage will have an impact and what effect, if any, that would have on the peace process between the two countries.
18. On 18th June 2001 both parties were informed of the African Commission's decision and were invited to forward their submissions on the abovementioned questions.
19. At its 30th ordinary session held in The Gambia, the African Commission heard oral submissions from all the parties and decided as follows -:
 - The Governments of the Federal Democratic Republic of Ethiopia and the State of Eritrea should submit claims relating to the abovementioned communication to the Claims Commission.

- That any correspondence relating to communication 233/99 and 234/99 made to the Claims Commission should be copied and forwarded to the African Commission.
 - To postpone further consideration on the merits of communication 233/99 and 234/99 to the 31st Ordinary Session to ascertain whether matters covered by the communication are also covered by and have been submitted to the Claims Commission.
20. On 24th October 2001 the parties were informed of the decision of the African Commission.
 21. During the 31st ordinary session of the African Commission, Eritrea submitted a letter from the President of the Claims Commission. In that letter the President of the Claims Commission states to the effect that, Eritrea and Ethiopia can provide the African Commission with copies of their statements of claim or other appropriate information relating to the Claims Commission if required by the African Commission.
 22. At its 31st ordinary session, the African Commission heard oral submissions from all the parties to the communication and decided to defer consideration of the matter to the 32nd session in order to allow the Complainants time to forward their written responses to the written submissions of Ethiopia.
 23. On 7th June 2002, all the parties to the abovementioned communication were informed of the African Commission's decision. Interights was requested to forward its written response to the Secretariat of the African Commission within 2 months from the date of notification.
 24. On 30th July 2002, Interights was reminded that the Secretariat was awaiting to receive their written submissions on or before the 7th August 2002. There has been no response from Interights thus far.
 25. At its 32nd ordinary session, the African Commission heard oral submissions from the State of Eritrea and decided to defer consideration of this communication to the 33rd ordinary session. Parties to the communication were informed accordingly.
 26. At its 33rd Ordinary Session, held from 15th to 29th May 2003, in Niamey Niger, the African Commission decided to suspend consideration of these communications *sine die*.

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Admissibility

27. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by the conditions stipulated in Article 56 of the Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant for a communication to be declared admissible.

28. Of the seven conditions, the government of Ethiopia claims that the Complainants have not fulfilled three; namely: **Article 56(1), (5) and (7)**. Additionally, it questions the neutrality, credibility and integrity of the NGOs submitting the communication.
29. The State of Eritrea on its part claims that the Complainants have not fulfilled two conditions, namely: **Article 56(6) and (7)**.
30. Article 56(1) of the African Charter stipulates
"Communications relating to human and peoples rights referred to in Article 55 shall be considered if they:
(1) Indicate their authors even if the latter request anonymity"
31. The government of Ethiopia submits that the Complainants being NGOs are expected to provide the names of their representatives, and since they failed to do so in their letter of August 1999 the African Commission should reject the communication.
32. Furthermore, the government of Ethiopia questions the neutrality, credibility and integrity of the NGOs submitting the communications. This, the government alleges is evidenced by the superficial treatment given by the Complainant NGOs to the plight of thousands of Ethiopians suffering in the hands of the Eritrean government whereas with respect to Eritrea, they submitted a detailed verbatim report. Ethiopia thus claims that the submission on Ethiopia is only an attempt by the Complainant to give it a semblance of credibility.
33. The African Commission is of the view that in terms of Article 56(1) of the African Charter, it is enough if the said complaint bears, as in this case, the name of one of the Organisation's representatives. Thus the present complaint cannot be declared inadmissible on the basis of Article 56(1).
34. With respect to the question of the neutrality, credibility and integrity of the NGOs submitting the communication, the African Commission does not consider this issue as one that falls within the requirement for the admissibility of the communication as stipulated under Article 56 of the Charter. In any case, the evidence before the African Commission does not lead it to uphold the submission of the government of Ethiopia on the credibility, neutrality and integrity of the NGOs particularly Interights which effectively became the Complainant.
35. Article 56(5) of the African Charter stipulates -:
"Communications relating to human and peoples rights referred to in Article 55 shall be considered if they:
(5) Are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged"
36. Regarding the issue of exhaustion of local remedies, the government of Ethiopia submits that the Complainants have not availed themselves of the remedies available at the local courts before approaching the African Commission.
37. The Complainant asserts, and the African Commission is of the opinion that there were no domestic remedies available to the Complainants, as a practical matter in this case. In

