Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007)

Communication 275/2003, *Article 19 v The State of Eritrea*

Decided at the 41st ordinary session, May 2007, 22nd Activity Report

Incommunicado detention of 18 journalists since 2001

Admissibility (exhaustion of local remedies, remedies must be available, effective and sufficient, 45-47, 51, 64, 67, 69, 72-76; administrative remedies, 70; ample notice, 77,

incommunicado
detention, 76, 81;
actio popularis
, 65

Derogation (not possible under Charter, 87, 98, 99)

Limitations of rights (must be consistent with international law, 92, 105)

Personal liberty and security (arbitrary arrest and detention, 93; no charge or trial, 94, 95; *inc ommunicado*
detention, 101)

Fair trial (trial within reasonable time, 96, 97, 100; access to legal counsel, 103)

Evidence (facts not contested by state, 102)

Cruel, inhuman or degrading treatment (*incommunicado* detention, 102)

Family (*incommunicado* detention, 103)

Expression (imprisonment of journalists, 106; banning of press, 107)

Summary of facts

1. On 14 April 2003, the Secretariat of the African Commission received a communication brought by Article 19 against the state of Eritrea, a state party to the African Charter.

2. Article 19 states that it is concerned especially about the continued detention *incommunicado* without trial of at least 18 journalists in Eritrea since September 2001.

3. The 18 journalists who are reportedly detained *incommunicado* are:

- Zemenfes Haile, founder and manager of the private weekly *Tsigenay*;
- Ghebrehiwet Keleta, a news writer for *Tsigenay*;
- Selamyinghes Beyene, reporter for the weekly *Meqaleh*;
- Binyam Haile of Haddas Eritrea;
- Yosef Mohamed Ali, chief editor of *Tsigenay*;
- Seyoum Tsehaye, free-lance editor and photographer and former Director of Eritrean State Television (ETV);
- Temesgen Gebreyesus, reporter for *Keste Debena*;
- Mattewos Habteab, editor of *Meqaleh*;
- Dawit Habtemicheal, assistant chief editor, *Meqaleh*;
- Medhanie Haile, assistant chief editor, *Keste Debena*;

- Fessahye Yohannes (or Joshua) editor-in-chief of *Setit*;
- Said Abdulkadir, chief editor of *Admas*;
- Amanuel Asrat, chief editor of *Zemen*;
- Dawit Isaac, contributor to *Setit*;
- Hamid Mohammed Said, ETV;
- Saleh Aljezeeri, Eritrean state radio; and
- Simret Seyoum, a writer and general manager for *Setit.*

4. The complainant alleges that in August 2001, a dozen senior officials and other members of the ruling elite, known as the G15, signed a public letter criticising President Isaias Afewerki's rule. This letter allegedly generated a political crisis which involved defections, resignations, the dismissal of top officials, the imprisonment of government critics and journalists and the cancellation of the general elections that had been planned for December 2001.

5. The complainant further alleges that on 18 and 19 September 2001, 11 former Eritrean government officials including the former Vice President Mahmoud Sherifo and the former Foreign Minister Petros Solomon were arrested in Asmara.

6. Furthermore, on 18 September 2001, the Eritrean government banned the entire private press comprising of the following newspapers -: *Meqaleh, Setit, Tiganay, Zemen, Wintana, Admas, Keste Debena* and *Mana.* Subsequently, many journalists were arrested and detained, including the 18 journalists who are now being held *incommunicado*. The reasons given by the government for these actions ranged from threatening national security to failure to observe licensing requirements.

7. The complainant asserts that *Hadas Eritrea*, a government-owned daily newspaper, is the only publication allowed in the country.

8. The complainant states that on 4 October 2002, they sent appeal letters to the President of Eritrea and to the Chairman of the African Commission urging them to ensure the unconditional release or a fair trial of the detainees. On 12 November 2002, the complainant sent a letter to the government requesting information on the detainees and permission to visit the country and the detainees. Article 19 alleges that all requests sent to the government have been ignored.

Complaint

9. Article 19 alleges a violation of the following articles of the African Charter:

Articles 1, 3, 5, 6, 7, 9, 13, 18 and 26 of the African Charter.

Procedure

10. By letter dated 21 April 2003, the Secretariat of the African Commission acknowledged receipt of the communication and informed the complainant that the matter had been scheduled for consideration at the 33rd ordinary session of the African Commission.

11. At its 33rd ordinary session held from 15 to 29 May 2003, in Niamey, Niger, the African Commission considered the communication and decided to be seized of the matter.

12. On 10 June 2003, the Secretariat wrote informing the parties to the communication that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within 3 months.

13. On 27 August 2003, the Secretariat received a *note verbale* from the respondent state requesting the African Commission to advise Article 19 to exhaust all domestic remedies.

14. On 10 September 2003, Article 19 forwarded by fax its submissions on admissibility.

15. On 15 September 2003, the Secretariat of the African Commission acknowledged receipt of

the *note verbale* from the respondent state and the submissions from the complainant. The Secretariat of the African Commission additionally advised the respondent state to forward its arguments supporting its assertion that the complainant had not exhausted domestic remedies. Article 19 was also reminded to forward a copy of the Decree banning the entire private press.

16. At its 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission examined the communication and decided to defer further consideration on admissibility of the matter to its 35th ordinary session.

17. On 4 December 2003, the Secretariat of the African Commission wrote to inform the parties of the African Commission's decision. The respondent state was furnished with another copy of the complainant's written submissions on admissibility and further reminded it to forward its written submissions on admissibility within two months.

18. On 23 February 2004, the Secretariat of the African Commission received submissions on admissibility from the respondent state. The Secretariat acknowledged receipt of the said submissions and transmitted a copy of the same to the complainants on 3 March 2004.

19. On 17 March 2004, the Secretariat received submissions from the complainant in response to the submissions from the state of Eritrea. The Secretariat of the African Commission acknowledged receipt of the said submissions and transmitted a copy of the same to the respondent state on 18 March 2004.

20. At its 35th ordinary session held from 21 May to 4 June 2004, in Banjul, The Gambia, the African Commission examined the communication and decided to defer further consideration on admissibility of the matter to its 36th ordinary session pending receipt of information from the complainant on concrete steps taken to access domestic remedies in Eritrea. The parties to the communication were informed accordingly

21. By *note verbale* and letter dated 15 June 2004 the respondent state and the complainant were respectively informed of the Commission's decision.

22. By letter dated 15 September 2004, the Secretariat of the African Commission reminded the complainant to send the information requested by the African Commission during the 35th ordinary session.

23. At its 36th ordinary session held in Dakar, Senegal from 23 November to 7 December 2004, the African Commission considered the communication and declared it admissible.

24. By *note verbale* of 13 December 2004 and by letter of the same date, the Secretariat of the African Commission notified the parties of the African Commission's decision and requested them to submit their arguments on the merits within three months of the notification.

25. By *note verbale* dated 27 January 2005, the state of Eritrea wrote to the Secretariat of the African Commission requesting the African Commission to dismiss the communication on the grounds that: one of the subjects of the communication had already been dealt with in another communication (communication 250/2002) and therefore would constitute a case of double jeopardy, and that the complainant had appeared before the African Commission only once despite repeated requests to 'face and question the accuser – a legal right which was denied them' by the African Commission.

26. By *note verbale* dated 23 February 2005, the Secretariat of the African Commission acknowledged receipt of the respondent state's *note verbale* and informed the respondent state that its request would be put before the African Commission for consideration during the 37th ordinary session.

27. By letter dated 24 February 2005, the Secretariat of the African Commission informed the complainant that the respondent state had requested the African Commission to reconsider its decision on the communication and declare the latter inadmissible.

28. By letter dated 30 March 2005, the complainant acknowledged receipt of the Secretariat's letter of 24 February 2005. The complainant indicated that they were of the belief that the African Commission had thoroughly examined the communication before arriving at the decision on admissibility and therefore urged the African Commission to consider the communication on its merits.

29. By letter dated 5 April 2005, the Secretariat of the African Commission acknowledged receipt of the complainant's letter of 30 March 2005 and requested it to submit its arguments on the merits or confirm whether the arguments contained in its complaint were sufficient.

30. By letter dated 13 April 2005, the complainant acknowledged receipt of the Secretariat's letter of 5 April 2005 and indicated that in their earlier submissions they had addressed themselves on the merits of the communication but further indicated that they were available to make oral submissions on the same.

31. By letter dated 13 April 2005, the Secretariat acknowledged receipt of the complainant's letter and informed them that the communication had been scheduled for consideration at the 37th ordinary session of the African Commission.

32. At its 37th ordinary session held in Banjul, The Gambia, the African Commission deferred further consideration of the communication due to the absence of the rapporteur of the communication.

33. By *note verbale* and a letter dated 10 June 2005, the respondent state and the complainant were respectively notified of the African Commission's decision.

34. At its 38th ordinary session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission considered the respondent state's request that the communication be dismissed but decided to confirm its decision on admissibility.

35. By *note verbale* and a letter dated 15 December 2005, the respondent state and the complainant were respectively notified of the African Commission's decision and requested the parties to submit their arguments on the merits of the communication.

36. On 6 March 2006, the Secretariat of the African Commission wrote to the parties reminding them to submit their arguments on the merits before the end of March 2006.

37. By electronic mail dated 3 May 2006, the complainant re-submitted its arguments on the merits of the communication, which was immediately communicated to the respondent state for its comments.

38. By *note verbale* dated 19 May 2006, the respondent state submitted its arguments on the merits of the communication.

39. At its 39th ordinary session held from 11 to 25 May 2006, the African Commission decided to defer consideration of the merits to the 40th ordinary session, in order to allow the Secretariat to consider the parties' arguments and draft an opinion on the merits.

40. By *note verbale* and letter dated 31 May 2006, the respondent state and the complainant were respectively notified of the African Commission's decision.

41. By letter dated 17 October 2006 and *note verbale* dated 18 October 2006, the complainant and the respondent state respectively were reminded that the African Commission would consider the merits of the communication at its 40th ordinary session.

42. By *note verbale* and letter dated 10 February 2007, the respondent state and the complainant were respectively notified that the African Commission had deferred the communication, as it was unable to consider the said communication at its 40th ordinary session because of lack of time. Both the complainant and the respondent state were informed that the communication would be considered at the 41st ordinary session of the African Commission.

The law

Admissibility

43. The current communication is submitted pursuant to article 55 of the African Charter which allows the African Commission to receive and consider communications, other than from states parties. Article 56 of the African Charter provides that the admissibility of a communication submitted pursuant to article 55 is subject to seven conditions. [1] The African Commission has stressed that the conditions laid down in article 56 are conjunctive, meaning that if any one

of them is absent, the communication will be declared inadmissible.
[2]

44. The parties to the present communication seem to agree that six of the conditions set out in article 56 have been met. They are however in dispute over the application of one of the conditions – article 56(5), which provides that communications relating to human and peoples' rights referred to in article 55 received by the African Commission shall be considered if they 'are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

45. The exhaustion of local remedies rule is a principle under international law of permitting states to solve their internal problems in accordance with their own constitutional procedures before accepted international mechanisms can be invoked. The particular state is thus enabled to have an opportunity to redress the wrong that has occurred there within its own legal order. It is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the state should have been exhausted.

46. The African Commission has held in previous communications that for local remedies to be exhausted, they must be available, effective and sufficient. In communication 147/95 and 149/96 , the African Commission held that a remedy is considered *available* if the complainant can pursue it without impediment, it is deemed *effective* if it offers a prospect of success, and it is found *sufficient* if it is capable of redressing the complaint.
[3]

47. In terms of article 56(5) therefore, the law on exhaustion of domestic remedies presupposes: (i) the existence of domestic procedures for dealing with the claim; (ii) the justiciability or otherwise, domestically, of the subject-matter of the complaint; (iii) the existence under the municipal legal order of provisions for redress of the type of wrong being complained of; and (iv) available effective local remedies, that is, remedies sufficient or capable of redressing the wrong complained of.

48. The second part of article 56(5) which is the subject of contention between the parties provides that a communication shall be considered if they are sent after the exhaustion of local remedies, 'if any, unless it is obvious that this procedure is unduly prolonged'. It follows therefore that the local remedies rule is not rigid. It does not apply if:

- local remedies are nonexistent;
- local remedies are unduly and unreasonably prolonged;
- recourse to local remedies is made impossible;
- from the face of the complaint there is no justice or there are no local remedies to exhaust, for example, where the judiciary is under the control of the executive organ responsible for the illegal act; and
- the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts.

Issues before the African Commission

49. The parties to the present case are in dispute over the question of the exhaustion of domestic remedies in Eritrea and it is therefore for the African Commission to make a determination on the matter.

50. On the one hand, the state argues that the stipulated requirement in article 56(5) has not been fulfilled by the complainant and that none of the abovementioned exceptions should therefore apply. On the other hand, the complainant alleges that the exception rule in article 56(5) should apply.

51. Whenever a state alleges the failure by the complainant to exhaust domestic remedies, it has the burden of showing that the remedies that have not been exhausted are available, effective and sufficient to cure the violation alleged, ie that the function of those remedies within the domestic legal system is suitable to address an infringement of a legal right and are effective. [4] When a state does this, the burden of responsibility then shifts to the complainant who must demonstrate that the remedies in question were exhausted or that the exception provided for in article 56(5) of the African Charter is applicable.

Submissions by the complainant

52. The complainant in the present communication argues that domestic remedies are not available and notes that the fact that the victims have been held for over three years (since September 2001) *incommunicado* 'is a manifestation of the fact that the administration of justice in Eritrea is extremely abnormal'.

53. The complainant further points to the fact that section 17 of the Eritrean Constitution provides safeguards against the arbitrary arrest and detention of persons, and the government of Eritrea has failed to abide by these safeguards. [5] The complainant claims that the 'deliberate failure of the government to abide by its own constitutional obligation shows that it is hopeless and impractical or unreasonable for the detainees to seize the domestic courts by way of *habeas corpus*'.

54. The complainant further argues that the executive branch of government in Eritrea interferes in the affairs of the judiciary thus rendering the latter's independence and effectiveness suspect. They cite the removal of the Chief Justice by the President of the Republic when the former allegedly requested the executive not to interfere in the judiciary. The complainant noted that 'if the Chief Justice could be removed from office for merely asking the executive branch of government not to interfere with the independence of the judiciary, what will happen to any judge who dares to order the release of the detainees marked out as 'traitors' and 'state enemies' by the highest authority, the President?'

55. The complainant notes further that the human rights violations complained of are serious and massive and in terms of the jurisprudence of the African Commission, such violations do not necessitate the exhaustion of local remedies.

56. The complainant concludes by stating that in fact, they had sent a writ of *habeas corpus* to the Minister of Justice requesting that the victims be brought to court but received no response from the Minister, and that they had requested to visit the victims but were not granted permission by the responding state.

Submissions by the state

57. The respondent state in its submission maintains that the Eritrean judiciary is independent and that the complainant should have exhausted local remedies either directly or through local legal representatives. The respondent state submits that it informed the complainant that they should take the initiative to approach the courts directly in order to seek justice for the detainees but no such efforts were made by the complainant.

