

235/00 : Curtis Francis Doebbler / Sudan

Summary of Alleged Facts

1. The Complainant represents 14,000 Ethiopian refugees who fled Ethiopia prior to 1991 during the Mengistu regime and lived in Sudan and were a subject of forced repatriation pursuant to a decision adopted by the Respondent State and the United Nations High Commissioner for Refugees (UNHCR) in September 1999. The Complainant states that during the 1980s and early 1990s an estimated 80,000 Ethiopians entered Sudan fleeing from persecution and from events disturbing public order in Ethiopia.
2. The Complainant alleges that the current Government in Ethiopia was formed by officials of the Tigrayan People's Liberation Front (TPLF) party, who were allies with the Ethiopian People's Revolutionary Party (EPRP) during the struggle against the Mengistu regime. The supporters of the EPRP are allegedly the main target of repression by the Ethiopian government throughout the country.
3. The Complainant alleges that all Ethiopian refugees in Sudan were previously granted asylum by the Government of Sudan in accordance with its international obligations. The United Nations High Commissioner for Refugees, the agency responsible for the protection of refugees worldwide, also honoured this recognition until September 1999.
4. The Complainant alleges that in September 1999, the Government of Sudan signed an agreement with the UNHCR to invoke the Cessation Clauses Article 1(C) (5)
This Convention shall cease to apply to any person falling under the terms of section A if: He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; <http://www.unhcr.org/3b66c2aa10.html> accessed 25.10.2010
of the 1951 UN Convention Relating to the Status of Refugees with effect from 1st March 2000.
5. The Complainant alleges that by this agreement, Ethiopian refugees in Sudan would lose their right to work or receive any social assistance as a way of coercing them into forced repatriation back to Ethiopia.
6. The Complainant states that in February 2000, a notice was posted on the door of the UNHCR compound in Khartoum, Sudan, entitled "Information Announcement to the Ethiopian Refugees in Sudan" and stated in part:

The Government of Sudan represented by the Commission for Refugees (COR) and the United Nations High Commissioner for Refugees (UNHCR) would like to inform all Ethiopian Refugees in Sudan of the following:

All Ethiopian Refugees outside Ethiopia after 1st March 2000 will lose their legal refugee status. This means all the legal rights granted by international, regional and local regulations which guarantee refugees status or condition as stipulated in the 1951 Geneva convention generally governing that status and treatment of refugees etc..., the legal status in respect of resolving individual cases and the right to appear before the courts etc..., the right to acquire employment and the guarantees, the issue of comprehensive guidance and supply of shelter, health and treatment, education, food, social security, etc ...and in conclusion, the various administrative assistance, and permits like travel permits, employment permits, driving licences, identity cards, residence and travel documents for travelling abroad and commercial licences etc...; all will cease to exist forthwith. ...

In light of this new situation, any Ethiopian refugee who decides to remain in the Sudan after 1st March 2000 will bear full responsibility of the consequences which may follow as the result of the forfeiture of his entitlements which he used to enjoy as a refugee before 1st March 2000. ...

To avoid unnecessary problems, which will occur as a result of your illegal stay in the Sudan after 1st March 2000, we request you to seriously consider the circumstances which will assist you in taking a reasonable decision to guarantee your safety and that of the future of your family.

7. The Complainant states that although the Government had only agreed to withdraw refugee status, dozens of refugees reported that the UNHCR informed them that they would be deported after 1st March 2000 and that any benefits that they were receiving would cease. Furthermore, some of the refugees were arrested, beaten, and further mistreated as a consequence of their protests against their involuntary repatriation.

8. The Complainant states that the Respondent State, the UNHCR and the Government of Ethiopia entered into an agreement to forcibly repatriate them. This action consisted of several steps, including all of the following: the withholding of social welfare benefits such as a medical attention, food, clothing, and housing entitlements; and the implementation of an unfair screening procedure.

9. The Complainant states that some of the refugees who protested the removal of their refugee status were sometimes arrested and deported or threatened with arrest and deportation, forcing many of them to flee to neighbouring countries.

10. The Complainant further alleges that at the time, Ethiopia was involved in a full-scale international armed conflict with its neighbour Eritrea.

11. The Complainant states that the UNHCR and the Respondent State agreed bi-laterally to establish a screening procedure. The Complainant alleges that this procedure did not provide the basic minimum standards of due process. For example, the refugees were not allowed to be legally represented; the Government of Sudan and/or the UNHCR recruited unqualified persons to do the screening. The screening did not take into account the 1969 African Refugee Convention or the African Charter in their evaluation of individual cases; the screenings did not start until months after the threat of forcible *refoulement* had been made, and implemented in large parts. Interpreters were recruited from the Ethiopian Embassy in Khartoum - the embassy of the State from which they harboured or had a recognised, well-founded fear of persecution.

12. The Complainant states that some of the refugees had lived and settled in Sudan for up to thirty years; that many of them are opponents of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and the Tigrayan People's Liberation Front (TPLF), ruling the country since 1991. The Complainant states that many refugees feared that they would be sent to the Ethiopia/Eritrea warfront, due to the war which was ongoing during the whole of 2000 or that they would be mistreated or even killed by the Ethiopian Government.

13. The Complainant states that some of the refugees, such as Mr Luel Kassa, who was forced to return in early 2001, were arrested upon return; and others fled Ethiopia again to Sudan or a third country as soon as they were able to.

14. The Complainant states further that many of the estimated 14,000 Ethiopian refugees who are still living in Sudan do not wish to return to Ethiopia because they have a well-founded fear of persecution or because they are fleeing the war and famine in Ethiopia.

15. The Complainant states that in March 2001, more than 1,700 Ethiopian refugees in Port Sudan and Khartoum staged a hunger strike to protest their return. Their main complaint: the unfair process for determining their status.

16. Since March 2001, the Complainant has contacted the Government of Sudan and the UNHCR in an effort to resolve this matter, but without success.

17. The Complainant states that although some refugees were allowed to stay in Sudan, others remained without the consent of the Government of Sudan and feared the prospect of immediate deportation without due process of law. The Complainant further alleges that many of these refugees live in inhuman conditions after being denied the basic necessities of life.

Complaint

18. The Complainant alleges violations of Articles 4, 5, 6, 12(3), (4) and (5) of the African Charter on Human and Peoples' Rights (African Charter).