coming to this decision the African Commission relies on its decision on the issue in **Communication 71/92 Recontre Africaine Pour la Defense des Droits de l'Homme/Zambia** a case that involved mass deportation and transfer of multiple victims. In this case the African Commission observed that

"The mass nature of the arrests, the fact that victims were kept in detention prior to their expulsion, and the speed with which the expulsions were carried out gave the Complainants no opportunity to establish the legality of these actions in the courts. For Complainants to contact their families, much less attorneys was not possible. Thus the recourse referred to by the government, ... was, as a practical matter, not available to the Complainants."

38. The government of Eritrea alleges that the Complainant has not fulfilled the conditions stipulated under Article 56(6) of the African Charter. Article 56(6) of the African Charter reads

"Communications relating to human and peoples rights referred to in Article 55 shall be considered if they:

(6) are submitted within a reasonable period from the time local remedies are exhausted or from the time local remedies are exhausted or from the date the commission is seized with the matter"

39. The African Commission is of the view that bearing in mind its decision in relation to Article 56(5), compliance with the provisions of Article 56(6) of the African Charter by the Complainant is rendered inapplicable.

40. Both the governments of Eritrea and Ethiopia also raise an objection to the African Commission admitting the communications stating that the Complainants did not comply with the provisions of Article 56(7) of the African Charter.

41. At its 27th ordinary session held in Algeria, after hearing the representatives of the parties on the admissibility of the case, the African Commission decided to declare both communications admissible.

42. It is to be recalled that at its 29th ordinary session held in Libya, the African Commission heard oral submissions from all the parties and decided to consolidate **Communications 233/99 and 234/99**. The African Commission also postponed further consideration on the merits of the case to the 30th Ordinary Session and invited parties to the communication 233/99 and 234/99 to submit arguments for the purpose of clarifications in terms of Rule 104 of the Rules of Procedure of the African Commission.

Clarifications Sought By The African Commission In Terms Of Rule 104 Of The Rules Of Procedure Of The African Commission

The desirability or otherwise of considering the communications under Articles 47-54 of the African Charter

43. The Respondent States argue that it is undesirable that the communications before the African Commission be converted into State-to-State proceedings. The government of Ethiopia takes this position because the two countries, Ethiopia and Eritrea have already negotiated and signed a Peace Agreement with regard to the conflict that gave rise to the

human rights violations that were committed by the respective States. Therefore the African Commission should discontinue considering the complaints before it and let the Ethio-Eritrean Claims Commission handle the matters raised within the complaints.

44. The communications presently before the African Commission are governed by Articles 55-57 of the Charter, a category of cases clearly distinct from complaints governed by Articles 47-54 of the Charter. The provisions of the African Charter and the rules of procedure do not provide for any procedure to convert non-State communications into inter-state communications. The initiation of an inter-state complaint is dependent on the voluntary exercise of the sovereign will of a State party to the Charter, which decision can only be made by States in accordance with the Charter. From the submissions of the Respondent States, the African Commission comes to the conclusion that Ethiopia and Eritrea do not wish to initiate an inter-state complaint before the African Commission; furthermore they believe that the complaint against them that is before the African Commission should be dismissed as they believe that the Ethio-Eritrean Claims Commission would be better suited to handle the matters raised in those complaints. The African Commission cannot and will therefore not consider the communication under Articles 47-54, a procedure relating to the consideration of inter-state communications.

