

Annex 2

Communication 310/2005 - Darfur Relief and Documentation Centre v. Republic of Sudan²

Summary of Facts

1. This Communication is submitted by the Darfur Relief and Documentation Centre (DRDC) (hereinafter called the Complainant), on behalf of 33 Sudanese citizens (hereinafter referred to as victims) against the Republic of Sudan (hereinafter called the Respondent State).
2. The Complainant states that the victims were hired by the Iraqi - owned Southern Oil Company in the early 1980s as drivers, mechanics, electricians, cooks, servants and manual workers in the oil fields of the said company in Basra City (Southern Iraq).
3. On 22 and 23 February 1983 the said victims were arrested during the first Gulf War between Iran and Iraq and taken to Iranian territory on 24 February 1983 as civilian war detainees where they were detained in special military prisons, until 5 October 1990 (seven years), when they were released and repatriated to Sudan.
4. The Complainant submits that while in detention, the victims lost their sources of income and were unable to communicate with their families and lawyers; they were psychologically and physically tortured, had no access to medical treatment and could not carry out their religious rituals.
5. Following the victims' release from prison, the Iraqi government agreed to meet part of the unpaid salaries for the years that they had spent in Iranian custody. No arrangements were made to pay compensation, damages or reparations for the suffering caused to the victims during their detention.
6. A total of US\$ 500,000, paid in Sudanese currency at the exchange rate of the day of payment, was to be given to the detainees and divided evenly among all of them. It was agreed by the governments of Sudan and Iraq that the said amounts would be paid to the victims through the Ministry of Finance and Economic Planning in Khartoum. (See supporting documents No. 1, 2, and 3).The two governments further agreed that the full amount would be deducted from the debt that Sudan owed Iraq.
7. The Complainant submits further that the Ministry of Finance and Economic Planning in Khartoum informed the victims about the payment arrangements reached between Sudan and Iraq (See supporting document No. 4). The victims accepted the payment terms despite the fact that they were not part of the

² The Republic of Sudan ratified the African Charter on 18th February 1986 and is consequently a State party to the African Charter.

negotiations that led to the payment agreement reached between Sudan and Iraq. This included payment in Sudanese currency and yet their salaries had been earmarked in US dollars.

8. The Complainant alleges that on 20 March 1992, the Sudanese Ministry of Finance and Economic Planning approved the payments to the victims and instructed the bank of Sudan to effect the said payments. (See supporting document No. 5). Subsequently, on 15 April 1993 and 10 May 1993, a total of US\$ 167,367 (SP 22,700,000) was paid to the victims as the first instalment. (see supporting document No.6) Each victim received the equivalent of US\$ 5,230. The Ministry of Finance and Economic Planning promised to pay the remaining balance amounting to US\$ 332,633 at a later date.
9. Payment of the remaining balance due to the victim was delayed and the Complainant states that the Ministry of Finance and Economic Planning eventually refused to pay the said amount altogether. The Complainant alleges that the then First Under-Secretary at the Ministry of Finance and Economic Planning, Mr. Hassan Mohamed Taha was responsible for ensuring that the said amounts were not paid to the victims.
10. The Complainant submits that the victims have attempted to use all the legal and political avenues available in order to have their rights recognised and recover the monies owed them but to no avail.

Articles alleged to have been violated

11. The Complainant alleges that Articles 1, 2, 5, 7(1) (a), 14 and 16(1) of the African Charter on Human and Peoples' Rights have been violated.

Prayers

12. The Complainant requests the African Commission to urge the government of Sudan to -:
 - Pay the outstanding balance due to the victims which currently amounts to US\$ 2,965,789, taking into account the accumulated benefit over the years or *rebeeh*³ specified under the Islamic Banking system applied in Sudan;
 - Pay an additional US\$3 million in compensation for the material, social and psychological damage and disruption of life that the victims have endured during the last 13 years. This brings the total amount being requested to US\$5,965,789.
13. The Complainant further requests that in case of delay in satisfactorily settling the communication and effecting payment, similar benefits should be paid during 2006 and the subsequent years, as well as, US\$ 1,000,000 compensation

³ According to the Islamic Banking System the "rebeeh" is an annual benefit on the principal fund. This amount is multiplied by 120%.

for each additional year from 1st January 2006. The complainant seeks payment of the above balance, benefits and compensation in US currency to be divided equally between the victims.

Procedure

14. The Communication is dated 22 November 2005 and was received by the Secretariat of the African Commission on 24 November 2005.
15. At its 38th Ordinary Session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission considered the Communication and decided to be seized of it.
16. By Note Verbale dated 8 December 2005, the Secretariat transmitted a copy of the Communication to the Respondent State by DHL and requested it to forward its submissions on admissibility within 3 months. The Complainant was also requested to send its submissions on admissibility within 3 months.
17. On 13 February 2006, the Secretariat of the African Commission received the Complainants' submissions on admissibility and acknowledged receipt of the same in a letter dated 14 February 2006. A copy of the Complainants' submissions on admissibility was forwarded to the Respondent State by fax and email.
18. By Note Verbale dated 20 March 2006, the Respondent State was reminded to forward its written submission on admissibility of the Communication.
19. On 20 May 2006, the Secretariat of the African Commission received a Note Verbale dated 20 May 2006 and attached to it was the State's submission on admissibility.
20. During the 39 Ordinary Session of the African Commission, the Commission decided to defer its decision on admissibility of the Communication to its 40th Ordinary Session. By letter and Note Verbale dated 31 May 2006, the Secretariat informed the Complainant and the State respectively, of the Commission's decision to defer the communication to its 40th Session.
21. By email dated 16 April 2007, the Secretariat received a letter dated 10 April 2007, from the Complainant, which had attached to it, additional submissions and documents in reply to the submissions of the Respondent State.
22. At its 40th Ordinary Session, the African Commission decided to defer the communication for further consideration on admissibility, to its 41st Ordinary Session.
23. During its 41st Ordinary Session which was held in Accra, Ghana, the Secretariat of the African Commission received, on the 22 of May 2007, a letter to the African Commission to which was attached further submissions by the complainant in

reply to the Respondent State's submission on admissibility.

24. At the 41st Ordinary Session of the African Commission, the decision on admissibility of the communication was further deferred to the 42nd Ordinary Session.
25. At the 42nd Session of the African Commission the decision on admissibility of this Communication was deferred, to get clarification on some issues from the Complainants.
26. At the 43rd Session the Secretariat was yet to receive the Complainants response and as a result deferred the Communication to the 44th Ordinary Session.
27. The Communication was further deferred during the 44th Session to give time to the Secretariat to draft its decision on admissibility.

The Law

Admissibility

Summary of the Complainant's arguments on admissibility of the communication

28. The Complainant states that a letter was addressed to the President of Sudan HE Omar El Bashir requesting him to intervene in the matter and resolve the case. (Attachment No. 7).
29. After studying the relevant documents relating to this matter, the Solicitor General, on 5 September 2000 forwarded a legal opinion to the Ministry of Finance and Economic Planning confirming that the victims were entitled to the payment of the outstanding balance held by the said Ministry. (Attachment No.9).
30. On 28 August 2001, Dr. Maghzoub Al Khalifa, the then Chair of the Joint Iraqi-Sudanese Ministerial Committee and a former Minister of Agriculture and Forestry of Sudan, sent a letter to the Ministry of Finance and Economic Planning reminding them of the agreement between the Sudanese and Iraqi governments and requesting them to pay the victims the outstanding amounts without delay. (Attachment No. 8).
31. The Complainant states that since attempts at solving the matter amicably had failed, the victims decided to pursue the matter in the courts of law.
32. The Complainant states that on 18 June 2000, the victims in this matter filed a complaint against the Ministry of Finance and Economic Planning before the Court of First Instance in Khartoum. The case - No. AM/1724/2000 was dismissed by the Court on 21 March 2000 (Attachment No. 10). The victims appealed against the judgment of the Court of First Instance before the Court of

Appeal in case no. ASM/475/2001. On 7 July 2001, the Court of Appeal issued an order to the Court of First Instance to reconsider its judgement and on 19 February 2002 the Court of First Instance dismissed the case once again. (Attachment No. 10).

33. The victims appealed against the second judgment of the Court of First Instance to the Court of Appeal in Khartoum in Case No. ASM/250/2002) and on 26 December 2002, the Court of Appeal upheld the judgment of the Court of First Instance and dismissed the case. (Attachment No. 11).
34. The victims approached the High Court in Khartoum, Civil Circuit in case MA/TM/165/2003 for an injunction against the ruling of the Court of Appeal. However, on 18 June 2003, the High Court decided to uphold the ruling of the Court of Appeal and dismissed the matter. (Attachment No. 11). The Complainants allege that the decisions of the court of first instance, Court of Appeal and the High Court, to dismiss the case, were based on technicalities and not on the spirit of justice, law and good conscience.
35. Consequently, the Complainant submits that the victims have exhausted all domestic remedies by virtue of the ruling of the High Court on 18 June 2003, which dismissed the case.
36. The Complainant submits that when reaching their judgments, the courts neglected to take into account elementary facts that would have favoured the victims' case. For instance, the fact that the victims received a part payment in respect of the agreement reached between Sudan and Iraq and that the Ministry of Finance and Economic Planning made an undertaking to pay the victims the outstanding balance; failure to take into account the legal opinion of the Solicitor General stating that he was not a witness to specific incidents. They also claim that the decisions of these Courts to dismiss the matter were based on technicalities and not on the spirit of fairness, law and justice.
37. The Complainant submits further that the Sudanese domestic courts are not competent to deal with a case of such magnitude and notes that the High Court when delivering its judgement in respect of the application for an injunction stated that the amount of financial indemnification claimed in this case supersedes the amount fixed by the Judicial Circular No. 44/99 which is a necessary condition for acceptance of an injunction before the High Court.
38. Additionally, the Complainant avers that the courts in Sudan failed to take into consideration the fact that the then ruling regime in Iraq was totalitarian and that the one in Sudan is military and as such citizens are unable to interfere with government decisions or procure the necessary documents that could prove their cases in a court of law.
39. For these reasons, the Complainant submits that the domestic judicial process was flawed and could not render justice to the victims.

40. The Complainant states that Sudan has been under totalitarian military government headed by a President who is still an active army officer since 30 June 1989. Consequently, the regime pursues a systematic policy of control and domination at all levels of the State apparatus including the judiciary whose procedure and decisions are not respected. As a result, Sudanese citizens, groups and organisations are unable to submit cases relating to human rights before the courts of law for fear of harassment, threats and intimidation by the government security agents.
41. To illustrate that the judiciary is not independent, the Complainant refers the African Commission to the annual reports the then UN Special Rapporteur on the Situation of Human Rights in Sudan in the Fifty-eighth⁴ and the Fifty-ninth⁵ Sessions of the UN Commission on Human Rights which make reference to the lack of independence of the judiciary in Sudan. Furthermore, the Complainant states that the International Commission of Inquiry on Darfur (ICID), established by the UN Security Council in October 2004 to investigate crimes committed within the context of the armed conflict in Darfur also examined the judicial system in Sudan as part of its mandate. In its report of 25 January 2005, the ICID gives a comprehensive overview of the Sudanese judicial system⁶. The Complainant submits that the report acknowledges that during the last decade the judiciary appeared to have been manipulated and politicised and as such judges who disagreed with the government often suffered harassment, including dismissals.⁷
42. The Complainant notes that, the Commission of Inquiry stated that it “considers that in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility...”⁸
43. The Complainant also draws the attention of the African Commission to its decision in **Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan**⁹ in which the Commission found that the judiciary in Sudan was not independent. The Complainant state that even after this pronouncement by the Commission, the situation in Sudan has not improved but has in fact deteriorated in manifolds, as more judges are purged from the judiciary and supporters of the government were appointed in their place.

⁴ E/CN.4/2002/46 dated 23rd January 2002, Para. 19, 20 and 21 pp. 6 and 7.

⁵ E/CN.4/2003/42 dated 6th January 2003' Para. 28 p.8.

⁶ See paragraphs 432-455, pp 111-115.

⁷ See Report of the International Commission of Inquiry on Darfur, at p.111 at Para. 432.

⁸ See Report of the International Commission of Inquiry on Darfur, at p115 at Para. 455.

⁹ Communications No. 48/90, 50/91, 52/91 and 89/93.

Summary of the Respondent State's submission on Admissibility

44. The Respondent State starts by stating that the judicial system of the Sudan is one of the most competent and efficient organs of the State based on the principle of its total independence and the principle of separation of powers. It goes further to state that the judicial system is efficient, honest and characterised with competence. The State submits that the Sudan is one of the few African States which has a Supreme Court in every Province and a judicial system which is available to all.
45. The State contends that the Complainants have not fulfilled the conditions stated in Article 56 of the African Charter. The Respondent State submits that the complaint has not complied with the condition in Article 56(5) of the African Charter which provides for the exhaustion of local remedies before a Communication is brought before the African Commission.
46. The State submits in this regard, that the Complainants are afforded the opportunity to have their cases heard by the Constitutional Court and Department of Grievances these are the two mechanisms put in place by the Constitution of Sudan, for the protection of human rights. The State substantiates this claim with documents on statistics illustrating the judicial performance in the Sudan and states that the Complainants are yet to exhaust all these avenues which are available to them.
47. The Respondent State claims that the provision of Article 56(1) was not fulfilled because the complaint "was submitted by a so-called Abdul-Baqui Jubril on behalf of Dafur Centre for Relief and Documentation Centre." The State further states that this person continues to lodge complaints which are not backed by any evidence or legal basis, sometimes to the Commission, presenting complaints under the umbrella of a number of civil society organisations.
48. The State further states that the Complainant has failed to comply with the provisions of Article 56(2) of the African Charter and that the Complainant's resort to Article 1 of the Charter is not applicable in the present case. The State submits that the ultimate nature of any case is that there is a winner and a loser and states further that the Charter requires that there is compliance with the law when rights of individuals and groups are discussed. It goes further to state that it is unacceptable to say that the judgments passed by the courts are in violation of human rights, that these judgments testify to the reality and are in keeping with the letter and spirit of the African Charter and the AU Charter and that any assumption contrary to that shall be tantamount to denying the courts of the member States of their functions.
49. The State goes further to state that the International Human Rights instruments recognise the sovereignty of States and the rule of the natural law existing in these States and that any assumption to the contrary is itself a blatant violation of the law.

50. The Respondent State further submits that the complaint is not in compliance with Article 56(3) of the African Charter, which provides that a Communication brought before the Commission should not be written in insulting or disparaging language. The State contends that the Complainants' submissions, especially in paragraph 40 of the Communication contained statements which had improper utterances against officials as well as the methods of the application of justice and the rule of law in the Sudan.
51. The Respondent State also submits that the complaint is not in conformity with Article 56(6) of the African Charter, which provides that a Communication should be brought within a reasonable time after the exhaustion of local remedies. The State contends that the present Communication was brought before the Commission after the expiration of 31 months of the court's judgement.
52. That for these reasons the Communication should be declared inadmissible by the African Commission.

Summary of the Complainants' reply to the Respondent State's submission on admissibility

53. The Complainant alleges that though the Supreme Court is the highest court in the Sudan, the Civil Procedures Act of Sudan provides that the "Supreme Court shall have jurisdiction to determine: Objection by way of cassation against the decisions and orders of the Courts of Appeal concerning objections against administrative decisions."
54. The Complainant also argues that the Communication does not have to do with, nor were it brought before the Shar'ia Courts; it is a civil suit which was properly brought before the civil law circuit.
55. Also the Complainant submits that the final decision of the High Court which dismissed their case was handed to them by the registrar, more than three months after its pronouncement by the court. This delay prevented the petitioners from bringing an application for review of the Supreme Court's judgment within the prescribed period of 15 (fifteen days).
56. On the contention of the Respondent State that they could bring their matter before the Constitutional Court, the complainants state that the Sudan's Constitutional Bill of 2005, outlines the jurisdiction, functions and powers of the Constitutional Court. This Bill provides that the Constitutional Court has no jurisdiction to review judgements, decisions, proceedings, and orders passed by the judiciary. This means that the Constitutional Court lacks the competence to entertain matters that were already dealt with by other Courts.
57. The Complainant also alleges that the victims' ordeal with the Sudanese authorities has been going on since 1993, when the Ministry of Finance and

Economic Planning failed to pay the remaining balance of the funds. The victims then started proceedings in the courts in 2000, which was finally dismissed by the High Court in June 2003, and according to the Complainants, the victims have exhausted all means possible at their disposal to recover their outstanding funds to no avail.

58. The Complainant also alleges that the judiciary of the Sudan is not independent of the government in the discharge of its duties. This it alleges is due to the fact that the country is ruled by a totalitarian military regime. That the government pursues a systematic policy of tight control and domination at all levels of the State apparatus including the judiciary.
59. The Complainant alleges that in view of the above facts, it has exhausted all possibilities for local remedy in the Sudanese courts and seek that the African Commission finds this Communication admissible.

Analysis on admissibility

60. The admissibility of Communications within the African Commission is governed by the requirements of Article 56 of the African Charter. This Article provides seven requirements which must all be met before the Commission can declare a Communication admissible. If one of the conditions/requirements is not met, the Commission will declare the Communication inadmissible, unless the Complainant provides sufficient justifications why any of the requirements could not be met.
61. In the present Communication, the Complainant claims that it has fulfilled all the requirements of Article 56 of the African Charter. The Respondent State on the other hand submits that five requirements of admissibility, that is, Article 56 (1), (2), (3), (5) and (6), have not been met.
62. Article 56(1) of the African Charter states that *“Communication relating to Human and Peoples’ Rights... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity...”* According to the Respondent State, the Communication does not indicate the authors. The Communication received by the African Commission indicates that the author of the Communication is the Darfur Relief and Documentation Centre which brought the Communication on behalf of 33 Sudanese nationals whose names are stated in the Communication. This means that the author of the Communication and the victims are clearly identified. The Commission therefore holds that the requirement under Article 56(1) of the African Charter has been met.
63. The State also submits that the Communication is incompatible with the Charter of the Organisation for African Unity (OAU) and as such does not comply with Article 56 (2), of the African Charter. This sub-Article provides that *“Communications...received by the Commission shall be considered if they are compatible with the Charter of the Organisation of African Unity or with the*

present Charter." In the present case, there is evidence of *prima facie* violation of the African Charter in the refusal of the Ministry of Finance and Economic Planning (an institution of the Sudanese government), to pay the outstanding balance of the money due to the 33 Sudanese nationals in breach of the agreement between the Sudanese and Iraqi governments to pay them this money as compensation for their time in Iranian prisons. Secondly in view of the compatibility requirements, Sudan is a State Party to the African Charter. Thirdly the Republic of Sudan became party to the Charter on 18 February, 1986, the alleged violations in this Communication falls within the period of the Charter's application to Sudan. Lastly, the alleged violation took place within the territorial sphere which the Charter applies. For these reasons, the Commission holds that the Communication has sufficiently fulfilled the requirement of Article 56(2) of the African Charter.

64. In its submission, the State calls on the African Commission to declare the Communication inadmissible on the ground that it does not comply with Article 56(3) of the African Charter which states that "*communications ... received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity (AU)*".

65. The Respondent State objects to the statements made by the Complainant in paragraph 40 of the complaint arguing that it is improper to describe any sovereign State as such. Paragraph 40 of the complaint states that "*This Communication documents a situation of absolute misuse of government authority and executive powers to inflict gross injustice and suffering among a vulnerable segment of the Sudanese citizens. This situation is a classical example of the absence of accountability of public officials and for the lack of proper administration of justice and the rule of law in Sudan.*"

66. In its decision on admissibility in *Zimbabwe Lawyers for Human Rights/ Zimbabwe(ZLHR)*¹⁰, the African Commission stated *inter alia* that "*in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56 (3) must be interpreted bearing in mind Article 9 (2) of the African Charter which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.*"

¹⁰ Communication 284/2003

67. The decision taken in ZLHR should be distinguished from another decision of the African Commission in *Ligue Camerounaise des Droits de l'Homme/ Cameroon*¹¹, where the African Commission held that the Communication was inadmissible because of the complainant's use of language like "[President] Paul Biya must respond to crimes against humanity", "30 years of the criminal neo-colonial/ regime", "regime of torturers", "government barbarisms" e.t.c., as this was considered as insulting language.
68. The Respondent State in this Communication does not expressly state that the Communication was insulting or disparaging but however noted that the language used is "improper". In the opinion of the African Commission, the language used in the Communication, and especially in Paragraph 40, is not insulting or disparaging to the Government of Sudan and as such, is not contrary to Article 56(3). For this reason, the Commission holds that the proviso under Article 56(3) has been complied with.
69. Article 56(4) of the Charter provides that a Communication would be admissible if it is "...not based exclusively on news disseminated by the mass media". There is nothing in this Communication which has shown that it was based on news by the mass media and none of the parties have contested that point. To this end the African commission holds that this proviso has been fulfilled.
70. The Respondent State further submits that the Communication does not comply with Article 56(5) of the African Charter which requires that "*communications...received by the Commission shall be considered: if they are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged*". The Commission has stated that the justification for this requirement is that a government should be aware of a human rights violation in order to have a chance to remedy such violation, thus protecting its reputation which may be tarnished by being called to plead its case before an international body. This requirement also precludes the African Commission from becoming a tribunal of first instance, a function which it cannot fulfil practically or legally.
71. In the present case, the Respondent State contends that the Complainant has not exhausted local remedies available to it in the Sudan. The State submits that the Complainant has not brought its case before the Supreme Court for review and have also not taken the matter to the Constitutional Courts on appeal. Article 15 (2) of the Constitutional Court Act of Sudan (as amended in 2005), stipulates that "...there shall not be subject, to review of the Constitutional Court, the business of the Judiciary, the judgements, decisions, proceedings and orders passed by the Courts thereof". This means that the Constitutional Court has no jurisdiction to entertain appeals arising from judgements, decisions, proceedings, and orders passed by the Judiciary.
72. The author alleges that the matter was first brought before the Court of first

¹¹ Communication 65/92

instance, but the case was dismissed, an appeal of this ruling was made to the Court of Appeal which ordered reconsideration of the matter in the court of first instance. The case was dismissed a second time by the court of first instance and this time the judgement was upheld by the Court of Appeal. The victims then brought the case before the High Court which approved the judgement of the Court of First Instance and dismissed the case. The Complainant claims that there is no other Court where they could take the case.

73. The Respondent State has however pointed out that there is still an option of taking the case before the Constitutional Court of the Sudan, available to the Complainants. The Constitutional Court Act of Sudan provides that “...*The Court... shall assume protection of the rights of a human being and the fundamental freedoms thereof*”¹² This, according to the State, means that the Complainant can still take its case on the alleged violation of the rights of the 33 Sudanese, to the Constitutional Court of Sudan for a remedy of the complaint. The African Commission therefore holds that not all the local remedies which are available to the Complainants have been exhausted in accordance with Article 56(5) of the Charter, and as such the Communication has not fulfilled this proviso.
74. Regarding the requirement under Article 56(6) of the African Charter which provides that “*Communications...received by the Commission shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter,...*”. The African Commission notes that the Charter does not provide for what constitutes “a reasonable period of time,” and neither has it defined reasonable time. For this reason, the African Commission would therefore treat each case on its own merits¹³.
75. Article 60 and 61 of the African Charter provides that the African Commission, in deciding matters brought before it, should draw inspiration from international law on human and peoples’ rights. The African Commission in this Communication would look at the jurisprudence of the European Court on Human Rights and the Inter- American Commission on Human Rights. The European Convention on Human Rights and Fundamental Freedoms provides that the (European) “*Court on Human Rights ... may only deal with the matter... within a period of six months from the date on which the final decision was taken*”¹⁴, after this period has elapsed, the European Court on Human Rights will declare such Application inadmissible. The American Convention on Human Rights also provides that to be declared admissible, “*the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment*”¹⁵. The Convention went further to

¹² Article 15(1) (d) of the Constitutional Court Act

¹³ Communication 308/05- Michael Majuru/Zimbabwe and Communication 43/90 Union des Scolaires Nigeriens- Union Generale des Etudiants Nigeriens au Benin/ Niger, where the Communication was declared inadmissible on the ground that none of the conditions relating to form, time limit or procedure laid down under Article 56 and Rule 114 of the (Previous Version of the Rules of Procedure) were complied with.

¹⁴ Article 26 The European Convention on Human rights.

¹⁵ Article 46(1) (b) of the American Convention on Human Rights

provide circumstances where this provision will not be applicable to include when “...there has been unwarranted delay in rendering a final judgment under the aforementioned remedies”.

76. The Inter American Commission on Human Rights has indicated that the six month period provided for in Article 46(1)(b) of the American Convention “has a twofold purpose: to ensure legal certainty and to provide the person concerned with sufficient time to consider his position”¹⁶
77. In the present Communication, a period of twenty nine (29) months (2 years and 5 months) has elapsed between the time when the High Court dismissed the matter (18 June 2003), and when the Communication was submitted to the African Commission (24 November 2005). The Complainant submitted this Communication way beyond a time which could be considered reasonable, looking at the European Court and the Inter- American Court jurisprudence. The Complainants have also not given any compelling reason why there was such a long wait before bringing the matter before the African Commission.
78. The provision of the Charter regarding time limit in Article 56(6) is to make a party complaining of a wrong done by a State, to be vigilant and to discourage tardiness from prospective complainants. However, where there is a good and compelling reason why a complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a complainant an opportunity to be heard.
79. In the present case, there is no sufficient reason given as to why the Communication could not be submitted within a reasonable period. For this reason, the African Commission holds that the Communication does not fulfil the proviso of Article 56(6) of the African Charter.

Decision of the Commission

80. It must be reiterated that the African Charter provides that all the requirements in Article 56 must be fulfilled before a Communication will be declared admissible by the African Commission. The Commission holds that the provisions of sub-Articles 5 and 6 of Article 56 have not been fulfilled by the Complainant.
81. In view of the above, the African Commission decides:
- 1) to declare the Communication inadmissible;
 - 2) to transmit its decision to the parties;
 - 3) to publish this decision in its 27th Activity Report.

Done in Banjul, The Gambia during the 46th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 11 - 25 November 2009.

¹⁶ IACHR, Case 11.230 - Francisco Martorell, Chile, Annual Report 1996, Report N° 11/96, par. 33.
27th Activity Report of the ACHPR

Annex 3

Communication 272/2003: Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon

Summary of the Facts:

1. The Communication had been initiated against the Republic of Cameroon, State Party ¹⁷ to the African Charter, by two Non Governmental Organisations (NGO); *The Association of the Victims of Post Electoral Violence of 1992 of the North West Region*, headquartered in Bamenda, Cameroon; and *The International Centre for the Legal Protection of Human Rights (INTERIGHTS¹⁸)*, headquartered in London, UK.
2. In the Communication, the Complainants contend that on the 23rd October 1992, in reaction to the confirmation by the Supreme Court of Cameroon of the victory of the candidate Paul Biya of the Cameroon Peoples' Democratic Party (RDPC) in the presidential elections of the 11th October 1992, the members of the Social Democratic Front (SDF), the Principal Opposition Party, attacked the symbols of the State and the militants of the Party which won the elections, in the city of Bamenda, their Party stronghold.
3. Property belonging to RDPC militants and to other citizens are said to have been destroyed. The damages caused to Messrs. Albert Cho Ngafor and Joseph Ncho Adu are estimated at one billion CFA francs for each of them. Damages to the tune of 800 million CFA francs are said to have been caused to about a hundred other individuals.
4. Certain victims such as Mr. Albert Cho Ngafor, who had been sprayed with petrol, were moreover subjected to serious physical attacks.
5. In consequence the Cameroonian Authorities arrested certain individuals presumed to be responsible for these events; the said Authorities also set up, in February 1993, a Committee responsible for the compensation of the victims.
6. However, having waited in vain for their compensation, the victims of the post electoral violence of Bamenda organised themselves into an Association and embarked on certain activities in order to have the matter settled amicably.

¹⁷ Cameroon ratified the Charter on 26th June 1989

¹⁸INTERIGHTS enjoys Observer Status with the African Commission.

7. This method however proved fruitless, as, in spite of firm promises made by the President of the Republic, who had been approached in the context of the measures taken towards an amicable settlement, no concrete result had been obtained by the victims of the violence.
8. On the 13th March 1998, the victims of the Bamenda events brought an appeal for responsibility against the Cameroonian State to the Administrative Chamber of the Supreme Court. The appeal in question had been recorded on the 22nd April 1998 by the Clerk of Courts, under the number 835/97-98.
9. On the 16th July 1998, the Government of Cameroon reacted, requesting the Supreme Court to declare the victims' submission inadmissible and since then, the proceedings have been blocked in spite of all the efforts made by the Counsels of the Complainants, with the support of certain administrative Authorities, like the Commissioner of the District of Mezam (home region of the victims).

The Complaint:

10. The Complainants allege the violation of Articles 1, 2, 4, 7 and 14 of the African Charter by the Republic of Cameroon. In consequence, the Complainants are requesting the African Commission to:
 - Declare the refusal by the Administrative Chamber of the Supreme Court of Cameroon to consider their appeal against the Government of Cameroon as contrary to the principles of the right to a fair hearing, as stipulated by the African Charter in its Article 7 and by the relevant provisions of other international human rights instruments;
 - Note that the Government of Cameroon has not respected its obligation to protect the physical integrity (Article 4) and property (Article 14) of individuals living on its territory or under its jurisdiction;
 - Request the Government of Cameroon to pay full compensation for the damages suffered by the victims of the post electoral violence in Bamenda;
 - Request the Government of Cameroon to enact positive legislation to ensure the fair, equitable and rapid compensation for the victims of human rights violations and to ascertain that the human rights violations committed in Bamenda do not happen again in Cameroon.

The Procedure:

11. The Communication which was received at the Secretariat of the African Commission on the 04/04/2003 had been registered under N° 272/2003, for consideration by the African Commission at its 33rd Ordinary Session (15-29 May, in Niamey, Niger).
12. By letter ACHPR/COMM/2 of the **15th April 2003**, the Secretariat of the African Commission acknowledged receipt of the Communication to the Complainants.

13. During its 33rd Ordinary Session, the African Commission examined the Complaint and decided to be seized of it. Consideration of its admissibility was deferred to its 34th Ordinary Session scheduled to be held from the 7th to 21st October 2003 in Banjul, The Gambia.
14. By letter and by Note Verbale of the **27th June 2003**, the Secretariat of the African Commission informed both the Complainants and the Respondent State of the decision of the African Commission.
15. On the **5th August 2003**, the Secretariat received a memorandum from the Complainants on the admissibility of the Complaint and conveyed it to the Respondent State by Note Verbale dated 6th August 2003, whilst reminding it to convey its own memorandum to the Secretariat as early as possible.
16. By Note Verbale of the **14th October 2003**, the Ministry of Foreign Affairs of the Republic of Cameroon requested additional information and more time for it to prepare its memorandum on the admissibility of the case.
17. By letter of the **17th October 2003**, the Secretariat contacted the Complainants requesting them to provide the supplementary information required by the Respondent State. The Complainants complied without delay and the request of the Respondent State was met on the 30th October 2003.
18. During its 34th Ordinary Session which was held from the **6th to 20th November 2003** in Banjul, The Gambia, the African Commission examined the Complaint and heard the Parties. Sequel to this, the African Commission deferred its decision on admissibility of the case to its 35th Ordinary Session.
19. By Note Verbale and by letter of the **16th and 17th December 2003** respectively, the Secretariat of the African Commission informed the Parties reminding the Respondent State that its memorandum on admissibility was still outstanding.
20. By letter dated **16 March 2004**, and received at the Secretariat of the Commission on the **18 March 2004**, the complainants conveyed a letter transmitting additional arguments in response to the oral arguments made by Respondent State at the 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003.
21. On the **19th March 2004**, the Secretariat of the African Commission sent a Note Verbale to the Respondent State reminding it to send its comments on the admissibility of the Complaint.
22. By Note Verbale dated **6th April 2004** and received at the Secretariat of the African Commission, the Respondent State, referring to the Note Verbale sent to it on the 16th December 2003, informed the Secretariat that the case of which the African Commission had been seized and which opposed it to the Complainants, was still pending before the Administrative Chamber of the Supreme Court of Cameroon which had deferred the said case to the 26th May 2004.

23. During its 35th Ordinary Session which was held in May/June 2004 in Banjul, The Gambia, the African Commission examined the Complaint and heard the Parties on the admissibility of the case. On this occasion, the Respondent State submitted in writing, its memorandum on the admissibility of the case to the Secretariat of the African Commission, which in turn had conveyed it to the Complainant Party by letter dated **17th November 2004**.
24. During its 36th Ordinary Session, which was held in November/December 2004 in Dakar, Senegal, the African Commission considered the Complaint and declared it **Admissible**.
25. By letters dated **20th December 2004**, the Secretariat of the African Commission notified this decision to the Parties and requested their arguments on the merits of the case as early as possible.
26. On **30th March 2005**, the arguments of the Respondent State on the merits of the Communication had been received at the Secretariat of the African Commission through a Note Verbale dated **16 March 2005**.
27. On **14th April 2005**, the Secretariat of the Commission acknowledged receipt of the memorandum from the Respondent State on the merits of the Communication and on that same date, conveyed it to the Complainant Party for reaction.
28. On **3rd October 2005**, the Complainant sent its rejoinder to the observations of the Respondent State on the merits of the Complaint by letter dated **26th September 2005**. On the **13th October 2005**, the Secretariat acknowledged receipt of the letter.
29. On **30th November 2005**, this document had been forwarded against a receipt of acknowledgement, to the delegation of the Respondent State attending the 38th Ordinary Session of the Commission.
30. During this same Session (21 November - 5 December 2005, Banjul, The Gambia), the African Commission examined the Complaint and in the absence of any reaction from the Respondent State to the arguments of the Complainant Party on the merits of the case, differed its decision at this point to its 39th Ordinary Session.
31. On **7th December 2005**, this decision was notified to the Parties and the Respondent State, in particular had been invited to send its reaction on the submissions of the Complainant within 3 months.
32. In the absence of any reaction from the Respondent State, a reminder had been sent to it on the **23rd March 2006**.
33. By Note Verbale dated **29th March 2006**, and received by the Secretariat of the African Commission on the **13th April 2006**, the Respondent State conveyed its reaction on the arguments submitted by the Complainant Party on the merits of the case.

34. The Secretariat transmitted these arguments to the Complainant Party on the **8th May 2006**.
35. In a Note Verbale dated **30th June 2006** and a letter also dated **30th June 2006**, the Parties had been respectively informed that during its 39th Ordinary Session, the African Commission had decided to defer the case to its 40th Ordinary Session scheduled for the 15th to 29th November 2006 in Banjul, The Gambia.
36. On the **4th October 2006**, the Secretariat of the Commission received a memorandum from the Complainant Party in rejoinder to the arguments on the merits formulated by the Respondent State to the Communication.
37. During its 40th Ordinary Session held in Banjul, The Gambia, from the 15th to 29th November 2006, the African Commission decided to defer the case to its 41st Ordinary Session scheduled for the **16th to 30th May 2007** in Accra, Ghana for a ruling on the merits of the case.
38. In a Note Verbale dated **31st January 2007** and a letter also dated **31st January 2007**, the Parties were informed about the deferment of the case to the 41st Ordinary Session of the African Commission scheduled for the **16 to 30 May 2007** in Accra, Ghana.
39. During its 41st Ordinary Session held in Accra, Ghana, the African Commission had deferred the Communication to its 42nd Ordinary Session for a decision on the merits of the case.
40. By Note Verbale dated **15th June 2007** and a letter dated the same day, the Parties to the Communication had been informed of the deferment of the case to the 42nd Ordinary Session of the Commission scheduled for the **14th to 28th November 2007** in Brazzaville, Congo.
41. In a Note Verbale dated **11th September 2007** a letter had been sent to the Respondent State reminding it of the deferment of the Communication to the 42nd Ordinary Session.
42. By letter dated **13th September 2007**, the Complainant Party had been reminded about the deferment of the Communication to the 42nd Ordinary Session.
43. The Parties had been respectively informed in a Note Verbale and a letter dated **19th December 2007** about the deferment of the examination of the decision on the merits to the 43rd Ordinary Session of the Commission to be held from 15 to 29 May 2008 in Ezulwini, in the Kingdom of Swaziland.
44. In a Note Verbale dated **18th March 2008** and a letter dated **20th March 2008**, the Parties had been reminded of the deferment of the case to the 43rd Ordinary Session of the Commission. The Parties had however been informed of the change of dates of the said Session the holding of which had been brought forward to the 7th to 22nd May 2008 instead of from 15th to 29th May as had been initially announced.

45. In a Note Verbale dated **24th October 2008**, the Secretariat informed the Respondent State about the deferment of consideration on the decision on the merits of the Communication to the 44th Ordinary Session scheduled for the 10th to 24th November 2008 in Abuja, Nigeria.
46. During the same period of the **24th October 2008**, the Complainants had been informed by letter of the deferment of the Communication for examination on the merits to the 44th Ordinary Session of the African Commission.
47. After the examination of the communication at the 44th Ordinary Session held in Abuja in the Federal Republic of Nigeria, the African Commission deferred the reexamination to the 45th Ordinary Session scheduled for the 13th to 27th May 2009 in Banjul, the Gambia for the consideration of the new developments in the area of international law.
48. In a Note Verbale dated 21st December 2008 and a letter dated the same day, the Secretariat informed the Parties to the communication about the deferment of the case to the 45th Ordinary Session scheduled for 13th to 27th May 2009. In addition by note verbale dated 23rd April 2009 and a letter dated the same day , a reminder was sent to the parties.
49. The parties to the Communication were informed that the matter was deferred to the 46th Ordinary Session of the Commission scheduled to be held in Banjul, The Gambia from 11-25 November 2009 in a Note Verbale and a letter both dated June 11, 2009.

The Law:

Admissibility:

50. The African Charter on Human and Peoples' Rights stipulates in its Article 56 that the Communications referred to in Article 55 should necessarily, in order to be considered, be sent after all local remedies have been exhausted, if they exist, unless the procedure of exhaustion of local remedies is unduly prolonged.
51. In this instance, the Complainant, while admitting that the case is still under consideration by the legal Authorities of the Respondent State who had been seized of it, contends that the procedures are unduly prolonged and that under these conditions the requirement that local remedies be exhausted as stipulated by Article 56 of the African Charter, cannot apply.

Arguments of the Complainant Party on the admissibility of the case:

52. In support of his argument, the Complainant contends, in his memorandum on admissibility dated 05th August 2003, that the Complaint had been deposited with the African Commission five years after the same Complaint against Cameroon had been brought before the Administrative Chamber of the Supreme Court of this State, and which has, to date, remained without any response.

53. In the memorandum cited earlier, the Complainant further contends that the alleged victims of the Complaint had made several fruitless submissions for an out-of-court settlement to the administrative and political Authorities of the Respondent State. The alleged victims had then brought an appeal for liability against the State of Cameroon before the Administrative Chamber of the Supreme Court on the 13th March 1998. The latter conveyed its statement on defence to the Complainants on the 12th August 1998. Since that date and in spite of the reaction of the Complainants (27th August 1998) and the numerous reminders, the Complainants did not receive any more information relating to the case from the Administrative Chamber of the Supreme Court, and this despite the national³ procedural legislation which stipulates that once the exchange of arguments is completed, the case files should be closed in the 5 months that follow. 5 years have passed without any reaction from the Administrative Chamber of the Supreme Court.
54. It is for this reason, pleads the Complainant, that although local remedies are available, they do not « at all respond to the imperative of efficacy which is their *raison d'être* ». The Complainant adds that the Administrative Chamber of the Supreme Court is familiar with this type of practices, which is why Cameroon had been condemned by the African Commission⁴ (for a case which had remained pending for 12 years before the Yaoundé Court of Appeal) as well as by the United Nations Human Rights Commission⁵ (for a case which had remained pending before the Administrative Chamber of the Supreme Court for more than 4 years).
55. During a hearing at the 34th Ordinary Session of the African Commission, the Complainant Party had reiterated these arguments insisting on the fact that the bringing of this case before the African Commission had contributed a lot to the revival of the case by the Cameroon legal Authorities after all these years of inaction.
56. In its memorandum with supplementary information on admissibility, dated 18th March 2004, the Complainant recalled that the Respondent State had been condemned by the African Commission and by the United Nations Human Rights Commission for the slowness of its justice system. These delays, which cannot be attributed to Cameroon's underdevelopment, but rather, according to the Complainant, « to the inefficiency of the Cameroonian national Authorities, both legal and administrative » are not only contrary to the African Charter but also to the principles of the right to a fair hearing adopted by the African Commission.
57. The Complainant further reiterates that the violation, according to him, by the Administrative Chamber of the Supreme Court, of the regulations which stipulate that once the exchanges of memoranda are completed, the latter should close the case file within 5 months, as since August 1998, the Complainants had not received any news from the said Chamber in spite of several reminders and, according to the Complainants, despite the fact that the Judges of this Court were « perfectly aware of the implications of this procedure for the Complainants ».

³ Cf. Law No 75/17 of the 08/12/1975 relative to the procedure before the Supreme Court

⁴ Communication 59/91 : Louis Emgba Mekongo/Cameroon

⁵ Communication 630/1995 : Abdoulaye Mazou/Cameroon

58. The Complainant Party moreover denounces the attitude of the powers that be, who had made promises which never culminated in results, but above all the shortcomings of the Cameroonian Authorities exposed by the mal-functioning of the Commission responsible for compensating the victims of the violence (placed under the Prime Minister's Office), which had been created in the context of the effort to find an amicable solution to the problem. This Commission, declares the Complainant, had been one of the local remedies open to the victims. But 12 years after its creation and 11 years after having heard the victims, this Commission had still not submitted its report. There again, concludes the Complainant, the delay is unduly prolonged. The Complainant therefore implores the African Commission to declare the Complaint admissible.

Arguments of the Respondent State on the admissibility of the case:

59. The Respondent State had for its part pleaded, during the hearing before the African Commission at its 34th Ordinary Session, that the delays observed in the administration of justice in Cameroon are due to the under developed nature of the country, which does not have the means to provide all the facilities required for a diligent justice system, and not to a deliberate desire by the Government to hinder the administration of justice.

60. The Respondent State again reiterated this point during a hearing by the African Commission at its 35th Ordinary Session. In its memorandum on admissibility submitted on this occasion, the Respondent State pleads that the Complaint is still under consideration before one of the highest national Courts which, certainly has a lot of backlog in its work, but which is aware of the situation and that the Parties require that the case be concluded by the national legal Authorities. Thus, on the 25th February and the 31st March 2004, the Administrative Chamber of the Supreme Court held two ordinary sessions. The debate on the case in question, scheduled for the 31st March 2004 had been postponed to the 26th May 2004 on the request of the Counsel for the Complainants.

61. The Respondent State further pointed out that for these reasons, the Complainant should not speak of abnormally long delays in the Cameroonian justice system, particularly where the « current delay is not attributable to the Court in charge of the case but rather to the Complainant Party itself ».

62. In consequence, the Respondent State requests the African Commission to declare the Communication inadmissible.

Analysis of the African Commission on the admissibility

63. The African Commission considers that the Complainant Party, before appearing before it had started to use the remedies available at the local level. The procedure before the Administrative Chamber of the Supreme Court had lasted 5 years without any feedback for the Complainants, contrary to the regulations in force and in spite of the numerous reminders which had been sent to the said Court. The

African Commission therefore considers that the delay on the part of the Court in the treatment of the case was unduly prolonged.

64. Pertaining to the Compensation Commission set up under the Prime Minister's Office, its operations were highly inefficient as 12 years after its creation and 11 years after hearing the victims, it had not published its report. There also, the African Commission considers that this *ad hoc* Commission, whose establishment was aimed at achieving an amicable settlement of the case, had registered excessive delays in its operations.
65. The Respondent State pleads that the legal Authorities remain aware of the case at the national level but the African Commission considers the delays by the Administrative Chamber of the Supreme Court of Cameroon excessive.
66. The African Commission further notes that re-introduction of the proceedings on the case before the Administrative Chamber of the Supreme Court in February 2004, namely after a gap of 5 years, only took place after the submission of a Complaint (to the African Commission), by the victims in April 2003 and after the decision on seizure taken by the Commission on the said Complaint in May 2003 (33rd Ordinary Session), as well as the hearing of the Parties to the case in November 2003 during its 34th Ordinary Session. This leads the African Commission to presume that the re-introduction of the proceedings was not accidental but rather it was due to the action brought by the victims before the African Commission.
67. The African Commission considers that State Parties have an obligation to administer, on their territory, clear and diligent justice in order to give satisfaction to the Complainants in the shortest possible time, in conformity with the relevant provisions of the African Charter and with the directives and principles of the right to a fair hearing in Africa.
68. In this particular case, the Commission notes that for 5 years, the Administrative Chamber of the Supreme Court of the Respondent State had not provided any reaction to the Complainants, in spite of several appeals by the latter. The Respondent State has admitted this fact but attributes it to lack of resources. Consideration of the case has indeed recommenced a short while ago, but one can reasonably conclude that this consideration was largely due to the seizure of the African Commission by the victims. Whereas this should not be the case, that is, justice to be administered by State Parties should not wait for the African Commission to be seized of a matter before it is rendered fully, clearly and diligently. This had not been the case with the Administrative Chamber of the Supreme Court of the Respondent State.
69. Concerning the Compensation Commission, an *ad hoc* institution meant to solve the problem amicably at the national level, has shown its limitations in failing to produce any Report after twelve years of existence. The Respondent State does not refute these allegations, which allows one to believe that they are true. The African Commission therefore considers that this remedy is neither effective nor satisfactory.

70. For these reasons, the African Commission declares the Communication admissible.

The Merits:

71. Pursuant to Rule 120 of the Rules of Procedure of the African Commission, once a Communication which is submitted under the terms of Article 55 of the Charter has been declared admissible, the Commission « examines it in the light of all the information which the Complainant and the Respondent State concerned have submitted in writing, and it renders its observations on the subject ».

72. It appears from the case file that parties have made their conclusions on the merits of the case since 30 March 2005, and that the information provided by the Parties to the Communication and added to the case file is sufficient to allow a ruling on the merits of the case.

SUBMISSIONS OF THE COMPLAINANTS ON THE MERIT

73. The Complainants are requesting the African Commission to declare the State of Cameroon in violation of the relevant provisions of the African Charter and in particular of Articles 1, 2, 4, 7 and 14 of the said Charter and, in consequence, to declare the State of Cameroon bound to pay compensation for the prejudices sustained by the victims of the post electoral events of 1992.

74. The Commission is consequently obliged to examine the alleged violations on the basis of the facts and the law.

ON THE VIOLATION OF ARTICLE 1 OF THE AFRICAN CHARTER

75. Under the terms of Article 1 of the African Charter, « *the OAU Member States, Parties to the present Charter, recognize the rights, responsibilities and freedoms enunciated in this Charter and undertake to adopt legislative and other measures for their application* ».

THE ARGUMENTS OF THE COMPLAINANTS PERTAINING TO THE VIOLATION OF ARTICLE 1 OF THE AFRICAN CHARTER

76. From the point of view of the violation of Article 1, the Complainants contend:

- i. That the African Charter sets out in its Article 1 a general obligation on the protection of rights. In this context, like « the majority of the human rights treaties, besides requiring the States Parties to abstain from all violation or unauthorized restriction of the rights it proclaims, compels them to take positive measures to guarantee the widest possible protection of the individuals under their jurisdiction ».

- ii. That if the recognition referred to by Article 1 of the Charter « bestows them universality⁶, to the guaranteed rights, the taking of appropriate measures allows them to assume real effectiveness ». That the Commission has had the opportunity to underscore this aspect during the examination of a case on the activities of a petroleum consortium in Southern Nigeria by re-affirming that the African Charter was creating a certain number of obligations for the States Parties which include, in particular, « the responsibility of respecting, protecting, promoting and implementing⁷ » the rights which it sets out before specifying that « the Governments have a responsibility to protect their citizens, not only by adopting appropriate legislation and by applying them effectively, but also by protecting the said citizens from harmful activities which can be perpetrated by private parties. This responsibility requires positive action on their part ».
- iii. That the interpretation by the Commission of Article 1 of the African Charter can be compared with that of the United Nations Human Rights Commission on Article 2 of the International Convention on Civil and Political Rights (CDH)⁸, interpretation in which the CDH affirms that the provision contained in Article 2 embraced an obligation of « absolute character » with « effect immediate⁹ » requiring the States Parties to « take legislative, judicial, administrative, educational and other appropriate measures to fulfill their obligations¹⁰ ».
- iv. That the Commission had to judge that the refusal or the negligence of the
 - a. Authorities of a State Party to protect journalists and human rights activists against
 - b. repeated attacks (harassment, arbitrary arrests, assassination, torture) by the security forces and unidentified groups, constitutes (d) a violation of the said Charter even if this State or its officers are (were) not the direct perpetrators of this violation¹¹ ».
- v. That the present Communication provides the Commission with the opportunity to
 - a. clarify the meaning and scope of the « positive actions » that the States are required to carry out in order to conform with the conditions of the African Charter, and this, by responding to the affirmation made by the Cameroonian Authorities and according to which the implementation of

⁶ See Juan Antonio Carrillo Salcedo « Article 1 » In the European Human Rights Convention : Commentary Article by Article under the direction of Louis Edmond Pettiti, Emmanuel Decaux and Pierre-Henry Imbert, Edition Economica 1999 page 141 « the use of the word in Article 1 recognizes preferably terms such as protect or respect, suggests that the recognized rights have a value erga omnes »

⁷ Communication 155/96 Action Centre for Economic and Social Rights vs. Nigeria paragraph 44.

⁸ See Note No. 22

⁹ General Observation No. 31 « « the nature of the legal obligation imposed on the States Parties to the Convention » of the United Nations Human Rights Commission, CCPR/C/21/Rev.1/Add.13. Op. Cit. Paragraph 14

¹⁰ Cf. General Observation No. 31 « the nature of the legal obligation imposed on the States Parties to the Convention » of the United Nations Human Rights Commission, CCPR/C/21/Rev.1/Add.13. Op. Cit. Paragraph 7

¹¹ Cf. Communication 74/92 National Human Rights and Liberties Commission against Chad, paragraph 35.

« all the legal, technical, human and material means at their disposal to control the post-electoral events of Bamenda in 1992 frees them from the obligation of means which is incumbent upon them ».

- vi. That the African Charter really and truly imposes **an obligation of result and not one of diligence** on the States Parties, of guaranteeing to the victims of the October 1992 events the enjoyment and effective exercise of the rights which it proclaims and the lack of respect for which gives rise to a right to compensation for the victims or their dependents and implies, for the Cameroonian State, the responsibility to compensate and the freedom to act against the perpetrator or perpetrators of the violation.
- vii. That, in effect, where, the Commission has not had numerous opportunities to make a ruling on the exact content of Article 1 of the Charter¹², it has nonetheless pointed out that this Article is the basis of the rights recognized by the African Charter in so far as it confers on it « the legally binding nature which is generally attributed to international Treaties of this nature and that any violation of one of its provisions would automatically represent a violation of Article 1¹³ ».

PERTAINING TO THE VIOLATION OF ARTICLES 2, 4, 7 & 14 OF THE AFRICAN CHARTER

77. Concerning the violation of Articles 2, 4, 7 and 14 the Complainants appear to link it

to the importance that Article 1 represents in the present case, since according to the Complainants, Article 1 is « the only one which defines the scope of the legal obligations contracted by the States Parties to the Charter, thereby allowing correct interpretation of the obligations contained in the other provisions of the Continental Treaty ». Thus, the Complainants contend that if taken in isolation, Article 1 of the Charter commits the State Parties to taking all the necessary legislative measures allowing the effective protection of the rights and liberties contained in the Charter, that is to say, of averting or at least of minimizing all risks of violating the exercise or enjoyment of these rights, and in combination with the other relevant provisions of the Charter, the obligation of averting violations imposes on the States Parties the obligations of:

- Taking preventive measures;
- Taking measures so that the enjoyment and exercise of the rights are not hindered by measures of seizure¹⁴ or of expropriation which are

¹² See Communications: No. 74/92; No. 137/94; No. 48/90; No. 50/91; No. 52/91; No. 89/93; No. 139/94; No. 154/96; No. 161/97; No. 147/95; No. 149/96; No. 155/96; No. 211/98; No. b223/98.

¹³ Cf. Communication No. 147/95 and 149/96 Sir Dawda K. Jawara against The Gambia paragraph 46.

¹⁴ Cf. Communication No. 140/94, 141/94 et 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda vs. Nigeria paragraph 54

not dictated by the satisfaction of a general interest or a public necessity or even the looting or the destruction of the property of natural persons or legal entities;

- Putting in place legislation which makes it possible to avert, repress and punish violations to life, but also « to take preventive measures of a practical nature to protect the individual whose life is threatened by the actions of another¹⁵ ».

78. Thus, the Complainants contend :

- i. That the above mentioned Articles had been violated by the State of Cameroon since the latter had failed in its obligation to take adequate preventive measures if not to avert or prevent the events in question, at least to reduce them to zero. To support this reasoning, the Complainants emphasize that the Cameroonian Authorities knew that the Bamenda events were going to take place and that several personalities had spoken of threats coming from the Social Democratic Front (SDF) against the security of people and property in the Province.
- ii. That the Prime Minister at the time, Mr. Achidi Achu had alluded to the said threats
 - a. in the campaign speech he made on the **6th October 1992**¹⁶ in Kumbo in the North-West Province. The said threats had been later mentioned by the Minister of Communication and Government Spokes-person in a press briefing on the political situation of the country during which he had spoken of the existence of a provisional arsenal of the SDF estimated at **300** pistols and **60** combat¹⁷ weapons. Furthermore, in the interview granted to the national Daily the Cameroon Tribune, the Secretary General of the ruling RDPC Party, had unveiled « the diabolical plan» concocted at the beginning of the month of October by the Opposition to take over power¹⁸. Moreover, direct threats having been made against all those who support the ruling party, several complaints received by the Governor of the North West province brought by citizens wishing to obtain Government protection testify to the fact that the territorial Administrative Authorities had been informed about the SDF's plans.
- iii. That despite these early warning signs, the Government of Cameroon, in neglecting to take adequate measures to prevent the events of October 1992 from taking place, thereby violated, even passively, the obligation of prevention contained in Article 1 of the African Charter. The State of Cameroon has neither brought the perpetrators of these atrocities to justice, nor paid compensation for the

¹⁵ Cf. CEDH, *Affaire Kilic vs. Turkey*, 28 March, 2000 paragraph 62

¹⁶ Cf Cameroon Tribune No. 5231 dated 7 October 1992, page 16

¹⁷ Cf. «The Minister Kontchou Kouamegni reacts to the SDF strategy of chaos » in Cameroun Tribune No. 5246 du 26 October 1992. Page 4

¹⁸ Cf. Cameroun Tribune No. 5231 dated 7 October 1992 page 8.

damages suffered by the victims whose right to an effective remedy has been violated.

- iv. That in consequence, the Commission should request the Cameroonian Authorities, in conformity with its own jurisprudence¹⁹, to pay compensation in view of the long delay by the Justice Administration in examining the Complainants' case. In conclusion, the Commission is being requested to reject the arguments of the Cameroonian Government, to take note of the violation of Articles 1, 4, 7 and 14 of the African Charter; to request the Government of Cameroon to institute proceedings against the perpetrators of the atrocities committed between the 23rd and 27th October 1992; to determine, on the basis of the evidence presented, the amount of compensation to be paid to the victims based on all the damages suffered by the latter. The Complainants further request the Commission to ask the State of Cameroon to amend the laws which are incompatible with the provisions of the African Charter and to fix a deadline for the State of Cameroon relative to the application of any decision that the Commission may take on this matter.

**THE ESSENCE OF THE ARGUMENTS OF THE RESPONDENT STATE IN
RELATION TO
THE VIOLATION OF ARTICLES 1, 2, 4, 7 & 14 OF THE AFRICAN CHARTER**

79. The Respondent State for its part, argues that the violations being alluded to by the Complainants are completely groundless since the State of Cameroon has not, in this particular case, deprived any of the Complainants of the right to respect for his life and physical integrity nor his right to property. The State of Cameroon took measures to save the life and property of individuals during what can be called the Bamenda events.
80. Furthermore, the Respondent State intimates that this particular case happened in the context of the years called democratic agitation during which Cameroon had experienced a certain amount of agitation due to the return to a multiparty system and to individual liberties. That for this reason, from May 1990 to December 1992, and due to the organization of two major elections, the legislative then the presidential, public law and order had been disrupted throughout the country thereby giving rise to a large loss of life, and important material damage.
81. According to the Respondent State, the specific case of Bamenda, which was of major proportions took place between the 23rd and 30th October 1992, and was marked notably by the difficulty of the State to maintain law and order. The Respondent State further contends that in the case of Bamenda, the implementation of the mandate to protect people and property by using the forces of law and order had been reinforced after the 23rd October 1992, date on which the results of the presidential elections were proclaimed. Thus, about 548 men had been deployed in the region of Bamenda with motor vehicles and other

¹⁹ See Communication 211/98 Legal Resources Foundation vs. Zimbabwe.
27th Activity Report of the ACHPR

vehicles for the maintenance of law and order and equipment adapted to deal with the situation on the ground. However, although the post electoral disturbances had taken place in other parts of the territory, these incidents had been extraordinarily violent in Bamenda where they took the form of a generalized insurrection and had been instigated by the militants of an Opposition Party, the Social Democratic Front (SDF).

82. Moreover, the Respondent State contends that::

- i. Following the destruction, a joint Gendarmerie-Police-Justice Commission had been set up and given the responsibility for carrying out investigations on all suspects who had been arrested. However, the individuals who were given heavy charges and had been brought before the State security Court had later been released on the persistent request of the human rights defender organizations.
- ii. That it happened that the State of Cameroon, having steadfastly implemented the legal, technical, human and material resources at its disposal to contain the post electoral events of Bamenda in 1992, it was thus freed from the **obligation of diligence which was its responsibility**. The extent of the events in question having the **character of force majeure** was such that they could not be attributed to the State of Cameroon.
- iii. That in view of the full compensation being demanded by the Complainants, it should be recalled that the responsibility of the State of Cameroon could not be established in either the unexpected happening of the Bamenda events, or in their management. Consequently, it would be extremely difficult to pay compensation since there is no law which authorizes this sort of payment particularly where the State is not the perpetrator in any way.
- iv. That in relation to the enactment of a law allowing the payment of fair and equitable compensation to the victims of the human rights violations in Cameroon, following the unexpected happening of the events in question, the following institutions had been successively put in place:
 - An organization for political dialogue at the national level called the Tripartite and comprising the State, Civil Society and the Political Parties. This Tripartite had made possible the realization of the constitutional amendments of 18th January 1996.
 - A Committee then a National Human Rights and Liberties Commission;
 - A National Elections Observatory and the strengthening of the National Communications Council.
- v. That taking all these matters into consideration and with all the proper reservations, the African Commission should declare the present Communication baseless.

**ANALYSIS OF THE COMMISSION WITH REGARD TO THE NATURE AND
SCOPE
OF THE OBLIGATION CONTAINED IN ARTICLE 1 OF THE AFRICAN
CHARTER.**

83. It follows from the arguments of the facts and the law presented by the Complainant Party and responded to by the Respondent Party, that the nature and the scope of the obligation contained in Article 1 of the African Charter constitute a matter of special importance in the present Communication. Thus, according to the Complainant Party, Article 1 of the African Charter imposes an obligation on the States Parties to take measures which can produce concrete results. Whereas it can be inferred from the arguments submitted by the Respondent Party that the provisions of Article 1 of the African Charter impose an obligation of diligence on the States Parties.
84. It is therefore up to the African Commission to clarify the nature and scope of this Article. It is evident that the legal aspect raised by the argument of the two Parties present before the African Commission relates to the question whether Article 1 of the African Charter imposes an obligation of diligence or an obligation of result vis-à-vis the States Parties to the said Charter. In other words, did the States Parties to the African Charter make the commitment of taking measures which should give certain results by virtue of Article 1?
85. In view of the importance of this question of law, and the importance which the Complainant Party appears to give Article 1, the African Commission should, in the present Communication, determine the legal nature of the obligation which the afore-mentioned Article imposes on States Parties.

**THE EXTENT OR THE SCOPE OF THE OBLIGATION CONTAINED IN
ARTICLE 1 OF THE CHARTER**

86. Concerning the scope or the extent of the obligation imposed by Article 1 of the African Charter, it is important to point out that it had been clarified *sui generis*²⁰, (in a distinctive manner) and that the Commission's jurisprudence is abundant enough in this area.
87. Thus, according to the Commission's jurisprudence, Article 1 confers on the Charter the legally binding character generally attributed to international Treaties of this nature. The responsibility of the State Party is established by virtue of Article 1 of the Charter in case of the violation of any of the provisions of the Charter. Article 1 places the States Parties under the obligation of respecting, protecting, promoting and implementing the rights.
88. The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of

²⁰ See Communications : No. 74/92 ; No. 137/94 ; No. 48/90 ; No. 50/91; No. 52/91; No. 89/93; No. 139/94; No. 154/96; No. 161/97; No. 147/95; No. 149/96; No. 155/96; No. 211/98; No. b223/98., in which the African Commission has had to clarify the scope of Article 1 of the Charter

the State to guarantee that private individuals do not violate these rights. In this context, the Commission ruled that the negligence of a State to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the Charter which would be attributable to this State, even where it is established that the State itself or its officials are not directly responsible for such violations but have been perpetrated by private²¹ individuals.