58. The respondent state further submits that the claims by the complainant that there is an 'information black out' and that the Eritrean judiciary lacks independence are unfounded as they are not substantiated by concrete examples indicating that there has been interference in the actual work of the judges and in the dispensation of justice in the country. With respect to the dismissal of the Chief Justice, the respondent state argues that in Eritrea the President appoints the Chief Justice and therefore has the power to dismiss him. [6]

59. Article 52 of the Eritrean Constitution provides for the removal and suspension of judges. Sub-article 1 provides that a judge may be removed from office before the expiry of his tenure of office by the President 'only, acting on the recommendation of the Judicial Service Commission', pursuant to the provisions of sub-article 2 of this article 'for physical or mental incapacity, violation of the law or judicial code of ethics'. Sub-article 2 provides that the Judicial Service Commission 'shall investigate whether or not a judge should be removed from office on grounds of those enumerated in sub-article 1' of this article. In case the Judicial Service Commission decides that a judge should be removed from office, it shall present its recommendation to the President. And sub-article 3 provides that the President may, on the recommendation of the Judicial Service Commission, suspend from office a judge who is under investigation. The state did not indicate whether these procedural safeguards had been followed but simply intimated that the Chief Justice is appointed by the President and can be dismissed by the President.

60. In his oral submission during the 35th ordinary session, the representative of the respondent state reiterated that the allegations made by the complainant were false and unfounded as they had been made without any serious attempts by the complainants to ascertain the facts before bringing the matter before the African Commission. Furthermore, the complainants had not submitted themselves to the courts in Eritrea and as such it is the responsibility of the complainant to find ways and means of utilising the domestic courts prior to bringing the matter before the African Commission. He reminded the African Commission that all conditions of article 56 must be met in order for a matter to be admitted and if any one of the conditions is not met, the communication must be declared inadmissible.

61. The representative of the respondent state informed the African Commission that the incarcerated journalists had been arrested by the police and were being held by executive authorities. However, following investigation, an administrative decision was reached to release two of the journalists and that the decision with respect to the remaining incarcerated journalists would be forthcoming.

62. He conceded that the detainees on whose behalf this communication is brought have not been brought before a court of law because of the nature of the criminal justice system in Eritrea. He stated that the criminal justice system in Eritrea does not have the institutional capacity to handle cases expeditiously and as such there is huge backlog of cases in all the courts in the country.

63. The respondent state further stated that contrary to the claims by the complainant that they were not able to visit Eritrea in order to assist the victims, everyone who was involved in the matter relating to the detained journalists and the political detainees was invited to Eritrea including the complainant who chose not to visit the country.

Decision of the African Commission on admissibility

64. To determine the question of admissibility of this communication, the African Commission will have to answer, among others, the following questions:

- Who is required under the African Charter to exhaust local remedies – the author of the communication or the victim of the alleged human rights violations?;
- Does the removal of a Chief Justice render domestic remedies unavailable and insufficient?;
- Does the fact that a state has failed to abide by its own laws render domestic remedies ‘hopeless, impractical and unreasonable’?;
- Does the communication reveal massive and serious violations of human and peoples’ rights?; and
- Does the continuous *incommunicado* detention of the victims render domestic remedies unavailable, ineffective and inefficient?

65. As regards who is required to exhaust local remedies, the African Charter is clear. It indicates in article 56(1) that the authors of the communication must indicate their identity even if they claim anonymity. This presupposes that domestic remedies are to be exhausted but by the authors. In the consideration of communications, the African Commission has adopted an *actio popularis*
approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality. All the author needs to do is to comply with the requirements of article 56. The African Commission has thus allowed many communications from authors acting on behalf of victims of human rights violations. Thus, having decided to act on behalf of the victims, it is incumbent on the author of a communication to take concrete steps to comply with the provisions of article 56 or to show cause why it is impracticable to do so.

66. As regards the removal of the Chief Justice, the complainant fails to demonstrate sufficiently how this removal prevented them from approaching the domestic remedies or how it rendered such domestic remedies unavailable, ineffective, 'hopeless, impractical and unreasonable'. The independence of the judiciary is a crucial element of the rule of law. Article 1 of the UN Basic Principles on the Independence of the Judiciary [7] states that

The independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of judiciary.

Article 11 of the same Principles states that '[t]he term of office of judges, their independence, security ... shall be adequately secured by law'. Article 18 provides that '[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties'. Article 30 of the International Bar Association (IBA)'s Minimum Standards of Judicial Independence [8] also guarantees that:

A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

and article 1(b) states that '[p]ersonal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control'. Article 52 (1) of the Eritrean Constitution provides an almost similar provision.

67. The issue however is, does the removal of a Chief Justice in a manner inconsistent with international standards render the judiciary in a state unavailable and ineffective? The complainant was simply casting doubts about the effectiveness of the domestic remedies. The African Commission is of the view that it is incumbent on the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the state due to isolated incidences. In this regard, the African Commission would like to refer to the decision of the Human Rights Committee in *A v Australia* [9] in which the Committee held that 'mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies'.
[10]
The African Commission can therefore not declare the communication admissible based on this argument.

68. As regards the complainant's argument that the government has failed to abide by its own constitutional obligations as provided for in article 17 of the Eritrean Constitution, the African Commission is of the view that the whole essence why human rights violations occur is because governments fail to abide by their domestic as well as international obligations. When this happens, individuals whose rights have been, are being or are likely to be violated seize the local courts to invoke their rights in order to compel governments to abide by these obligations. The Eritrean Constitution provides ample safeguards against persons who are arrested and detained without charge or trial. Apart from sub-articles 1, 3, and 4 of article 17, sub-article 5 of the same article is very instructive. It provides that

Every person shall have the right to petition the court for a writ of *habeas corpus*. Where the arresting officer fails to bring him before the court of law and provide the reason for their arrest, the court shall accept the petition and order the release of the prisoner.