The Extent To Which Matters Covered By The Complaints Are The Subject Of The Peace Agreement Between The Governments Ethiopia And Eritrea Signed On 12th December 2000, Including The Mechanism For The Consideration Of Claims By Individuals In Either State Whose Citizenship May Be In Dispute (Article 5(8))

45. The matters raised by the Complainants before the African Commission relate to abuse of human rights of people in violation of the provisions of the African Charter by the governments of Ethiopia and Eritrea during the period of the Ethio-Eritrean Conflict.
46. Article 5(1) of the Peace Agreement between the Respondent States establishes a Claims Commission and further spells out its mandate. Article 5(1) of the Peace Agreement provides -:
- (1) *Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration, all claims for loss, damage or injury by one Government against the other, and by nationals (including both neutral and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are:*
- (a) *related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation or, Cessation of Hostilities Agreement, and*
- (b) *result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.*

47. The mechanism for the considering claims brought by Ethiopia and Eritrea is governed by Article 5(8) of the Peace Agreement which provides -:

(8) Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons. All claims submitted to the

Commission shall be filed no later than one year from the effective date of this agreement. Except for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this agreement, the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this Article, and any such claims which could have been and were not submitted by that deadline shall be extinguished, in accordance with international law.

48. As part of their submissions on the clarification sought by the African Commission, the government of Ethiopia forwarded documents relating to the Claims Commission's hearings that were held from 1st to 2nd July 2001. During the hearings, the Claims Commission addressed itself to the nature of the claims that the governments of Ethiopia and Eritrea will place before it. The Claims Commission was of the view that its jurisdiction under Article 5(1) includes two basic types of claims. The Parties may file traditional Inter-State claims under the principles of the law of State Responsibility for injury to the Claimant State. These may include claims for injuries to the State occurring by reason of injuries to its nationals in violation of international law. Or, the Parties may choose to file the claims of individual nationals that fall within the scope of Article 5(1). The Claims Commission is open to either approach, or to a combination of them, so long as no duplicate compensation for the same injury results.
49. At the 31st session of the African Commission, both the Respondent States asserted that they had filed with the Claims Commission, all the matters covered by communication 233/99 and 234/99.
50. The government of Eritrea contended that it made claims for violations of the rights of Eritrean citizens and/or Ethiopian citizens of Eritrean ethnic origin and that these claims also constitute allegations of violations of the African Charter and of international law (Statements of Claims Nos. 15, 16, 17, 19 and 21). The claims include the internment without trial of civilians because of their membership in political organisations or for reasons of their ethnicity or national origin. The government of Eritrea stated that it made claims on behalf of persons of Eritrean citizenship and/or Eritrean national origin for -:
 - The illegal internment of civilians in concentration camps without formal accusation or trial;
 - The physical maltreatment and torture of such individuals;
 - The discriminatory dismissals from employment, evictions from rental property, and seizure of property from persons of Eritrean national origin who are still present in Ethiopia.
51. The government of Ethiopia also argues that the allegations presented in this communication have been submitted to the Claims Commission. They state that in their Statement of Claim No. 5 that they submitted before the Claims Commission, they made claims for the unlawful treatment of Ethiopian nationals living in Eritrea, including arbitrary detention, mass internment, torture, abuse, murder, forced disappearances, forced conscription into the military, confiscation of property and systematic rape of Ethiopian women. The Statement of Claim also includes factual representations relating to the Eritrean government's policy of discrimination against Ethiopians in Eritrea, including arbitrary dismissal of Ethiopian nationals from public and private employment

in Eritrea; Eritrea's unlawful restrictions on the freedom of movement, including exit from Eritrea and forceful expulsion of Ethiopians and unlawful and inhuman conditions during the expulsion of Ethiopian nationals from Eritrea.

The Relevance Or Otherwise Of Article 56(7) Of The African Charter

52. Article 56(7) of the African Charter provides:

"Communication relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

(7) do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter

53. Article 56(7) of the Charter precludes the African Commission from considering cases that have been settled by States 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.

54. The Complainant refers the African Commission to its decision in ***Communication 59/91, Emgba Mekongo Louis/Cameroon***, where it held that mediation by political institutions such as the European Union was irrelevant to Article 56(7) of the Charter. Interights thus submits that this holding applies with equal force to the political organs of the OAU.

55. The Claims Commission created by a Peace Agreement should not be viewed as a political organ of the OAU; rather it is a body that has been established under a Peace Agreement and which, under Article 5(13), is bound to apply rules of international law and cannot make decisions *ex aequo et bono*. Indeed the Claims Commission has ruled that in dealing with evidence, they must apply evidentiary rules that prove or disprove disputed facts (See decision number 4 of the Claims Commission). The Claims Commission therefore has the capacity, unlike the African Commission to deal with complex matters such as the citizenship status of the individuals, what amount of compensation shall be awarded and to whom, in respect of the violations that they have suffered. Such was the complexity that the African Commission was faced with in ***Emgba Mekongo Louis/Cameroon (supra)*** where it found a violation of Mekongo's rights but stated "that it was unable to determine their amount and the quantum should be determined under the law of Cameroon".

56. In ***Communication 60/91, Constitutional Rights Project/Nigeria***, the African Commission held that it would not rely on the process or mechanism of a "discretionary, extra-ordinary ... non-judicial nature" or that "have no obligation to decide according to legal principles" to preclude the admissibility of a communication under Article 56(7) of the African Charter. The African Commission would say that this is clearly not the case with regard to the Claims Commission as has been demonstrated by Article 5(13) of the Peace Agreement that provides that it is bound to apply rules of international law and cannot make decisions *ex aequo et bono*. This therefore puts the Claims Commission under those bodies envisaged under Article 56(7).

57. From the submissions of the Respondent States, it seems to the African Commission, that the matters brought before it, are matters that have been placed before the Claims Commission which can therefore adequately deal with such matters.
58. At the 31st Ordinary Session, the Complainants requested the African Commission to defer consideration of these communications to the 32nd ordinary session to enable them submit written responses to the Respondent States' submissions. The African Commission granted the request and informed the parties accordingly. The Secretariat of the African Commission has written to the Complainants asking them to forward the stated written responses but there has been no reaction from them.
59. In principle the appropriate remedy of those claims submitted to the Claims Commission should be monetary compensation. However, it is also within the Claims Commission's mandate to provide other types of remedies that are acceptable within international practice. It is probable that the African Commission will reach a decision finding the Respondent States in violation of the rights of the individuals on whose behalf Interights is acting. However, as was the case in **Emgba Mekongo Louis/Cameroon** (*Supra*), the African Commission would certainly be constrained in awarding compensation and may have to refer this matter to the Claims Commission and at which point the matter would certainly be time barred.
60. While the African Commission would have opted to proceed and deal with the instant communications, the Respondent States Parties have assured the African Commission that all the issues before the African Commission will be brought before the Claims Commission.
61. For these reasons, the African Commission decides as follows -:
- To suspend consideration of communication 233/99 and 234/99 *sine die*, and await the decision of the Claims Commission with regard to matters contained in this communication;
 - That the Respondent States keep the African Commission regularly informed of the process before the Claims Commission with particular reference to the matters contained in these communications;
 - The Republic of Ethiopia and the State of Eritrea are requested to transmit a copy of the text of the decision of the Claims Commission to the Secretariat of the African Commission as soon as it is delivered;
 - In the event that the Claims Commission does not fully address the human rights violations contained herein, to reopen the matter for consideration;
 - Reserves its decision on the merits of these communications.

***Done at the 33rd Ordinary Session held in Niamey, Niger
from 15th to 29th May 2003***