Procedure

19. The complaint was received at the Secretariat of the African Commission on 22 February 2000.
20. At the 27th Ordinary Session held from 27th April to 11th May 2000 in Algiers, Algeria, the African Commission decided to be seized of the communication and requested the parties to address it on the exhaustion of domestic remedies.
21. The above decision was communicated to the parties on 30 June 2000.
22. At its 28th Ordinary Session held from 23 October to 6 November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this communication to the 29th Ordinary Session.
23. On 13th March 2001, the Secretariat received the Complainant's submissions on admissibility.
24. At the 29th Ordinary Session held from 23rd April to 7th May 2001 in Tripoli, Libya, the Respondent State informed the African Commission that they were not aware of communications 235/00 and 236/00 - submitted by Dr Curtis Doebbler against Sudan. During the Session, the Secretariat provided the Respondent State with copies of the said communications. The African Commission decided to defer consideration of these communications to the next session.
25. On 19th June 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the Respondent State to forward its written submissions within two (2) months from the date of notification of this decision.
26. On 14th August 2001, a reminder was sent to the Respondent State to forward its submissions within the prescribed time to enable the Secretariat to process the Communication.
27. During the 30th Ordinary Session held from 13th to 27th October 2001 in Banjul, The Gambia, the Secretariat of the African Commission received the Respondent State's written submissions in Arabic on all pending communications against it on admissibility.
28. During the same Session, the African Commission heard the oral submissions of the parties with respect to the communication. The African Commission noted that the Respondent State had not responded to the issues raised by the Complainant. The African Commission therefore decided to defer the communication to the 31st Session, pending receipt of detailed written submissions from the Respondent State.
29. On 15th November 2001, the Secretariat informed the parties of the decision and requested the Respondent State to forward its written submissions on the issues raised by the Complainant within two (2) months from the date of notification of this decision.
30. On 7th March 2002, a reminder was sent to the Respondent State to forward its submissions within the prescribed time.
31. At its 31st Ordinary Session held from 2nd to 16th May 2002, in Pretoria, South Africa, upon the request of the Complainant, the African Commission decided to suspend consideration of this communication in order to allow the parties to pursue an amicable settlement.
32. On 29th May 2002, the parties were informed of the decision of the African Commission.
33. On 17th August 2002, the Complainant informed the Secretariat that he had written to the Respondent State with a view to negotiating an amicable settlement. However, he had not received any response from the Government of Sudan.
34. On 16th January 2003, the Secretariat received a request from the Complainant for a hearing on admissibility. The Secretariat acknowledged receipt of this correspondence on 27th January 2003.
35. The Secretariat informed both parties that the admissibility of the communication would be considered at the 33rd Ordinary Session.
36. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission deferred its decision on admissibility to allow the parties more time to send their written submissions on admissibility.
37. On 18th June 2003, the Secretariat of the African Commission informed both parties of the above-mentioned decision and requested them to forward their written submissions on admissibility within three (3) months from the date of notification of this decision.
38. On 18th September 2003, the Secretariat reminded the parties to provide the African Commission with their submissions on admissibility.
39. By letter dated 19 September 2003, the Complainant forwarded a brief on admissibility concerning the exhaustion of domestic remedies.
40. By a Note Verbale dated 30th September 2003, the Respondent State was informed that the

communication would be considered at the 34th Ordinary Session. The arguments of the Complainant were attached to the Note Verbale.

41. During its 34th Ordinary Session held in Banjul from 6th to 20th November 2003, the African Commission considered the Respondent State's arguments on admissibility and declared the communication inadmissible for non-exhaustion of domestic remedies.

42. On 4th December 2003, the Secretariat of the African Commission transmitted the decision to the parties.

43. On 10th February 2004, the Complainant requested the African Commission to reconsider its decision on admissibility and requested an oral hearing at the next Ordinary Session.

44. During the 35th Ordinary Session, the Commission considered the request to reconsider its decision on admissibility, and deferred it to the 36th Ordinary Session. The Commission requested the Secretariat to inform both parties of the decision and deferred consideration of the matter to the 37th Ordinary Session. The same decision was communicated to the parties. The Secretariat requested them to submit additional arguments on admissibility. A copy of the Complainant's brief was forwarded to the Respondent State, which was duly requested to forward its response.

45. On 25th October 2005, the African Commission informed the Complainant of its decision to grant him an opportunity to argue for the re-opening of the communication at its 36th Session.

46. At the 36th Ordinary Session, the African Commission, upon consideration of the arguments put forward by the Complainant in his "Brief on the Issue of Exhaustion of Domestic Remedies", decided to reconsider its decision adopted during the 34th Ordinary Session, at its 37th session.

47. On 14th March 2005 the parties were informed about the decision of the African Commission and a copy of the Complainant's brief was forwarded to the Respondent State, which was duly requested to forward its response.

48. During the 37th Ordinary Session held from 27th April to 11th May 2005 in Banjul, The Gambia, the African Commission decided to defer reconsideration of the admissibility to the next session.

49. On 28th June 2005, both the Complainant and the Respondent State were informed of the decision. The Respondent State was also reminded to forward its written submissions on admissibility within two (2) months from the date of notification of this decision.

50. At the 38th Ordinary Session held in Banjul, The Gambia, from 21st November to 5th December 2005, the Respondent State submitted written arguments on admissibility. The African Commission deferred reconsideration of the admissibility of the communication to its 39th Ordinary Session.

51. On 16th December 2005, the Secretariat informed the parties of the decision. A copy of the Respondent State's arguments was sent to the Complainant.

52. On 8th March 2006, the Secretariat received from the Respondent State a copy of the minutes of an August 2000 meeting between the Government of Sudan, the Government of Ethiopia and the UNHCR. A copy of the latter documents was transmitted to the Complainant.

53. On 23rd March 2006, the Secretariat received a response to the Respondent State's submissions of 3rd December 2005. The document was duly transmitted to the Respondent State.

54. At the 39th Ordinary Session held in Banjul, the Gambia from 9th to 23rd May 2006, the African Commission reconsidered its decision on admissibility and declared that the communication was admissible.

55. By a Note Verbale of 14th July 2006, the Secretariat informed both parties of the aforementioned decision and requested them to submit their arguments on the merits within two (2) months.

56. On 18th September 2006, the Secretariat received a letter from the Complainant, requesting that the deadline for submission of arguments on the merits be extended by 6 (6) months, as the Complainant had been unable to contact the Secretariat.

57. On 16th October 2006, the Secretariat acknowledged receipt of the letter from the Complainant, and reminded both parties to submit their arguments on the merits by the end of October 2006.

58. On 11th April 2007, the Secretariat received the arguments on merits from the Complainant.

59. On 25th April 2007, the African Commission acknowledged receipt of the Complainant's submissions and reminded the Respondent State to submit its arguments on the merits by 10th May 2007.

60. On 20th June 2007, the Secretariat sent a Note Verbale to the Respondent State reminding the Respondent State that the African Commission intended to consider the communication on the merits during the 42nd Ordinary Session and requested it to forward its arguments on the merits by the end of July 2007.

61. On 6th June 2007, the Secretariat informed the Complainant that the Respondent State had yet to submit its arguments on the Merits.

62. By a Note Verbale of 30th October 2007, the Respondent State was reminded to submit its arguments on the Merits before the commencement of the 42nd Ordinary Session in Congo, Brazzaville.

63. On 3rd November 2007, the Secretariat of the African Commission informed the Respondent State that it had not yet received its submission on the merits.

64. On 23rd November 2007, during the 42nd Ordinary Session, the Respondent State submitted its arguments on the merits. The arguments were in Arabic. During the 42nd Session the African Commission deferred consideration of the communication on the merits in order to allow for translation of the Respondent State's submissions.

65. On 27th December 2007, the Secretariat informed the parties of its decision to defer the communication. It acknowledged receipt of the State Party's brief on the merits, and also forwarded it to the Complainant.

66. At the 43rd Ordinary Session, which took place from 7th to 22nd May 2008 in Ezulwini, Swaziland, the African Commission deferred the communication to the 44th Ordinary Session, to give the Secretariat enough time to prepare the draft decision on the merits.

67. On 2nd June 2008, the parties were informed of the decision of the African Commission.

68. During the 44th Session held in Abuja, Federal Republic of Nigeria, the African Commission considered the communication and decided to defer it to the 45th session in order to finalise its decision on the merits.

69. By letter and Note Verbale of 23rd January 2009, both the Respondent State and the Complainant were informed of the decision of the Commission.

Law

Admissibility

70. The African Commission recalls that it declared the communication inadmissible during the 34th Ordinary Session of the Commission. The Complainant filed a request for the reopening of the case during the 35th Ordinary Session. This request was considered during the 36th Ordinary Session.

71. When declaring the communication inadmissible, the African Commission stated the following:

Although the parties have not provided the African Commission in writing with further written submissions on the issue of local remedies, the African Commission is in a position to rule on the admissibility of this communication by making reference to the written submissions of the Complainant (received on 13th March 2001) and those of the Respondent State (received during the 30th Ordinary session) as well as the oral submissions submitted by both parties during the 33rd Ordinary Session.

72. The Complainant alleges that there were no effective local remedies against the Government's threat to forcibly repatriate the Ethiopian refugees. The refugees had been denied the right to legal representation during the hearings that were aimed at determining whether there was any risk if they returned to Ethiopia to be tortured or be subjected to inhuman, degrading and cruel treatment.

73. The Complainant submits that the procedure for repatriation agreed to by the UNHCR and Sudan was unacceptable for the following reasons: firstly, the Ethiopian refugees were given no opportunity to make representations during the decision-making process, despite public announcements to this effect. Secondly, most of the interpreters/translators were taken from the Ethiopian Embassy, the country from which the refugees were fleeing and they could therefore have been biased or prejudiced.

74. The Complainant adds that the Respondent State denied visas to the legal representatives of the refugees. By failing to ensure that the refugees were given a fair hearing in matters concerning their human rights under the African Charter, the Respondent State had by doing so denied them the right to access local effective remedies.

75. The Respondent State argued that there had been no complaint against illegal or forced repatriation of Ethiopians, and that this communication does not contain any concrete indication in this regard. The Respondent State acknowledges that it understood the situation in Ethiopia was not favourable to those who feared persecution in their country of origin, but reassured the African Commission that every

repatriation procedure in this case followed the principle of the Convention signed between Sudan, Ethiopia, and the UNHCR.

76. Furthermore, the Respondent State submitted that the Complainant neither approached the UNHCR nor any Court or administrative body to rule on any allegations of violation committed during the process of repatriation. The Complainant could have submitted an administrative application or referred the matter to the competent courts available in Sudan.

77. The Respondent State informed the African Commission that Article 20 of the 1996 Code of Administrative Courts gives the Complainant the right to lodge an appeal against any administrative decision. An appeal could have been lodged in the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the Government of any region or Federal or Regional Minister. The African Commission notes that the Complainant in this communication makes no mention of any attempt on his part to access the available local remedies in the Respondent State.

78. For the above reasons, the African Commission declares that communication inadmissible for non-exhaustion of local remedies.

Commission's Decision on Review

79. The Commission accepted the Complainant's request to reconsider its decision on the basis of the submission by the Complainant that the Commission had not addressed itself to its jurisprudence, regarding the exceptions to the exhaustion of local remedies rule, in particular the non-applicability of domestic remedies to situations of massive violation of human rights, as is alleged in this instance.

80. The Commission reconsidered its decision under 1995 Rules of Procedure of the African Commission on Human and Peoples' Rights, Article 118.2 of the African Commission's Rules of Procedure. 1995 Rules of Procedure of the African Commission on Human and Peoples' Rights, Article 118.2 reads as follows:

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.

81. 1995 Rules of Procedure of the African Commission on Human and Peoples' Rights, Article 118.2 does not stipulate the conditions under which the Commission may reconsider its previous decision. The Commission may exercise its discretionary powers to reconsider its decision upon a party moving it, and adducing compelling reasons. The Commission is called upon at all times to protect human and peoples' rights. A decision to reconsider its decision must be aimed at protecting human and peoples' rights.

82. Further to that general principle, a party seeking the reconsideration or review of a decision must show that the Commission failed to take into account the criteria set out in Article 56 of the Charter, or it erred in reaching the decision it did. The review must be based on the same facts as was initially before the Commission. A party cannot introduce new facts or information at the review stage.

83. The Commission has in the past, based on its jurisprudence, held that the requirement of exhaustion of local remedies does not hold "... where it is impractical or undesirable for the Complainants or victim to seize the domestic courts."¹

84. Based on the above reasons the Commission reconsidered and departed from its previous decision and considered the parties' submissions on admissibility.

Decision on admissibility

85. The admissibility of the communications submitted under the African Charter is governed by Article 56 of the African Charter. Of the seven conditions stipulated by this article, six have been met. The seventh which is Article 56.5, stipulates that:

communications shall be considered if they [quote]"are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged... .

86. The Respondent State claims that the Complainant did not exhaust local remedies. It stressed that the Complainant had the right to lodge an appeal against any administrative decision in accordance with Article 20 of the 1996 Code of Administrative Courts, and they could lodge an appeal to the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the Government of any region or to the Federal or Regional Minister.

87. The Complainant submits that the African Commission has held that "the rule of exhausting domestic remedies is the most important condition for admissibility of Communications. There is no doubt therefore, in all communications seized by the African Commission, the first requirement considered concerns the exhausting of local remedies...."² The Complainant argues that the reason for this rule has been defined by the Commission as a two-fold test. First, it is to give domestic courts an opportunity to decide upon cases before they are brought to an international forum. If a right is not well provided for at the domestic level, there cannot be effective remedies at all. ³

88. Second, the Complainant states that the Respondent State should have notice of a human rights violation in order to have the opportunity to remedy such violation before submitting them to an international tribunal. ⁴ The Complainant submits that the Respondent State was aware of the refugees' situation for years and did not act to protect them. The Complainant alleges that there can be no doubt that the Respondent State Government had been put on notice of the situation giving rise to this communication. Such notice was given by the refugees themselves communicating with the Government; the communications of the refugees' legal representatives with the Government and coverage of the plight of the refugees by the news media.

89. The Complainant submits that the Respondent State responded to these communications by denying any responsibility for the plight of the refugees. The Complainant states that, because of the serious violations of human rights that have occurred, the requirement that the refugees resort to domestic remedies should be deemed waived and the Commission should consider the merits of this communication.

90. The Complainant claims that when interpreting Article 56.5 of the Charter, the African Commission should take into consideration generally recognised principles of international law in the interest of ensuring the protection of human rights. ⁵

91. The Complainant submits that the Commission has unequivocally held that when a Respondent State raises the defence of non exhaustion of local remedies, it must discharge the burden by demonstrating the existence of such remedies." ⁶

92. The Complainant urges the African Commission to draw inspiration from regional and international human rights mechanisms on this issue. The Inter-American Court of Human Rights has repeatedly affirmed that a state has duties "to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights." ⁷ The Court held that "the State claiming non-exhaustion of domestic remedies has an obligation to prove that the domestic remedies remain to be exhausted and that they are effective."⁸

93. The Inter-American Commission on Human Rights expressly stated that the burden of proving that effective local remedies exist and that they had not been exhausted fell upon the government making such a claim. ⁹

94. A similar view regarding the burden of proof was taken by the United Nations Human Rights Committee whereby a Respondent State "...had failed to provide.... sufficient information on effective remedies."¹⁰ Equally, the European Court and Commission of Human Rights have held that the government shoulders the burden of proving that there are effective remedies.

95. Similarly, the Grand Chamber of the European Court for Human Rights has expressed the opinion that "it is incumbent on the Government claiming non-exhaustion of domestic remedies to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time."¹¹ The Court continued:" ...that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success."¹² Only once this burden of proof has been met does the petitioner have to establish that the local remedy "was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances."¹³

96. The Complainant urges the Commission to apply the standards articulated above, which require the Respondent State to prove that effective local remedies exist in Sudan and that they are reasonably accessible. The Complainant submits further that it is evident that the Respondent State has not met this burden of proof. It has not shown that the refugees had adequate and effective remedies. The Government had itself prevented refugees accessing any remedies - irrespective of their effectiveness and adequacy - that it alleges are available.

97. The Complainant submits that communication 235/00 involves massive and serious violations of human rights. He states that the African Commission has found that actions threatening the life and welfare of less than a thousand people amount to serious and massive violations of human rights.¹⁴

98. The Complainant alleges that the present communication involves more than fourteen thousand (14,000) Ethiopian Refugees, whose daily survival is threatened and who cannot approach the authorities for fear that their refugee identity documents would be confiscated and they would be deported without the due process of law.

99. The Complainant states that the Respondent State has suggested that the refugees could have theoretically relied on Administrative and Constitutional procedures in "Article 20 of the 1996 Constitutional and Administrative code, and in accordance with Article 120 (2)(b) of the Constitution." The Complainant alleges that this would not have been an adequate remedy because the Judiciary in Sudan is not independent.

100. The Complainant points to the fact that the Commission noted that the Respondent State had dismissed over 100 judges when it came to power approximately twelve years earlier.¹⁵ The Complainant further alleges that since 1989, the appointment of Judges is done in close coordination with the President. The Complainant goes on to state that the 1998 Constitution of Sudan intentionally enhanced the powers of the President.¹⁶

101. The Complainant alleges that on 12th December 1999, the President declared a State of Emergency and prolonged his control over the Judiciary until 2001. Cases brought to the Court challenging this declaration of emergency have been dismissed with little or no attention to international human rights law. Instead the Courts have relied on vague references to customary presidential powers that override the clear words of the Constitution.¹⁷ The Complainant concludes that the Sudanese Courts have been under the control of the Sudanese Executive since 1989, and that an independent judiciary does not exist in Sudan.

102. The Complainant submits that the Respondent State has no system in place that can protect human rights in the overwhelming majority of cases. He points to examples of *Amal Aba al-Ajab v. Government of Sudan* case in which the Court refused to apply international human rights law.¹⁸ He also points to a similar situation in the case of *Abdelraham et al v. Sudan*, Case No. 7/98 of 13th August 1998.¹⁹

103. The Complainant submits that the lack of independence of the judiciary is the result of several steps taken by the Sudanese Government since it came to power in 1989. He cites the reports of Mr Leonard Franco, the UN Special Rapporteur on the Situation of Human Rights in Sudan as well as numerous non-governmental organisations to demonstrate the lack of independence of the judiciary in Sudan.²⁰

104. The Complainant argues that although a new Constitution was adopted on 1st July 1998, the Executive still exercises broad powers over the Judiciary: Section 5 of the Constitutional decree 13/1995, entitled 'Powers of the President' provides that ... "the President shall be the Guardian of the Judiciary and the Council of Justice in accordance with the Constitution and the Law" , ... "A Judge shall be guided by the concept of supremacy of the Constitution, Law and general guidance of Sharia." Section 61 (1-3) provides that: "The Judiciary is responsible before the President for the performance of its functions effectively and honestly for the prevalence of justice; its function is to adjudicate fairly in constitutional, administrative, family, civil and criminal disputes and to exercise its judgment in accordance with the law."

105. The Complainant alleges that Sudan is ruled under a State of Emergency whereby the president exercises almost complete control over the executive, legislative and judicial functions. The Complainant alleges further that for the foregoing reasons, no adequate and effective remedies exist in Sudan that the refugees should be required to exhaust.

106. The Complainant submits that in the present case, the Respondent State has repeatedly denied the victims access to their legal representative, Dr Curtis F. J. Doebbler, by repeatedly refusing to grant him a visa to enter the country. The Government has also failed to make facilities available to the refugees, even when they are in custody, to contact their legal representative.

107. The Complainant rejected the submission by the Respondent State that redress by way of an appeal to the UNHCR or an appeal to the Sudanese Courts was available to the refugees.

108. He submitted that neither of these means of redress was adequate. An appeal to the UNHCR was ineffective because the refugees were denied legal representation. He argues that UNHCR decision makers refused to apply the *African Charter on Human and Peoples' Rights* and the *1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa*. Secondly, appeals to the Sudanese Courts were not possible, because there was no decision made by a Sudanese administrative body.

109. The Complainant submitted that the Respondent State denied responsibility for the protection of Ethiopian refugees under its jurisdiction.

110. The Complainant stated that the Sudanese Government's position is in contrast to the position expressed by the Commission, that: "the Charter specifies in Article 1 that the State Parties shall not only

recognise the rights, duties and freedoms adopted by the Charter, but they should also "undertake.....measures to give effect to them." Therefore, if a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.²¹

111. The Complainant submitted further that the process offered by the UNHCR was flawed in several serious matters. Despite repeated requests to represent the refugees in procedures before the UNHCR, the refugees were denied the right to legal representation.

112. The UNHCR recruited translators from the Ethiopian Embassy in Sudan to interview the Complainants. Because the procedures applied by UNHCR, did not apply the most basic standards of due process, it cannot be considered effective or adequate for protecting the rights of the refugees that are guaranteed in the African Charter.

113. Moreover, the Complainant submitted that the right to appeal from procedures that do not meet the standards of due process is illusory and cannot be deemed an effective remedy. The refugees could not appeal a decision by the UNHCR to the Sudanese administrative bodies. Only administrative decisions made by Sudanese Government authorities may be appealed. The Government of Sudan itself admitted that it had nothing to do with the decision of the UNHCR. Consequently, there was no domestic remedy that could adequately and effectively protect the victims' human rights.

114. The Respondent State reiterated its position that the Complainant neither approached the UNHCR nor any court or administrative body to denounce the alleged violation of the rights of pre-1991 Ethiopian refugees. The Respondent State stressed that the Complainant could have challenged the manner in which the repatriation exercise was carried out by lodging an appeal to the Supreme Court in accordance with Article 20 of the 1996 Code of Administrative Courts. Article 20 of the Code provides that anyone can lodge an appeal to the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the Government of any region or Federal or Regional Minister.

115. The Respondent State added that the Complainant did not cite any case of refugees who had been illegally or forcibly returned to Ethiopia. The Respondent State acknowledged that the situation prevailing in Ethiopia in March 2000 was not favourable to the repatriation of those refugees fearing persecution in their country of origin. It stated however that the repatriation process followed the principles laid down in the Trilateral Agreement signed between the Government of Sudan, the Government of Ethiopia and the UNHCR in August 2000.

116. The African Commission is of the view that, even if certain domestic remedies were available, it was not reasonable to expect refugees to seize the Sudanese Courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation. The Commission notes that the refugees' legal representative was repeatedly denied entry into the country by the Respondent State's authorities.

117. Furthermore, even accepting the argument of the Respondent State that the refugees could have challenged the decision to repatriate them before the Administrative Courts or appealed to the Supreme Court, the Commission holds the view, which it has stated oftentimes before, that where the violations involve many victims, it becomes neither practical nor desirable for the Complainants or the victims to pursue such internal remedies in every case of violation of human rights.²² **For all these reasons, the African Commission declares this communication admissible.**

Consideration of Merits

118. The present communication alleges that the Respondent State has violated the human rights of an estimated fourteen thousand Ethiopian refugees, following the invocation by the UNHCR of the Cessation Clause under Article 1(C)(5)

This Convention shall cease to apply to any person falling under the terms of section A if: He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality(<http://www.unhcr.org/3b66c2aa10.html> accessed 25.10.2010) of the *1951 United Nations Refugees Convention* .

Complainant's submission on the Merits

119. The Complainant states that sometime in September 1999, the Respondent State and the UNHCR concluded an agreement, which *inter alia* stipulated that by 1st March 2000 Ethiopian refugees in Sudan would lose their right to work or receive any social assistance as a way of coercing them into forced repatriation.

120. The Complainant states that the said refugees were subsequently repatriated involuntarily to Ethiopia, or were threatened with arrest or involuntary repatriation by the Respondent State upon protesting the repatriation. Others were forced to leave Sudan for third countries.

121. The Complainant alleges that the Respondent State violated Articles 4, 5, 6, 12(3), (4), and (5) of the African Charter as a result of the failure to protect the Ethiopian refugees against the involuntary repatriation, and from threats of arrest. He states further that by failing to protect the refugees, it forced them to live under inhumane conditions, without the basic necessities of life. The Complainant is alleging that the Ethiopians are *de facto* refugees, and thus protected by Article 12 of the African Charter of Human and Peoples' Rights.

122. The Complainant submits that the Respondent State has an obligation to ensure respect for the right to life, the right to humane treatment and the right to security of person for every individual under its jurisdiction. It also has an obligation under Article 7 of the African Charter, which requires that every individual has a right to a fair determination of his human rights as protected in the Charter.

123. The Complainant draws the attention of the African Commission to Article 60 of the Charter, to draw inspiration from the UN Convention on Refugees of 1951²³ and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, instruments which the Respondent State has signed and ratified²⁴ when determining the meaning of the above articles in the Charter in relation to those instruments.

124. The Complainant argues that since the African Charter is a treaty that is *later in time*, than either the UN Refugees Convention, or the African refugees convention, the general principle of international law to be applied to resolve any conflict between treaties is that the latter treaty prevails over the former treaty that are not compatible. The Complainant relies on Article 30(3)

When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

of the Vienna Convention on the Law of Treaties,²⁵ which states that "the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty." He argues that by applying this principle, any provisions of the UN refugees convention that are incompatible with either the African refugee convention or the Charter must be deemed to be overridden by these latter two instruments.

125. The Commission wishes to state that it does not find any conflict or incompatibility between the African Charter and the two refugees' convention, or between the UN and the OAU refugees conventions. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 OAU Convention stipulates that it is a complement to the 1951 UN Refugees Convention. Paragraph 9 of its preamble recognises the 1951 UN Convention and the 1967 Protocol as the basic and universal instruments relating to the status of refugees. Article VIII of the OAU Convention enjoins Member States to cooperate with the UNHCR, and states further that the OAU Convention is a regional complement to the 1951 UN Convention.

126. In that respect the Commission shall read the provisions of the three instruments as complementing each other. The Complainant's argument that the provisions of the latter convention prevail over the former do not in any way affect the interpretation the Commission will give to the applicable provisions, should it be necessary to do so under this communication. This is because the provisions are at most complementary to each other and not mutually exclusive.

127. Concerning the said violations, the Complainant submits that the Respondent State did not deny the facts as presented; rather it has merely alleged that the problem is the responsibility of the UNHCR. He states that both the Government of Sudan and the UNHCR recognised all of the refugees in the 1990s. The Complainant states that while the Respondent State claims that the refugees no longer need protection, the refugees, nevertheless, refute this claim. He argues that the refugees still deserve protection and, at the very least, they deserve a fair process to determine this question in each of their individual cases. He argues that since the Respondent State has denied the refugees protection, and a fair determination

process, it is necessary to examine the *de jure* status individually.

128. The Complainant argues that both customary international law and the African Charter provide special protection to individuals who are unable to seek the protection of their own country. These persons - refugees and asylum seekers - are recognised as being in particularly vulnerable positions. States are under a legal obligation to consider refugees' claims to protection through a fair procedure and to provide them protection if their claims are found to be well-founded.

129. Referring the Commission to Article 12 of the African Charter, the Complainant argues that the Charter specifically recognises the need to protect such individuals, notwithstanding that it does not define in detail who qualifies as a refugee, except to describe them as any person who is persecuted. He goes on to state that the second preambular paragraph

Considering that the African Charter, while guaranteeing the freedom of movement and freedom of residence of every individual within a state subject to being law abiding, recognises that when persecuted, every individual shall have the right to seek and obtain asylum in other countries in accordance with the respective laws of the said countries, and international law,

of Resolution No. 72/(XXXVI)/04, creating the Commission's Special Rapporteur, reiterates this protection, while also drawing States' attention to their obligations under relevant international instruments.²⁶

130. The Complainant further argues that the Convention Relating to the Status of Refugees is *lex specialis* in relation to the African Charter.²⁷

131. He argues that the *Convention Governing the Specific Aspects of the Refugee Problem in Africa* is *lex specialis* to both the Charter and the Convention Relating to the Status of Refugees. He states that this instrument elaborates and strengthens the definition of a refugee deserving the protection of asylum. This treaty, he maintains, extends the definition of a refugee by stating in paragraph 2 of Article 1 that not only is a refugee a person as described by the UN Refugees Convention, but also that:

[t]he term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

132. The Complainant concludes that, in the instance case, this expanded definition applies to the Ethiopian refugees in addition to the definition in the UN Refugee Convention. This expanded definition must also be the basis of the interpretation and implementation of Article 12 by the Commission because it provides individuals cumulatively the most adequate protection of their human rights in accordance with the international legal obligations that the Government of Sudan has voluntarily undertaken.

Respondent State's Submission on the Merits

133. The Respondent State in its submission states that Sudan is always committed to the implementation of international human rights instruments and continues to cooperate with the UN High Commission for Refugees which has the responsibility of monitoring international and regional conventions on refugees.

134. The Respondent State denies all the Complainant's allegations. It argues that as a signatory to the African Charter and various refugee instruments, it was merely cooperating with the UNHCR "...in performing its functions, and assist it in facilitating its duties and carrying out its assignments to monitor and implement the provisions" of the Geneva Convention.²⁸ The Respondent State argues that refugees are only entitled to receive support from the UN, where fear from persecution which caused him/her to flee, still persists.

135. The Respondent State argues that following the fall of Mengistu's regime in 1991, the UNHCR was of the view that the circumstances which led to the flight of Ethiopians to Sudan and to the other countries of the world, no longer existed. The Respondent State states that the UNHCR believed that the situation in Ethiopia after Mengistu's fall had sufficiently changed for the return of large numbers of refugees to that country. It nevertheless argues that the announcement of the Termination of Refugee Status for Ethiopian refugees was not supposed to take place before an adequate period of time elapsed, to ensure stability and sustainability of the change in the country of origin.

136. The Respondent State, quoting Article 1(c) para. 1-6

This Convention shall cease to apply to any person falling under the terms of section A if: 1) He has voluntarily re-availed himself of the protection of the country of his nationality; or 2) Having lost his

nationality, he has voluntarily re-acquired it, or 3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or 4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or 5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; 6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

of the *1951 UN Refugees Convention*, which defines the six conditions under which refugee status ceases, argues that in the case of the Ethiopian refugees, the conditions no longer justified their continued stay in Sudan. The Respondent State argues that these six conditions are based on the consideration that international protection is not usually granted when it is not justified.

137. It cites the Cessation Clause, Article 1(C)(5)

This Convention shall cease to apply to any person falling under the terms of section A if: He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

as the source of the current dispute, which was not only directed at the Ethiopian refugees in Sudan, but to Ethiopian refugees elsewhere in the world. The Respondent State argues that indeed the UNHCR had issued similar Cessation Clauses in the past for other refugees from Zimbabwe, Malawi, Mozambique, Namibia, South Africa and Chile, when the situation in those countries normalised. The Respondent State submitted that since Sudan hosts a large number of Ethiopian refugees, to avoid the consequences which a hasty implementation would cause to the refugees and to the Sudanese as well, it requested the Third Committee of the United Nations in New York for a gradual implementation of the Cessation Clause to the Ethiopian refugees in the Sudan.

138. The Respondent State states that a Tripartite Agreement between Sudan, Ethiopia and the UNHCR was executed in 1993. Under this Agreement a programme of voluntary repatriation began to be implemented in 1993 and continued into 1998. The Respondent State submits further that, according to this Agreement, 720,000 refugees returned voluntarily. However, at the end of the programme, a considerable number of the refugees remained in the Sudan.

139. The Respondent State stated that, both Ethiopia and Sudan requested the UNHCR on 29th December 1999 and 1st February 2000 respectively for a postponement of the repatriation due to the outbreak of the war with Eritrea. The Respondent State, Ethiopia and the UNHCR later concluded another Tripartite Agreement on 25th August 2000 to repatriate refugees at the end of the war with Eritrea, and the end of the rainy season.

140. The August 2000 agreement provided, *inter alia*, for transport modalities, provision of return packages for the returnees, such as cups, blankets, food allowances and other non food items. It also established a mechanism for a residual caseload of individuals with compelling reasons for international protection, and those who for social and economic reasons wished to remain in Sudan.

141. A screening process was carried out jointly by the Sudanese Commission on Refugees and the UNHCR to determine those who continued to need international protection. It was agreed that the regularisation for those wishing to remain in Sudan was a matter for bilateral discussion between the two governments. The screening process was envisaged to end in November 2000. Repatriation would be conducted between 1st and 31st December 2000, since food and funding would not be available in 2001. The implementation for repatriation was delayed to a later date (14th March 2001) to allow for proper implementation and assessment.

142. The Respondent State argues that the UNHCR brought in the best cadres serving in different parts of the world to take part in this exercise, so as to ensure equity and justice. The Respondent State submits that the repatriation was voluntary. It denies that any refugees were imprisoned, tortured or were subjected to involuntary return. It submits further that no person was denied social services, such as medical care, food or shelter. Assistance was extended to refugees throughout up to their final place of residence. Those remaining were assisted until all phases of the implementation of the cessation clause were exhausted,

including the reconciliation of their legal status.

143. The Respondent State submitted further that of those who did not opt for voluntary repatriation, 282 were granted protection, while 2753 were not. The determination was done in accordance with the 1977 UNHCR Executive Committee (EXCOM) decision, which requires Member States to adopt comprehensive procedures to ensure that asylum seekers are given adequate time to make an appeal for reconsideration of a decision to accredit them, to the same committee or another authority.

144. By June 2001, the Respondent State had registered 7,072 Ethiopians from both the 1993 to 1998, and the 2000 repatriation phases and issued them with an annually renewable residence permits, pursuant to UNHCR Executive Committee (EXCOM) decision No 69, which requires Member States implementing the cessation clause to make appropriate arrangements to enable persons expected to leave the country to take care of strong family and other social and economic engagements.

145. The Respondent State drew that attention of the Commission to the date the communication was received at the Commission's Secretariat on the 22nd February 2000. It submitted that the Communication was received prior to the date of the implementation of the Cessation clause. The Respondent State submitted that "10,000 Ethiopian refugees actually returned to their country voluntarily in the wake of the implementation of the clause... ." It argues that such returnees cannot be deemed to be included in the communication.

Commission's Decision on Merits

146. The present communication turns on issues relating to the application of two important principles in international refugee and human rights law. The first issue is the effect of the Cessation Clause and its application under the *1951 United Nations Convention on Status of Refugees vis-a-vis* a State Party to the African Charter. The second issue is the applicability of the *non-refoulement* principle based on the actions taken by the Respondent State as a consequence of the Cessation Clause. The African Commission is therefore required to determine whether or not the Respondent State, in applying the Cessation Clause, acted in a manner which amounted to the *refoulement* of refugees to their country of origin where they feared persecution, and hence constituting a violation of the African Charter.

147. Before analysing the instant case, it is important to clarify these concepts, namely the "cessation clause," "refoulement" and "non-refoulement."

148. Article 1(C)(5)

This Convention shall cease to apply to any person falling under the terms of section A if: He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

of the *1951 UN Convention on the Status of Refugees* stipulates one of the six conditions which brings to an end the refugee status and hence the protection hitherto enjoyed by a refugee during asylum in a host country, after fleeing persecution or the fear of persecution in his/her home country. Article 1(C)(5) of the *1951 UN Refugees Convention* reads as follows:

[t]his Convention shall cease to apply to any person, (i.e. a refugee) if [h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee ...who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

149. *The 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa* stipulates a cessation clause of its own. reads as follows:

[t]his Convention shall cease to apply to any refugee if (e) he can no longer, because of the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

According to the two conventions the status of a refugee ceases when circumstances which caused the person to assume refugee status cease to exist. Such a person can no longer refuse the protection of his or her country. International protection is granted to refugees because they do not enjoy the protection of their own home countries. The Cessation Clause does not apply when compelling reasons arising out of previous persecution force a person to refuse the protection of ones country.

150. "*Non-refoulement*", on the other hand, is a principle which has taken an increasingly fundamental character, as one of the cornerstones of international refugee law. It prohibits the return of an individual to a country in which he or she may be persecuted.²⁹ This principle is set out in the *1951 UN Refugee Convention*, Article 33 (1)] which states that: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion."³⁰

151. *The 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa*³¹ enshrines the principle of *non-refoulement* in of this Convention. It reads as follows:

"[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty [quote] would be threatened for the reasons set out in paragraphs 1 and 2."

152. Paragraphs 1 and 2 of Article 1 of the OAU Convention define the conditions which compel an individual to flee the country of his habitual residence and seek asylum in another country.

153. Having seen the applicable provisions, it is incumbent upon the Commission to determine whether the Respondent State violated the African Charter.

154. The Complainant submitted that the Respondent State denied 14,000 Ethiopian refugees the protection they deserved and a fair determination process when it executed a joint agreement with the UNHCR in September 1999, giving effect to the cessation clause by 1st March 2000.

155. Did the actions of the Respondent State, in executing the joint agreement in September 1999 and posting the notice in February 2000, amount to committing a *refoulement*, i.e. the act of expelling the refugees? The mere execution of the agreement and posting of the notice did not constitute an act amounting to an expulsion or repatriation. The September 1999 and the subsequent notice clearly expressed the intent to apply the Cessation Clause. They created an atmosphere which triggered this communication even before the Cessation Clause implementation was set in motion. The repatriation process under the refugee conventions is conducted in a voluntary manner.

156. The Respondent State, being a party to the September 1999 agreement was thus responsible for whatever action that would follow the execution of the said agreement. The Respondent State cannot blame the UNHCR for its own actions. The Respondent State has however stated that it did not *refouled* the refugees. It has submitted that it did not forcibly repatriate them; it did not imprison them nor deny them the basic necessities of life as alleged by the Complainant.

157. The Respondent State denied that it repatriated refugees during the Eritrean-Ethiopian conflict. In fact it submitted that both Ethiopia and itself requested the UNHCR to postpone the repatriation during the Ethiopian Eritrean War. Repatriation resumed after the end of the conflict when a tripartite agreement was concluded in August 2000. The agreement provided for voluntary repatriation, inclusive of UNHCR assistance to the returnees as well as modalities for determination of a caseload of refugees who did not opt to be repatriated.

158. The Respondent State stated that the refugees were not denied assistance, in spite of the notice, till the end of the repatriation programme. 282 refugees continued receiving protection after the cessation clause.

159. The Complainant alleged that the Respondent State had mistreated the refugees for protesting their forcible repatriation. He alleged that the refugees were beaten, arrested, forcefully repatriated, and in other cases were threatened with forced repatriation for demanding to remain in Sudan for fear of persecution if they were returned to Ethiopia.

160. The African Commission wishes to state that the accounts by the two parties about the events subsequent to the Cessation Clause differ in certain respects. The Complainant, who claimed to represent 14,000 refugees, submitted that many of the refugees did not want to return to Ethiopia because they were

aligned to the opposition EPRP and feared persecution. The Respondent State submitted that most of the pre-1991 refugees returned. A substantial number were granted further protection and others were issued with residence permits due to family or socio economic reasons. The Respondent State argues that by June 2001 it had issued residence permits to more than 7000 refugees who did not opt to be repatriated. At the same time it stated that other post 1991 refugees who had fled the current Ethiopian regime continued to remain in Sudan.

161. The African Commission has not found any substantive reasons to doubt the account by the Respondent State. The African Commission holds that thousands of refugees repatriated voluntarily under the tripartite arrangements and those who remained were accorded refugee status or assumed normal immigrant status upon being granted residence permits.

162. The African Commission states, however, that the allegations made by the Complainant could have been a case of a few refugees who feared the worst during the time immediately after the Cessation Clause was announced. The fear of the unknown by a substantial number of refugees who were able to communicate with their lawyer as well as the publicity generated by press reports, coupled with the frustrations of denial of visas by the Respondent State to the Complainant, compounded the perception that the Respondent State was about to *refoule* the refugees.

163. The Commission has found no evidence that refugees were *refouled* as a result of the cessation clause. The Commission has not established any cases of imprisonment, arrest, and forcible repatriation. There was no concrete evidence brought to the attention of the Commission to the effect that such cases, if any, were linked to the promulgation and implementation of the cessation clause. The Respondent State demonstrated by providing figures, which were not refuted, of refugees who repatriated voluntarily prior to and after the cessation clause, as well as those who were granted further protection or alternative solutions to repatriation. The Complainant allegations that Articles 4, 5 and 6 of the African Charter were violated have not been proved.

164. The Complainant argues that Article 7 of the African Charter requires that every individual has a right to a fair determination of the human rights protected in the Charter.

165. The Respondent State denied that it violated Article 7 of the African Charter. It argued that there is no uniform process for determination of refugee status and appeals under the international refugee regime. It stated that it had established a joint determination mechanism involving the Sudanese Commission of Refugees and the UNHCR to carry out determination for the refugees who did not opt for voluntary repatriation under EXCOM decision No 69. The Commission, while reiterating the need to adopt judicial remedies in the event of the failure of such administrative mechanisms, takes note of the EXCOM stipulated mechanism for the reconsideration of decisions by the same committee or another authority, in the event of dissatisfaction with a decision of the Joint Committee.

166. The Commission wishes to state that the Complainant raised issues which, in actual fact, had been taken care of. The Communication appears to have been instituted before the implementation of the Cessation Clause began. Hence when implementation began, the alleged violation of the refugees' rights expressed by the Complainant was eventually taken care of by the Respondent State.

167. The Complainant submitted that the refugees continued to consider themselves as *de facto* refugees post-the cessation clause based on paragraphs 3, 4 and 5 of Article 12 of the African Charter:

(3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

(4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

(5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Going by the aforesaid submission, the Commission finds that based on the information before it, there were only cases of refugees who repatriated voluntarily, or those who remained within the Respondent State under various recognised legal status, namely those who retained their status or those who became immigrants upon the grant of residence permits, and the post-1991 refugees who were, in any case, not the subject of the Communication. The Commission, therefore, finds that there was at no time any case of *de*

facto refugees.

The Commission finds that the Communication was filed in anticipation of a violation, which did not happen in actual fact after the implementation of the cessation clause set in motion.

168. The Complainant's allegation that Article 12 of the African Charter was violated has also not been proved.

Decision of the African Commission

The African Commission finds that the allegations concerning violations of Articles 3, 4, 5, 6, 7, 12(3), (4) and (5) of the African Charter have not been proved.

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

Footnotes

1. See Amnesty International, et al. vs Sudan, Consolidated comm. 48/90, [50/91], 52/91 and 89/93, 27th Ordinary Session, 10th Activity Report (2000).
2. 228/99-The Law Office of Ghazi Suleiman/ Sudan, 33rd Ordinary Session, Sixteenth Annual Activity Report (2003) at para. 29.
3. communication155/96-Social and Economic Rights Action Group and Centre for Economic and Social Rights/ Nigeria, Fifteenth Annual Activity Report (2003) para 37.
4. Ibid. at para 38.
5. See Article 60 of the African Charter.
6. Rencontre africaine pour la défense des droits de l'Homme v. Zambia, comm. 71/92, 21st Ordinary Session, