

**Communication 373/2009 (formerly 242/2001) – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l’Homme* v Islamic Republic of Mauritania**

**Decision on Complainants’ Request for Review**

1. On 1 September 2004, the Secretariat of the African Commission received from the Complainants, a request to review the Commission’s decision on the merits of **Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l’Homme*/Islamic Republic of Mauritania**, adopted at the African Commission’s 35<sup>th</sup> Ordinary Session, held in Banjul, The Gambia in May 2006.
2. The request was considered at the 36<sup>th</sup> Ordinary Session of the Commission held in Dakar, Senegal, from 23 November – 7 December 2006, and the Commission decided to bring the request to the attention of the Respondent State for the latter’s comments. In spite of numerous reminders; the Commission has not received any response from the Respondent State. The Commission will therefore proceed to take a decision on the Complainants’ request, in spite of the fact that the State has not responded.
3. In the request, the Complainants raised two issues: the first issue relates to the decision of the African Commission being *infra petita*, and the second issue relates to the fact that the decision of the Commission ‘did not represent the required guarantees of impartiality’.
4. Regarding the first issue, the Complainants argue that having found the Respondent State in violation of certain provisions of the African Charter, the African Commission failed to address itself to the prayers of the Complainants, so as to restore the victim to his rights. According to the Complainants, this failure to pronounce on the prayers renders the Commission’s decision *infra petita*.

5. On the question of impartiality, the Complainants submit that the principles of natural justice were not respected. They claim that one of the Members of the African Commission, a national of the Respondent State, took part in the deliberations that arrived at the final decision on the Communication. According to the Complainants, this is against Rule 109 of the Rules of Procedures of the African Commission, which forbids Members of the Commission from participating in the deliberation of a Communication when they have a “personal interest” or have “participated in whatever capacity in the adoption of whatever decision relating to the case referred to by the Communication”.

6. To consider this request, the African Commission has to address two preliminary issues:

- Whether or not it is competent to review its own decision; and
- Under what circumstances its decision should be reviewed?

### **On the Competence of the Commission**

7. Neither the African Charter nor the Commission’s own Rules of Procedure provide for a review of the African Commission’s decision on the merits. Provision is made within the Commission’s Rules of Procedure only for the review of a decision on admissibility, and even then, only in a situation where a Communication has been declared inadmissible.<sup>1</sup>

8. This notwithstanding, the African Commission can draw inspiration from the practices of similar regional and international bodies to determine whether it can review its own decision. In **Purohit & Moore v The Gambia**<sup>2</sup> the Commission was

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<sup>1</sup> See Rule 118(2).

<sup>2</sup> Communication 241/2001.

confronted with a similar request and it invoked Articles 60 and 61 of the African Charter, and adopted the principles and practices of other international tribunals with similar mandate. In that Communication, the Commission was persuaded by the practices of the International Court of Justice (ICJ), whereby Article 61(1) of the ICJ Statute requires that, 'an application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming review, always provided that such ignorance was not due to negligence'.<sup>3</sup>

9. The African Commission further adopts the ICJ's reasoning that an application for revision must be made within a certain period of time.<sup>4</sup>

10. Therefore, like all tribunals, domestic and international, judicial and quasi-judicial, the African Commission has the competence to review its decision on the merits, especially where it is evident that the application for review has introduced a new or compelling issue which, had the Commission had knowledge of, would have impacted on the decision; or where the Commission has inadvertently failed to take into account certain facts during the consideration of the case.

11. In other words, the Commission can review its own decision when it is apparent that the application introduces a new or compelling element, the failure to consider which would be an affront *to fairness, justice and good conscience*.

12. After determining that it is competent to review its own decision and the circumstances under which it can review its own decisions, the African Commission will now examine whether the application of the Complainants meet the African

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<sup>3</sup> Statute of the International Court of Justice. See [www.icj-cij.org/documents](http://www.icj-cij.org/documents)

<sup>4</sup> It should be noted that the ICJ has held that the application should be submitted 'at latest within six months of the discovery of the new fact' and 'no application for revision may be made after the lapse of ten years from the date of the judgment.' See ICJ Statute – Article 61 (4 & 5).