69. In the instant case therefore, the complainant could, at the very least, have seized the local courts by way of a writ of *habeas corpus* to draw the court's attention to the constitutional provision they claim the government has breached.
Lawyers often seek the release of detainees by filing a petition for a writ of
habeas corpus

. A writ of
habeas corpus
is a judicial mandate to an arresting officer ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A
habeas corpus
petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment. The
writ of
habeas corpus
has been described as 'the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action'.
[11]
It serves as an important check on the manner in which the courts pay respect to constitutional rights.

70. The complainant in their submissions does acknowledge that they did send a writ of *habeas corpus*
to the Minister of Justice. The African Commission is of the view that even though it expected the Minister to advise the complainant on the proper procedure to follow, the failure to do so does not constitute a breach of the law. The Ministry of Justice is the same arm of government that has failed to 'abide by its own constitutional obligations…' and it is only the courts that can order it to do so. By sending the writ to the Minister of Justice, the complainant cannot claim they were attempting the exhaustion of domestic remedies as article 56(5) requires the exhaustion of legal remedies and not administrative remedies.

71. As regards the argument that the communication reveals serious and massive violations of human rights, the African Commission would like to reiterate its earlier decisions in communication 16/88, [12] **25/89, 47/90, 56/91, 100/93,** **[13]** 27/89, 46/91, 49/91, 99/93 [14]
that it cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in respect of each individual complaint. This is the case where there are a large number of victims. Due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable.

72. However, as regards the continuous *incommunicado* detention of the detainees, the African Commission would like to note the state party's acknowledgement that the victims are still being held in detention because of the poor state of the criminal justice system in the country. With

respect to this argument by the state party, the African Commission notes that whenever there is a crime that can be investigated and prosecuted by the state on its own initiative, the state has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the complainants, or the victims or their family members assume the task of exhausting domestic remedies when it is up to the state to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards.

73. The African Commission would also like to note that the state party has made a general refutation of the claims alleged and has insisted that domestic remedies do exist and that the complainant did not attempt to exhaust them. The African Commission notes, however, that the state party has merely listed *in abstracto* the existence of remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the case. [15]

74. In the instant communication therefore, the fact that the complainant has not sufficiently demonstrated that they have exhausted domestic remedies does not mean such remedies are available, effective and sufficient. The African Commission can infer from the circumstances surrounding the case and determine whether such remedies are in fact available, and if they are, whether they are effective and sufficient.

75. The invocation of the exception to the rule requiring that remedies under domestic law should be exhausted provided for in article 56(5) must invariably be linked to the determination of possible violations of certain rights enshrined in the African Charter, such as the right to a fair trial enshrined under article 7 of the African Charter. [16] The exception to the rule on the exhaustion of domestic remedies would therefore apply where the domestic situation of the state does not afford due process of law for the protection of the right or rights that have allegedly been violated. In the present communication, this seems to be the case.

76. Holding the victims *incommunicado* for over three years demonstrates a *prima facie* violation of due process of the law and in particular, article 7 of the African Charter. By not taking any action to remedy the situation more than twelve months after the African Commission had been seized of the communication goes to demonstrate that the state has equally failed to demonstrate that domestic remedies are available and effective.

77. Another rationale for the exhaustion requirement is that a government should have notice of

a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. The African Commission is of the view that the state has had ample time and notice of the alleged violation to at least charge the detainees and grant them access to legal representation. However, if it is shown that the state has had ample notice and time within which to remedy the situation, even if not within the context of the domestic remedies of the state, as is the case with the present communication, the state may still be said to have been properly informed and is expected to have taken appropriate steps to remedy the violation alleged. The fact that the state of Eritrea has not taken any action means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged.

78. The African Commission would like in this regard to refer to its decision in communication 18/88 [17] which concerned the detention and torture of the complainant for more than seven years without charge or trial, the denial of food for long periods, the blocking of his bank account, and the use of his money without his permission. The African Commission held that in such circumstances it is clear that the state has had ample notice of the violations and should have taken steps to remedy them. The African Commission would also like to restate the position taken in communication 250/2002. [18] In that communication, the African Commission was of the view that the sit
uation as presented by the respondent state does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the remedies under domestic law and have thus been prevented from exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.

79. The situation as presented by the respondent state does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the remedies under domestic law and have thus been prevented from exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.

80. In the *Albert Mukong* case, the Human Rights Committee held that a state party to the Covenant, regardless of its level of development, must meet certain minimum standards regarding conditions of detention. [19] This reasoning of the Human Rights Committee can also include the fact that a state party to the African Charter regardless of its level of development must meet certain minimum standards regarding fair trial or due process conditions. The Committee concluded that 'the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle … democratic tenets and human rights'.
[20]

81. The continuous *incommunicado* detention of the victims without charge bars them from any legal representation and makes it difficult for the complainant or any person interested in assisting them from attempting whatever domestic remedies might be available. To leave the detainees to languish in detention forever because of the inadequacy of the state's criminal justice system or because there is no one to access the domestic courts on their behalf would be grossly unjust, if not unfair.

82. In the absence of any concrete steps on the part of the state to bring the victims to court, or to allow them access to their legal representatives three years after their arrest and detention, and more than one year after being seized of the matter, the African Commission is persuaded to conclude that domestic remedies, even if available, are not effective and/or sufficient.

For this reason, the African Commission declares the communication admissible.

Decision of the African Commission on request by the respondent state to dismiss the communication

83. The present communication was declared admissible at the 36th ordinary session of the African Commission held in Dakar, Senegal from 23 November to 7 December 2004. In response to the African Commission's request for written submissions on the merits, the respondent state in a *note verbale* dated 27 January 2005 wrote requesting the African Commission to dismiss the communication. The respondent state's grounds for such dismissal were that:

- One of the 18 journalists in this matter had been the subject of another communication – communication 250/2002, *Zegveld and Another v Eritrea,* which the African Commission had already disposed of. The respondent state therefore argued that dealing with that person in this matter constitutes double jeopardy.
- The complainant had appeared before the African Commission only once despite repeated requests to 'face and question the accuser – a legal right which was denied them' by the African Commission.

84. In dealing with the respondent state's request that the communication be dismissed the African Commission noted that rule 118(2) of the African Commission's Rules of Procedure

stipulate that: 'If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration'.

85. No provision is made therein for the African Commission to dismiss a matter after having declared it admissible. In any case, the victims who are the subject of this communication are still being held in *incommunicado* detention by the respondent state and are accordingly unable to access domestic remedies whether on their own or through legal representatives. It is for these reasons that the African Commission has decided not to dismiss the communication and will therefore consider it on the merits.

Decision on the merits

86. The African Commission will not deal with any issue already decided upon in communication 250/2002.

87. Eritrea submits that the acts alleged were undertaken 'against a backdrop of war when the very existence of the nation was threatened' and that, as a result, the government was 'duty bound to take necessary precautionary measures (and even suspend certain rights).' However, unlike other human rights instruments, [21] and as emphasised in communication 74/92, [22]
the African Charter does not allow states parties to derogate from it in times of war or other emergency. The existence of war, international or civil, or other emergency situation within the territory of a state party cannot therefore be used to justify violation of any of the rights set out in the Charter, and Eritrea's actions must be judged according to the Charter norms, regardless of any turmoil within the state at the time.

88. The complainant alleges, and Eritrea does not deny, that 11 political dissidents and 18 journalists have been detained, *incommunicado* and without trial, since September 2001. It is also alleged by the complainant, and admitted by the respondent state, that private newspapers were banned from September 2001. Although Eritrea maintains that this ban was temporary, it is not clear from the information available whether or when the ban was lifted.

89. The basic facts are not therefore in dispute. However, the versions of the parties vary as regards the motivation for the detention of the individuals concerned and the ban on the press.

According to the complainant the arrests were due to the detainees having expressed their opinions and spoken out against the government; the respondent state on the other hand claims that the 11 political opponents were arrested for breaching articles 259 (attacks on the independence of the state), 260 (impairment of the defence powers of the state) and 261 (high treason) of the Transitional Penal Code of Eritrea. As regards the ban on the press and the detention of the 18 journalists, the respondent state claims that these occurred because, 'the stated newspapers and the leading editors were recruited into the illegal network organised for the purpose of ousting the government through illegal and unconstitutional means'.

90. Eritrea 's argument, then, is that its actions were justified by the circumstances prevailing within its territory during the relevant period, and permissible under its domestic law. Reference is made to articles 6 and 9 of the African Charter, the relevant sections of which provide respectively that:

No-one may be deprived of his freedom *except for reasons and conditions previously laid down by law* ; and

Every individual shall have the right to express and disseminate his opinions *within the law*. (Emphasis added)

91. Such provisions of the Charter are sometimes referred to as 'claw-back clauses', because if 'law' is interpreted to mean any domestic law regardless of its effect, states parties to the Charter would be able to negate the rights conferred upon individuals by the Charter.

92. However, the Commission's jurisprudence has interpreted the so called claw-back clauses as constituting a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with states parties' international obligations should be enacted by the relevant national authorities. [23] The lawfulness of Eritrea's actions must therefore be considered against the Charter and other norms of international law, rather than by reference to its own domestic laws alone. [24]

93. The arrest and detention of the journalists and political opponents is claimed by the complainant to breach articles 6 and 7 of the Charter. Article 6 provides that 'no-one may be arbitrarily arrested or detained'. The concept of arbitrary detention is one which both the Commission and other international human rights bodies have previously expounded upon. In the *Albert Mukong* case, ***[25]*** the United Nations Human Rights Committee stated that,

'arbitrariness' is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law … remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances … remand in custody must further be necessary in all the circumstances.

From this case it can be inferred that an arrest or detention may be legal according to the letter of domestic law, but arbitrary and therefore illegal by reason of its inappropriate, unjust or unpredictable nature.

94. The Eritrean detainees have not been charged, or brought to trial. This in itself constitutes arbitrariness, as the Commission has previously stated. In communication 102/93, [26] the Commission held that, '[w]here individuals have been detained without charges being brought … this constitutes an arbitrary deprivation of their liberty and thus violates article 6'.

95. Furthermore, the length of time for which the detainees have been kept in custody must be considered. Both parties agreed that the arrests occurred in September 2001. The journalists and political opponents have therefore been detained, without charge or trial, for a period of over five years.

96. Article 7(1)(d) of the Charter provides that all individuals shall have 'the right to be tried within a reasonable time by an impartial court or tribunal'. The Commission has expanded upon this provision in its Resolution on the Right to Recourse and Fair Trial, which states that: [27]

Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time

or be released.

97. The question of what is reasonable cannot be expressed in terms of a blanket time limit which will apply in all cases, but rather must depend on the circumstances. This approach has also been espoused by the European Court of Human Rights, which has held that the reasonableness of the length of proceedings is to be assessed in accordance with all the circumstances of a case. The European Court will look in particular at the complexity of the case, and the conduct of the applicant and of the relevant authorities. [28]

98. Eritrea contends that the delay in bringing these particular detainees to trial is due to the complexity and gravity of the offences committed, and to the 'precarious war situation' existing within the state. However, as already stated, it must be borne in mind that states parties cannot derogate from the Charter in times of war or any other emergency situation. Even if it is assumed that the restriction placed by the Charter on the ability to derogate goes against international principles, there are certain rights such as the right to life, the right to a fair trial, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances.

99. The existence of war in Eritrea cannot therefore be used to justify excessive delay in bringing the detainees to trial. Furthermore, a backlog of cases awaiting trial cannot excuse unreasonable delays, as the European Court of Human Rights has held. [29] Further, in the case of *Albert Mukong*, referred to above, the Human Rights Committee stated that states parties to the ICCPR must observe certain minimum standards as regards the condition of detention, regardless of their state of development. The Commission considers that the same principle applies to the length of detention before trial, and that states parties to the Charter cannot rely on the political situation existing within their territory or a large number of cases pending before the courts to justify excessive delay.

100. Moreover, the detainees are being held *incommunicado*, and have never been brought before a judge to face charges. In these circumstances, the Commission finds that Eritrea has breached the requirement of trial within a reasonable time set out in article 7(1)(d). This is consonant with its previous decisions, such as communication 102/93, in which three years detention was found to be unacceptable, and communication 103/93, [30] in which the Commission stated that seven years detention without trial, 'clearly violates the 'reasonable time' standard stipulated in the Charter'.

101. The fact that the detainees are being held *incommunicado* also merits further consideration in terms of international human rights law. The United Nations Human Rights Committee has directed [31] that states should make provisions against *incommunicado* detention, which can amount to a violation of article 7 (torture and cruel treatment and punishment) of the International Covenant of Civil and Political Rights, to which Eritrea has acceded. Furthermore, the Commission itself has stated that

holding an individual without permitting him or her to have contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned. [32]

102. Eritrea has not denied the complainant's contention that the detainees are being held *incommunicado*, with no access to legal representation or contact with their families, and as the Commission has enunciated in many of its previous decisions, where allegations are not disputed by the state involved, the Commission may take the facts as provided by the complainant as a given. [33] Nor does the political situation described by Eritrea excuse its actions, as article 5 permits no restrictions or limitations on the right to be free from torture and cruel, inhuman or degrading punishment or treatment. The Commission thus finds that Eritrea has violated article 5, by holding the journalists and political dissidents *incommunicado* without allowing them access to their families.

103. In keeping with its earlier decisions on similar cases, [34] the Commission also finds that such treatment amounts to a breach of article 18, as it constitutes violation of the rights of both the detainees and their families to protection of family life. Finally, the Commission holds that there has been a violation of article 7(1)(c), since the detainees have been allowed no access to legal representation, contrary to the right to be defended by counsel which is protected by that provision of the Charter.

104. The Commission turns its attention now to the question of whether there has been a violation of the detainees' rights to express and disseminate their opinions, as alleged by the

complainant. The events which give rise to this allegation are the ban by the Eritrean government of the private press, and the arrest and detention of the 18 journalists. The respondent state argues that these actions were justified by the activities of the journalists and the newspapers in question, which it considered were aimed at overthrowing the government. Further, the Eritrean government claims that its actions did not constitute a breach of the Charter, as article 9 only protects the expression and dissemination of opinions within the law.

105. As explained above, permitting states parties to construe Charter provisions so that they could be limited or even negated by domestic laws would render the Charter meaningless. Any law enacted by the Eritrean government which permits a wholesale ban on the press and the imprisonment of those whose views contradict those of the government's is contrary to both the spirit and the purpose of article 9. The Commission reiterates its own statement in communications 105/93, 128/94, 130/94 and 152/96. [35] According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

106. By applying norms of international human rights law, the Commission has previously found, and finds in this case, that the imprisonment of journalists 'deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information. This action is a breach of the provisions of article 9 of the Charter'. [36]

107. Moreover, banning the entire private press on the grounds that it constitutes a threat to the incumbent government is a violation of the right to freedom of expression, and is the type of action that article 9 is intended to proscribe. A free press is one of the tenets of a democratic society, and a valuable check on potential excesses by government.

108. No political situation justifies the wholesale violation of human rights; indeed general restrictions on rights such as the right to free expression and to freedom from arbitrary arrest and detention serve only to undermine public confidence in the rule of law and will often increase, rather than prevent, agitation within a state. The Commission draws on the findings of the UN Human Rights Committee:

The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights. [37]

For the reasons given above the Commission:

- Holds a violation of articles 1, 5, 6, 7(1), 9 and 18 by the state of Eritrea;
- Urges the government of Eritrea to release or to bring to a speedy and fair trial the 18 journalists detained since September 2001, and to lift the ban on the press;
- Recommends that the detainees be granted immediate access to their families and legal representatives; and

Recommends that the government of Eritrea takes appropriate measures to ensure payment of compensation to the detainees.

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[1] See art 56 of the African Charter on Human and Peoples' Rights.

[2] See African Commission, Information sheet 3, communication procedure.

[3] Communication 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].

[4] Inter-American Court of Human Rights, case of *Velásquez Rodríguez*, judgment of

29 July 1988, para 63.

[5] **See art 17(1) No person may be arrested or detained save pursuant to due process of law. … (3) Every person arrested or detained shall be informed of the grounds for his arrest or detention and the rights he has in connection with his arrest or detention in a language he understands. (4) Every person who is arrested and detained in custody shall be brought before the court within 48 hours of his arrest, and if this is not reasonably possible, as soon as possible thereafter, and no such person shall be detained in custody beyond such period without the authority of the court. (5) Every person shall have the right to petition the court for a writ of *habeas corpus*. Where the arresting officer fails to bring him before the court of law and provide the reason for their arrest, the court shall accept the petition and order the release of the prisoner.**

[6] Art 52(1) of the Eritrean Constitution.

[7] Adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[8] IBA Minimum Standards of Judicial Independence (adopted 1982).

[9] Communication 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

[10] See also *L Emil Kaaber v Iceland*, communication 674/1995, UN Doc CCPR/C/58/D/674/1995 (1996). See also *Ati Antoine Randolph v Togo*, communication 910/2000, UN Doc CCPR/C/79/D/910/2000 (2003).

[11] *Harris v Nelson*, 394 US 286, 290-91 (1969).

[12] *Comité Culturel pour la Démocratie au Bénin v Benin* [(2000) AHRLR 23 (ACHPR 1995)]. Communication 16/88 concerns the arrest of students, workers and pupils and their detention without trial (some for several months), during which they were tortured and maltreated..

[13] *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)]. Communication 25/89 alleges the torture of 15 persons by a military unit, on or about 19 January 1989, in Kinsuka near the Zaire River. On 19 April 1989 when several people protested their treatment, they were detained and held indefinitely. Communication 47/90 alleges arbitrary arrests, arbitrary detentions, torture, extra-judicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, and suppression of the freedom of the Press. Communication 56/91 alleges the persecution of Jehovah's Witnesses, including arbitrary arrests, appropriation of church property, and exclusion from access to education. Communication 100/93 makes allegations of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleges that public finances were mismanaged; that the failure of the government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years; that freedom of movement was violated; and that ethnic hatred was incited by the official media
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[14] *Organisation Mondiale Contre la Torture and Others v Rwanda* [(2000) AHRLR 282 (ACHPR 1996)].
The communications allege the expulsion of Burundi nationals who had been refugees without the opportunity to defend themselves at trial; arbitrary arrests and summary executions; the detention of thousands of people by the armed forces on the basis of ethnic origin; the destruction of Tutsi villages and massacre of Tutsis.

[15] *Albert Womah Mukong v Cameroon,* communication 458/1991, UN Doc CCPR/C/51/D/458/1991 of 10 August 1994.

[16] Inter-American Court of Human Rights, c*ase of Velásquez Rodríguez*. para. 91. See in this connection also
Judicial Guarantees during States of Emergency
(articles 27.2, 25 and 8 of the American Convention on Human Rights), advisory opinion

OC–/87 of October 6, 1987. Series A. Nº 9, para 24.

[17] *El Hadj Boubacar Diawara v Benin*, July 1988 [*Comité Culturel pour la Démocratie au Bénin v Benin* (2000) AHRLR 23 (ACHPR 1995)] .

[18] *Zegveld and Another v Eritrea* (2003) [AHRLR 84 (ACHPR 2003)].

[19] *Communication 458/1991 para 9.3.*

[20] *Mukong* para 9.7 supra.

[21] For example, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

[22] *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)], para 21: 'The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chat cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.'

[23] See for example communication 101/93, *Civil Liberties Organisation (in respect of the Bar Association) v Nigeria* [(2000) AHRLR 186 (ACHPR 1995)], para 16, and communication 212/98, *Amnesty International v Zambia*, para 50.

[24] See communications 147/95 and 149/96*, Jawara v The Gambia*, paras 57-59.

[25] Human Rights Committee, communication 458/1991 *Albert Mukong v Cameroon*, 10 August 1994, para 9.8.

[26] *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 191 (ACPHR 1998)], para 55.

[27] ACHPR /Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial (1992), para 2(c).

[28] *Buchholz v Germany*, 7759/77 [1981] ECHR 2 (6 May 1981).

[29] *Union Alimentaria Sanders SA* [*v Spain*], 7 July 1989, Series A Number 157.

[30] *Abubakar v Ghana* [(2000) AHRLR 124 (ACHPR 1996)] para 12.

[31] General Comment 20, 44th Session, 1992.

[32] Communications 48/90, 50/91, 52/91 and 89/93, *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999) para 54].

[33] Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* .

[34] See for example communications 143/95 and 150/96, *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 235 (ACHPR 1999)].

[35] *Media Rights Agenda and Others v Nigeria* [(2000) AHRLR 200 (ACHPR 1998)].

[36] Communications 147/95 and 149/96, *Jawara v the Gambia*.

[37] *Mukong* case, para 9.7.