89. According to the permanent jurisprudence of the Commission, Article 1 imposes restrictions on the authority of the State Institutions in relation to the recognized rights. This Article places on the State Parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the Charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributable to the State can constitute, as had been indicated earlier, a cause of international responsibility of the State, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims²².
90. In this context of prevention, the State should carry out investigations so as to detect the various risks of violence and take the necessary preventive measures. The problem here does not concern so much the acts violating the rights but rather of knowing whether the State took the tangible measures to prevent the imminent risks of perpetration of the said acts. It is not a question of inculping the State for its lack of conscientiousness regarding any act perpetrated in relation to the guaranteed rights but of knowing whether the State, considering the imminent risks of serious violations, used due diligence that was required. Under the terms of comparative law, it is the position that was taken by the InterAmerican Human Rights Court in the **Vélasquez Rodríguez case** in the following terms:
91. “an illegal act which violates human rights and which is initially not directly imputable to a state (for example because it is the act of a private person or because the person responsible has not been identified) can lead to the international responsibility of State, not because of the act itself, but because of the absence of due diligence to prevent the violation or to respond to it as required by the convention.”
92. In the case **Zimbabwe Human Rights Forum vs. Zimbabwe**, the Commission had indicated and ruled that the doctrine of *due diligence* should be applied on a case by case basis.

²¹ Communication 74/92, National Human Rights and Liberties Commission vs. Chad; Communication 155/96, Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria.

²² Communication 245/2002, Zimbabwe Human Rights NGO Forum vs. Zimbabwe, parag. 143.

ON THE NATURE OF THE OBLIGATION CONTAINED IN ARTICLE 1 OF THE CHARTER

93. The scope of the State's general obligation to protect, sanctioned by Article 1 of the Charter having been clarified, it is therefore necessary to determine the nature of this obligation. Is it an obligation of diligence or an obligation of result?
94. Though by their origin, the obligation of diligence and the obligation of result emanate from the domestic law systems, particularly from continental civil law, this term has also been frequently used in international law since the 20th century²³.
95. The obligation of diligence consists, for a Party to a Contract, in placing at the disposal of the other Party all the available resources without however guaranteeing the result that the said resources would produce. Thus, in the context of this obligation, the debtor undertakes to deploy all efforts to provide the creditor with a given requirement, but without being able to guarantee it. It is the case of the Doctor who undertakes to provide all the necessary care to his patient without however being able to guarantee the recovery of the said patient.
96. The assertion of such a responsibility has the effect of compelling the Party on whom reposes the obligation of diligence to pay compensation for the damages it may have caused in the execution of this obligation. This compensation takes the form of a conviction for the payment of damages with interest, that is to say an obligation to pay a sum of money. It is in this context that the notion of obligations arises, to which the Respondent State alludes in talking about its resources on the one hand and its corollary, the obligations of result, on the other.
97. On the contrary, the obligation of result pre-supposes the commitment of the debtor to obtain a specific result. Thus, in the context of this obligation, the transporter of a traveller undertakes to carry the passenger from point A to point B safe and sound.
98. Pertaining to evidence, the evidence of a fault is only required from the Complainant in the case of obligations of diligence since the Complainant has to prove that the debtor has not deployed all the required efforts to obtain the success of the undertaking. On the other hand, the creditor of an obligation of result is exempted from providing such evidence. In effect, all he has to do is to establish that the promised result has not been obtained; the debtor can only obtain release from his responsibility by establishing that the non-execution is due to circumstances beyond his control which cannot be attributed to him but to

force majeure. The force majeure represents a foreign event which is both unforeseeable and uncontrollable which is at the root of an injury²³.

99. Generally, in international law, the notion of obligation of diligence and that of result emanate from the interpretation of Articles 20 and 21 of the draft articles of the International Law Commission (ILC) pertaining to the responsibilities of States. It must be noted that the comments from these two articles were adopted by the ILC which caused the latter to make a distinction between the violation of international obligations referred to as "behaviour" or "diligence" and the violation of obligations otherwise called " result" ²⁵

100. Under Article 20 of the draft Articles of the ILC entitled "Violation of an international obligation requiring the adoption of a predetermined specific behaviour when the behaviour of the said State is at variance with the behaviour specified under that obligation".

101. In respect of Article 21 of the draft ILC Articles which is entitled "Violation of an international obligation requiring the attainment of a specific result, the provision stipulates that:

"1) A State is in violation of an obligation requiring it to choose a determined result

if by the behaviour exhibited, the State does not ensure the realisation of the expected result required from it under the terms of that obligation.

2) If the behaviour of the State has created a situation that does not conform to the result required from it by the international obligation, but that it emerges from the obligation that this result or an equivalent result can all the same be achieved by the subsequent behaviour of the State, then a violation of the obligation occurs only when the State also fails by its subsequent behaviour to achieve the result expected from her by that obligation".

102. Thus, if the obligation of diligence requires that the State adopts specific behaviours or actions to attain specific results, then under obligation of result, the State enjoys the freedom of choice and action to achieve the result required by that obligation"

103. Consequently, in the case *Coloza vs Italy* case, the European Court of Human Rights declared and rendered judgement that " the contracting States (parties) enjoy very wide discretion in terms of the calculation of the choices and means to ensure

²³ The distinction between these two types of obligations in international law has for the first time been established in explicit terms by D. Donati who has made it a general principle(**D. Donati I Trattati internazionali nel diritto costituzionale, Turin, Unione tipografico-editrice torinese, 1906, vol. I . p. 343 et suivant**) . It had already implicitly been done by H. Triepel where he highlighted the difference between domestic law immediately applicable and domestic law that is internationally pertinent (H. Triepel, *Volkerrecht und Landesrecht*, Leipzig Hirschfeld, 1899, p. 299) [édition française : *Droit international et droit interne*, tr. Par R. Brunet, Paris, Pedone, 1920, p. 297]

²⁴Aubert Jean-luc, *Introduction to the Law and Fundamental Themes of Civil Law*, Paris, Armand Colin, 1995 N°244 P.252

²⁵ Yearbook of the International Law Commission, 1977, Vol II, Part 2, page 12 onwards

²⁶ Request No. 9024/80, CEDH, (1985) Série A, vol. 89

that their legal systems are in keeping with the provisions of Article 6 paragraph 1 (Art 6-1) in this field. The task of the Court is not to indicate to the States these means, but to determine if the result required by the Convention had been achieved”

104. Similarly, in the *De Cubber vs Belgium*²⁷, the European Court of Human Rights observed that its task was to determine if the contracting States achieved the result required by the European Convention and that its task was not to point out specifically the means used to arrive at that result.
105. Moreover, in the judgement pronounced on January 19, 2009 in the case relating to the request for interpretation of the judgement of March 31, 2004, in the *Avena* case and other Mexican citizens (*Mexico vs the United States of America*, the International Court of Justice which had been seized by Mexico for the interpretation of paragraph 153 of the aforementioned judgement as imposing on the United States of America an obligation of result, maintained that “ It is true that the obligation enunciated in this paragraph is an obligation of result which should manifestly be enforced unconditionally²⁸...”
106. Thus, the question that arises generally is to appreciate, on the one hand, the ultimate purpose or objective of the rights prescribed by the African Charter on Human and People’s Rights and on the other hand, whether yes or no the obligation prescribed in Article 1 of the Charter seeks to attain a purpose, an objective or to achieve a result through the provisions contained therein.
107. In the view of the Commission, the distinction between the obligation of diligence and that of result should not make one lose sight of the fact that , all obligations contained in a Treaty, Convention or a Charter seek to attain an objective, a purpose or a result. The Governments of the States Parties are linked to the people living on their territory by a social contract consisting of ensuring the security and guaranteeing the fundamental rights, including the right to life and respect for the physical and material integrity of the citizens. Where the rights, responsibilities and freedoms recognized by the States Parties to the Charter can hardly pose major problems, since these regulations are outlined in the Articles 2 to 29 of the Charter and their recognition emanates from the will of the States themselves to ratify the Charter, nonetheless this recognition ensues from the commitment made by these States to take tangible measures capable of implementing the provisions prescribed by the Charter.
108. It is also important to clarify that the signature, acceptance and ratification by the States of the provisions contained in the Charter, the preparation or the adoption of legal human rights instruments only constitute, in themselves, the beginning of the indispensable exercise of promotion, protection and the reparation of human and peoples’ rights. The practical implementation of these legal instruments through the State Institutions endowed with creditor, material and human resources, is also of considerable importance. It is not enough to make do with taking measures, these measures should also be accompanied with institutions that produce tangible results. Furthermore, the Periodic Report

imposed on the States Parties in the context of Article 62 of the African Charter is part of the procedure placed at the disposal of the African Commission to verify the results obtained by the States regarding their commitment as outlined in Article 1 of the said Charter.

109. Where it is true that the laws guaranteeing the rights and freedoms, those criminalizing the given facts and providing for penalties against the perpetrators of the said facts, as well as the State institutions which implement these instruments use the resources at the disposal of the citizens, it is also true that the decisions of the Courts and Tribunals made in relation to the violations of these rights and the results of the execution of the said decisions, contribute to restoring the rights of the victims.
110. It follows from the above that Article 1 of the African Charter imposes on the States Parties the obligation of using the necessary diligence to implement the provisions prescribed by the Charter since the said diligence has to evolve in relation to the time, space and circumstances, and has to be followed by practical action on the ground in order to produce concrete results. Thus, in its decision on **Communication 74/92**, the Commission said that the Governments have the responsibility of protecting their citizens not only through appropriate legislation and its effective enforcement but also by protecting them against injurious acts which can be perpetrated by third parties.
111. In fact, in the Commission's view, it is an obligation of **RESULT** that Article 1 of the African Charter imposes on the States Parties. In effect, each State has the obligation of guaranteeing the protection of the human rights written in the Charter by adopting not only the means that the Charter itself prescribes, in particular "all the necessary legislative measures for this purpose but in addition measures of their choice that the Charter called for by Article 1 and it therefore defined as one of result.
112. In accordance with its traditional commitment to protect the rights guaranteed by the Charter, the State Party is obliged to ensure the effective protection of human rights through out its territory. If this obligation were that of an obligation of diligence the guaranteeing of human rights would be the object of legal insecurity liable to release the State Parties to the human rights protection instruments from any responsibility of effective protection. It is in taking into account the compelling nature of the protection of human rights that the human rights instruments set up control institutions to ensure that the obligations ensuing from these instruments are effectively implemented.

ANALYSIS OF THE COMMISSION WITH REGARD TO THE APPLICATION OF THE CASE IN POINT

113. The legal nature of the obligations outlined in the provisions of Article 1 of the Charter having been clarified, the specific question raised with regard to its application to the case in point is that of knowing whether the State of Cameroon was held by an obligation of diligence or an obligation of result and whether the

circumstance of force majeure cited by the Respondent State is fulfilled in order to release the said State from its obligation.

114. The Complainant contends that the State of Cameroon is bound by an obligation of result and consequently is compelled to pay compensation for the injuries suffered by the victims of the 1992 post-electoral events. The State of Cameroon on her part maintains that it was bound by an obligation of diligence as the 1992 events were of an insurrectional character. They are akin to a situation of force majeure which the means employed by the Government could not curtail. Consequently, the State of Cameroon avers that it is free from any liability.

115. Pertaining to the case in point, considering the definition of the legal nature indicated above, the Commission is of the view that the obligations which ensue from Article 1 impose on the State of Cameroon the need to implement all the measures required to produce the result of protecting the individuals living on its territory. The use of the legal, technical, human and material resources that the State of Cameroon claims to have did not produce the expected result, namely that of guaranteeing the protection of human rights. For the post electoral events which gave rise to serious violations against the lives and property of the citizens would not have taken place if the State which, through its investigations knew or should have known about the planning of the said events, had taken the necessary measures to prevent their happening.

116. The events in question having taken place the day after the announcement of the results of the presidential elections, the Authorities only acted four days after the exploding of the hostilities, which promoted the magnitude of the violence and the serious violations of human rights and destruction of property. It has been established that, under the circumstances, the Respondent State has failed in its obligation to protect, considering its lack of diligence and allowed the destruction of lives and property. Furthermore, by invoking the circumstances of force majeure to free itself from its responsibility, the State of Cameroon has implicitly shown that it had been held by an obligation of result in this particular case.

117. In principle, the circumstance of force majeure which assumes the characters of unpredictability, irresistibility and imputability can be invoked if the conditions had been fulfilled at the time of the events. In this case, the said characters of unpredictability, irresistibility and imputability required by a situation of force majeure and which the Respondent Party is invoking cannot be applicable for, according to the Respondent State itself, disturbances of public law and order existed in the country since May 1990 and specifically during the holding of the elections, and that moreover, the threats²⁴ of the 11, 18, 19 and 22nd October 1992 from the SDF, the Opposition Party and qualified by the Respondent State as « an atmosphere of political intimidation and counter intimidation... », sufficiently prove the existence of early warning signs of the events in question and consequently the predictability of the events.

²⁴ Cf. Cameroun Tribune No. 5231 of 7 October 1992 p. 8 and 16, Cameroun Tribune No. 5246 of 26 October 1992 p.4

118. What is more, the Respondent State had manifested its control of the territory and therefore its ability to stand up to the perpetrators of the post electoral events, by instituting a state of siege a few days after the events in question; had this state of siege been instituted earlier, the events in question would have at least been reduced in scope if not entirely quelled.
119. The obligations prescribed by the African Charter in its Article 1 impose on the States Parties (the State of Cameroon included) the need to put in place all measures liable to produce the result of preventing all violations of the African Charter over their entire territory. These are not only violations which could emanate from the State machinery itself or those from non State actors. The implementation of the legal, technical, human and material means alluded to by the State of Cameroon should have, in principle, produced the result of preventing the events in question since the said events were foreseeable; the said means should at least, have served to bring the perpetrators to justice, have them judged and sentenced in accordance with the law and restore the rights of the victims or their dependents after the said events had taken place. This is an *à posteriori* result which should have produced results considering the means chosen by the State of Cameroon itself
120. Each State Party to the African Charter is responsible for the security of the people and property living everywhere on its territory. Having a character of *erga omnes*²⁵, such an obligation constitutes part of those which cover a particular interest for all the States Parties to the African Charter and for the entire international Community since it is recognized in both domestic and international law. Therefore, as underscored by the Respondent State, if it cannot be directly responsible for the events, the State of Cameroon cannot also extricate itself from its responsibility for the actions of others which are a result of its failure to conform to the provisions prescribed by Article 1 of the African Charter and therefore of its obligation of **RESULT**.
121. Consequently, in having failed to prevent the 1992 post electoral violence even though there were early warning signs (evidently) of the events in question and not having obtained the intended results mentioned above, the State of Cameroon has failed in its obligation of **Result** imposed on it by Article 1 of the African Charter, and that in consequence the Respondent State is hardly in a position to invoke the circumstances of force majeure. It therefore follows that the victims and their dependents should have their rights restored in full.

ANALYSIS OF THE COMMISSION WITH REGARD TO THE VIOLATION OF ARTICLES 2, 4, 7 AND 14 OF THE AFRICAN CHARTER

122. By invoking the violation of Articles 2 and 7 of the Charter, the Complainants wish to contest the freezing of the petition by the victims pertaining to responsibility

²⁵ Cf. Barcelona Traction Judgement, CIJ, 5 Feb. 1970
27th Activity Report of the ACHPR

of the issue which has been pending before the Administrative Chamber of the Supreme Court since 1998, in order to obtain full compensation of the corporal and material damages suffered. For the Complainants this procedure constitutes a violation of the right to an effective remedy.

123. Article 2 stipulates that:

« Every individual has the right to enjoy the rights and freedoms recognized and guaranteed under the present Charter without distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status ».

124. It appears that complainants drew the infringement of the enjoyment of their rights and freedoms hence the violation of article 2 of the Charter, from the fact that the respondent State failed to take adequate measures to prevent the violence which led to the physical harm and material damage suffered by the victims.

125. The African Commission is of the view that there is no doubt in the present case that the victims of the post elections violence suffered from damage which infringed the enjoyment of their rights. Respondent State did not debate the fact of harm being caused to the victims, but rather argued that the post election events are act of God and therefore it is beyond the capability of the State of Cameroun which should not be held liable

126. The African Commission is therefore in the position to hold that the provisions of article 2 of the African Charter have been violated because the victims were enjoying their rights and freedoms when they were attacked. Such attacks which infringed their rights and freedoms were made possible because the State of Cameroun failed to fulfill its obligation to protect which incumbent upon the State.

127. Article 7 stipulates:

« Every individual shall have the right to have his cause heard. This right comprises:

[...] (d) the right to be tried within a reasonable time by an impartial Court or Tribunal »

128. The term « remedy » refers to « any procedure by means of which one submits a constitutive act of an alleged violation of the [Charter] to an institution qualified in this respect, for the purpose of obtaining, as the case may be, a cessation of the act, its annulment, its amendment or compensation »²⁶. Is effective the remedy which not only exists de facto, but also is accessible to the party concerned and is appropriate. The petition should be appropriate so as to allow the denunciation of the alleged violations and the payment of appropriate compensation.

129. However, the effectiveness of the remedy is not linked to the expected outcomes. Nonetheless, the effects in question should be of a nature to remedy the

²⁶ Pettiti Louis-Edmond, Decaux Emmanuel and Imbert Pierre-Henri, the European Human Rights Convention, commentary Article by Article, Paris,Economica,1999 P.467-468

alleged violation, otherwise the effective character of the remedy disappears. Finally, there is need to specify that the right to effective remedy sanctions an obligation of diligence, for what is guaranteed is the existence of an appropriate remedy and not its favourable result, but an unfavourable jurisprudence renders the remedy useless.

130. Considering all of the foregoing, the Commission is of the view that the Complainants did not benefit from the right to an effective remedy, for if it was established that the remedy was available and assessable, it should be noted that it had not been appropriate since the fact that it was frozen made it impossible for the Court to make a ruling. The petition remained pending for more than 5 years before the Complainants decided to seize the African Commission in 2003.

131. With regard to Articles 4 and 14, the Complainants highlight the violations to the physical integrity and to the material damages suffered by the victims.

132. Under the terms of Article 4,
« Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right ».

133. Article 14 provides that “The 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.”

134. In the light of their arguments, it would appear that the Parties seem to agree on the effectiveness of the violations to the lives of the victims and the considerable material damages which resulted from the violence of the post-electoral events. The Government has shown this agreement by setting up a Rescue Committee for the Victims, in conformity with the Law of 26 June 1964 which authorizes the State to provide « *assistance within the limits of the amounts provided for this purpose or constant assistance in any other form* ». The said Committee had evaluated the amount of damages –interest at five billion, eight hundred and eight million, three hundred and ten thousand, and eight hundred and eighty francs CFA (5 808 310 880). From all appearances, the victims had not been entirely unprejudiced.

135. The Respondent State observed in its arguments that it was not at all a compensation on its part but a show of solidarity, because it is not directly responsible for the prejudices suffered by the victims, and that it was an act by private individuals that the victims could bring to justice so as to have satisfaction with respect to their grievances.

136. The Commission is of the view that the responsibility of the Government has been established. It therefore follows that the Government should pay compensation for the prejudices suffered. Despite the fact that the Government is denying it, it understood that it could not remain insensitive to its obligation to pay fair compensation to the victims, for this reason it set up a Committee to assess the damages suffered by the Complainants.

DECISION OF THE COMMISSION

137. Based on the foregoing reasons, the African Commission Decides that:

- i. The provisions of Article 1 of the African Charter impose on States Parties an **obligation of Result**;
- ii. The State of Cameroon failed in its general obligation as set forth and sanctioned under Article 1 of the African Charter and consequently the State of Cameroon has an obligation of **RESULT**;
- iii. **Due to its obvious lack of diligence**, the State of Cameroon is held responsible for the violation of Articles **2, 4, and 14** of the African Charter; and therefore, the State of Cameroon is responsible for the acts of violence which took place on its territory which gave rise to human rights violations, whether these acts had been committed by the State of Cameroon itself or by people other²⁰; than the State;
- iv. The State of Cameroon had moreover violated the provisions of Article 7 of the same Charter;

138. Recommends to the State of Cameroon to:

- i. Take all the necessary measures for guaranteeing the effective protection of human rights at all times, and everywhere both in times of peace and in times of war;
- ii. Pursue its commitment to give fair and equitable compensation to the victims and without delay, to pay fair and equitable compensation for the prejudices suffered by the victims or their beneficiaries;
- iii. That the amount of compensation for the damages and interest be fixed in accordance with applicable laws;

Done in Banjul, The Gambia at the 46th Ordinary Session of the African Commission on Human and Peoples' Rights held from 11 – 25 November 2009.

²⁰ The jurisprudence of the Commission is constant regarding the responsibility of States towards others, see the National Commission on Human Rights and Freedoms vs. Chad ; Com. 155/96.