Commission's requirements for a review of its decision, that is, whether the *application introduces a new or compelling element*.

13. In the present Communication, the Complainants have seized the Commission on two main issues:

- (a) allegation that the decision of the Commission was *infra petita*; and
- (b) allegation of partiality.

14. Can the Commission consider these two issues to be new or compelling to warrant a review of its decision?

15. While the two issues raised by the Complainants do not raise any new element relating to the substance of the Communication that they submitted, they certainly are compelling enough to warrant a review.

**On the question that the decision is *infra petita***

16. The Complainants in their application for review are not raising new facts. They have also not introduced evidence that was not brought to the attention of the African Commission during the consideration of the Communication on the merits. Rather they are asking the Commission to pronounce itself on each of the prayers they made when the Communication was submitted to the Commission.

17. The Complainants, in the Communication, had requested the Commission that should the latter find the State in violation of any of the provisions of the African Charter, it should:

- urge the State to restore all rights of the UFD/EN and instruct it to restore all confiscated properties;

- request the Mauritanian authorities to harmonise national legislation in accordance with the relevant provisions of the African Charter pertaining to fair trial and freedom of association and expression;
- ask the Mauritanian government to take necessary measures to ensure that such violations against political parties not be repeated;
- call on the State to put an end to such infractions; and
- request the Mauritanian government to inform the Commission of any measures it takes to address the breaches elaborated in the Communication.

18. In its decision, the African Commission held with respect to the allegations made against the State that “the dissolution of *UFD/Ere Nouvelle* political party by the Respondent State was not proportionate to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of Article 10(1) of the African Charter”. The Commission did not pronounce itself on any of the prayers made by the Complainants.

19. Does the fact that the Commission did not address the prayers of the Complainants make its decision *infra petita*? Put differently, could the Commission’s decision not to pronounce on the prayers made by the Complainants be considered *infra petita*?

### **What is an *infra petita* decision?**

20. The term *infra petita* is a Latin expression sometimes used to describe a situation where the court has failed to pronounce itself on one of the main claims of a petition. In terms of Article 190 (2)(c) of the **Swiss Federal Statute on Private International Law (PILA)**, an arbitral award or remedy can be set aside if the tribunal has adjudicated beyond the relief sought (*ultra-petita*) or granted relief different than what was sought (*extra-petita*) or failed to adjudicate certain claims raised by the complainant (*infra-petita*).

21. To fully appreciate whether the Commission's decision was *infra petita*, there is need to differentiate between an 'allegation' or 'claim' and a 'prayer' or 'remedy'.
22. An allegation is a claim by a party in a pleading, which the party intends to prove in a court of law. According to the Black's Law Dictionary, an allegation is an assertion, claim, declaration or statement of a party to an action, made in a pleading, setting out what he expects to prove. Allegations thus remain assertions without proof, until they can be proved. Generally, in a civil complaint, as is the present case, the plaintiff (in this case, the Complainants) must carry the burden of proof and the burden of persuasion in order to prove their allegation.
23. In the present Communication, the Complainants allege or claim that the Respondent State has violated certain provisions of the Charter, which allegation/claim they want to prove before the Commission. Simply put, an allegation or a claim is a legal action to obtain a remedy, or the enforcement of a right against another party. It is a legal statement made to alert the accused of the legal implications.
24. A remedy on the other hand is an action taken by a court of law to enforce a right, impose a penalty, or make some other court order in order to resolve a dispute. According to the Black's Law Dictionary, a remedy is the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.
25. In the Communication under consideration, the Complainants allege/claim that the Respondent State has violated Articles 1, 2, 7(1), 9(1), 10(1), 13(1) and 14 of the African Charter, dealing with the State's obligations under the Charter, freedom from discrimination, the right to have one's cause heard, freedom of expression, freedom of association, the right to participate in government and the right to property. These, in the opinion of the Commission, are the Complainants' allegations/claims put before the Commission, which the Complainants want to prove had been violated by

the Respondent State and which they required the Commission to pronounce itself on, based on the interpretation of the African Charter.

26. Apart from making these allegations, the Complainants also called upon the Commission that, should it find that they (the Complainants) have proven the allegations, it should adopt certain measures to reinstate the victim to his rights, including, urging the Respondent State to restore all rights of the UFD/EN and instruct it to restore all confiscated properties; requesting the Mauritanian authorities to harmonise national legislation in accordance with the relevant provisions of the African Charter pertaining to fair trial and freedom of association and expression; requesting the Mauritanian government to take necessary measures to ensure that such violation against political parties not repeat itself; call on the State to put an end to further violations; and requests the Mauritanian government to inform the Commission of measures it has taken to address the breaches elaborated in the Communication. In the opinion of the Commission, the above requests represent the remedies sought by the Complainants.

27. There is thus a clear distinction between an allegation/claim and a remedy/prayer. In the present Communication, the Complainants are not disputing the fact that the Commission addressed the allegations. They are rather arguing that the Commission, having considered the allegations and found a violation, did not provide them with the remedies they requested.

28. Naturally, when a petitioner brings a complaint before a tribunal, he/she expects the tribunal to make a determination as to his/her rights vis-à-vis the other party (in this case the State). There is a legitimate expectation on the part of the petitioner that where the tribunal (in this case, the African Commission) finds that a State has violated the rights of the petitioner, he/she would be provided with remedies so as to restore his/her rights; that the State would be cautioned to take measures to ensure that the act that resulted in the violation does not repeat itself; and the tribunal could

make any other decision it deems necessary in the particular circumstance. These are legitimate expectations from the Complainants.

29. The right to a remedy for a violation has been firmly established under international law. This principle is provided in Article 63 (1) of the Inter-American Convention on Human Rights which provides that "...if the [Inter-American Court] finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party". In applying this provision, the Inter-American Court held in ***Yakye Axa v Paraguay***<sup>5</sup> that, "any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations".
30. In the present Communication, the Commission found that "the dissolution of UFD/*Ere nouvelle* political party by the Respondent State was not proportional to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of Article 10(1) of the African Charter". It made no further determination, either by way of restoring the victim to his rights or proposing what the State should do to prevent a recurrence of the violation.
31. Does the fact that the Commission, after concluding that there was a violation of the Charter but failing to provide the remedies requested by the Complainants, renders its decision *infra petita*?
32. To answer this question, the Commission will have to analyse the decision to examine the claims made by the Complainants and the extent to which the Commission addressed them.

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<sup>5</sup> *Case of Yakye Axa Indigenous Community v Paraguay, Judgment of 17 June 2005, Series C No. 125. 5. I/A Court H.R.*

33. A tribunal will not be considered to have omitted to pronounce itself on a claim if it can be deduced from the judgment that the claim was implicitly rejected, or on the contrary, that the tribunal implicitly admitted it. It is usually the case for example, where a petition contains main, as well as, subsidiary claims.
34. In the present Communication, the allegation/claim of the Complainants before the Commission is clear - that by its action, the Respondent State has violated Articles 1, 2, 7(1), 9(2), 10(1), 13(1) and 14 of the Charter. These are mere allegations/claims which the Complainants have to prove before the Commission. At the same time, the remedies the Complainants requested were also clear. (See para 17 above).
35. After analyzing the submissions made by both the Complainants and the State, the Commission held with respect of the Complainants allegations/claims that Article 7(1) as alleged has not been violated (see Commissioner's arguments from paras 43 – 47 of the decision); that Articles 9 (2), and 13(1) as alleged have equally not been violated; but that Article 10(1) has indeed been violated as alleged (see paras 76 – 85 of the decision).
36. In its analysis of the Complainants allegations/claims, the Commission failed to address three allegations/claims, that is, the alleged violation of Articles 1, 2 and 14, dealing with the state obligations under the Charter, non-discrimination and the right to property, respectively.
37. While it is important for the Commission to provide remedies to a victim whenever it finds that the State has infringed the victim's right, failing to do so does not render the Commission's decision *infra petita*, if it can be deduced from the decision that all the allegations mentioned in the Communication have been addressed by the Commission.

38. From the analysis above, it is evident that that the Commission failed to pronounce itself on all the allegations made by the Complainants, in particular, it failed to pronounce itself on the alleged violation of Articles 1, 2 and 14, the latter being a principal allegation. To the extent that the Commission did not address all the allegations, the decision of the Commission is *infra petita*.

39. Having established that the decision is *infra petita*, can the Commission supplement its decision?

38. It is perfectly legal for a tribunal that has forgotten to decide on a claim (*infra petita*) to supplement its decision without affecting the *res judicata* character of the other claims decided upon. This procedure excludes recourse to a higher court and can be undertaken *suo moto* or on the request of one of the parties.

39. The Commission will therefore proceed to pronounce on the alleged violation of Articles 1, 2 and 14 of the Charter.

### **Alleged violation of Article 2**

40. The Complainants allege that there the Respondent State has violated Article 2 of the African Charter. Article 2 states that: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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".

41. The Complainants do not demonstrate how the Respondent State discriminated against the victim, and as such the Commission cannot hold that the State violated Article 2 of the Charter.

### **Alleged violation of Article 14**

42. The Complainants alleged that the State confiscated the property of the political Party in violation of Article 14 of the Charter which provides that '[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'.
43. The right to property is a traditional fundamental right in democratic and liberal societies. It is guaranteed in international human rights instruments as well as national constitutions, and has been established by the jurisprudence of the African Commission.<sup>6</sup> The role of the State is to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.
44. The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.
45. However, in the situation described by the present Communication, the State has not demonstrated that the property of the Complainant was confiscated for public interest or in accordance with any established law. The confiscation was done arbitrarily in a manner that violates Article 14 of the African Charter.

### **Alleged violation of Article 1**

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<sup>6</sup> See Communications 71/92 - Rencontre Africaine pour la Défense des Droits de l'Homme/Zambia, Communication 292/2004 - Institute for Human Rights and Development in Africa/Republic of Angola, and Communication 159/1996 - Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola.

46. The African Commission concludes further that Article 1 of the African Charter 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 a violation of Article 1.

### **On the question of partiality**

47. On the question relating to the participation of a Member of the Commission who is a national of the Respondent State, the Commission would like to reiterate that its Rule 109(1) requires that no Member shall take part in the consideration of a Communication:

- If s/he has any personal interest in the case, or
- If he/she has participated, in any capacity in the adoption of any decision relating to the case which is the subject of the Communication’.

48. Rule 109 (2) further empowers the Commission to rule on the applicability of Rule 109(1) where it is called to do so.

49. In the opinion of the African Commission ‘take part’ under Rule 109 (1) of its Rules of Procedure means contributing in the deliberations of a subject matter. While it is recommended that a Commissioner who recuses him/herself leaves the hall during deliberations, a Commissioner who recuses him/herself but chooses to sit in the hall cannot be considered to have taken part in the deliberations. In terms of Article 31, the members are independent experts of the highest reputation, known for their high morality, integrity, impartiality...and serve in their personal capacity. It is thus expected that Members of the Commission live up to the standards befitting their position.

50. It is not necessarily the case that a Member of the Commission from a country against which a complaint has been lodged would have an interest in that particular case. However, it is important to take into consideration the public perception or adopt the principle of a reasonable person in the consideration of a Communication. Would the public or a reasonable man believe that a member of the Commission would 'take part' in the deliberation of a Communication concerning his country and take a neutral decision?
51. The African Commission adheres strictly to the natural justice principle of *nemo iudex in sua causa*: "no man is permitted to be a judge in his own cause". This principle is very critical in the administration of justice, for justice must not only be done, but must be seen to be done.
52. The use of the word 'shall' in Rule 109 implies that the Commission would not compromise in the implementation of this principle. In the Complainants' submissions, they quoted paragraphs 2 and 17 of the Final Communiqué of the 35<sup>th</sup> Ordinary Session of the African Commission to buttress their argument that a Commissioner, a national from the Respondent State, took part during deliberations of the Communication in question.
53. In terms of Rule 106 of the Commission's Rules of Procedure, Communications are examined in private session and the Complainants could not have been privy to what transpired during the examination of the Communication in question.
54. The African Commission's records indicate that the Commissioner in question did not take part in the deliberations of the present Communication.
55. The burden of proving that he did rests with the Complainants. Under such circumstances, and relying on the presumption of regularity, it is presumed that the Commission complied with its procedures under Rule 109.

56. In terms of the presumption of regularity, there is a favourable presumption that all what the Commission does in the normal course of its duty is regular and valid. This evidentiary principle which has its historical roots in the presumption against misconduct of public officials, presupposes that every individual in his or her private and official capacity, does his or her duty, until the contrary is proved. In other words, it will be presumed that government officials (in this case, the Members of the Commission) have discharged their duty rightly and in good faith, unless the circumstances of the case provide adequate proof to the contrary
57. To overturn this presumption, the party that seeks to challenge the presumption, and in this case, alleges that the Commission did not comply with its Rules, bears the burden of proof.
58. The Commission noted in this instance that the fact that the name of the Commissioner, a national of the Respondent State, appeared in the Final Communiqué of the Commission does not signify that the latter took part in the proceedings regarding the Communication in question, in violation of Rule 109. The Complainants therefore have the burden to prove that the spirit and object of 109 have been breached. The only evidence that the Complainants adduced was the reference to the 2<sup>nd</sup> paragraph of the Final Communiqué of the 35<sup>th</sup> Ordinary session of the Commission which indicated that the Commissioner was one of the Members that attended that session.
59. In terms of the Commission's practice, the Final Communiqué lists the names of the Members who attend a particular session. The Communiqué however does not indicate which Members took part in the deliberations of which any particular agenda item. In this case, the name of the Commissioner in question, like the names of all the other Members who attended the session, was indicated in the Final Communiqué of the session. This does not however mean that he took part in the deliberations with respect to the Communication in question.

60. Admittedly, the Complainants could have been misled by the Final Communiqué to assume that all the Members who attended the session also took part in deliberations on all the agenda items, especially as the Final Communiqué did not indicate whether or not any member recused themselves on any particular item.
61. The African Commission is very strict in its application of its Rules of Procedure, and in particular, Rules 109, and with respect to the said Rule, its application is not limited to the consideration of Communications, but extends to all items considered by the Commission.
62. The Commission is therefore of the view that the Complainants have not fully discharged their burden of proof, and to state that the Commissioner, a national of the Respondent State did not take part in the consideration of the Communication in question, and his participation at the session is not proof that he participated in the deliberation related to this Communication.

### **Decision of the African Commission**

63. In view of the above, the Commission finds that:
- i the decision on the merits of Communication **Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l’Homme/Islamic Republic of Mauritania** is *infra petita*, to the extent that it did not address itself to the allegation of violations of Articles 1, 2 and 14 of the African Charter;
  - ii the Respondent State did not violate Article 2 of the African Charter;
  - iii the Respondent State violated Articles 1 and 14 of the African Charter;

iv the Complainants have not discharged their burden of proof with respect to the allegation of partiality, and relying on the presumption of regularity, concludes that the Commission acted correctly and in good faith.

64. The African Commission recommends that:

- i) the Respondent State should pay adequate compensation to the victim for the loss suffered;
- ii) the Respondent State should take steps to ensure that its law on freedom of association, in particular the establishment and functioning of political parties, is in conformity with the provisions of the Charter;
- iii) the Respondent State should inform the African Commission on measures adopted to implement these recommendations within 180 days of receipt of this decision.

***Adopted at the 8<sup>th</sup> Extraordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia.***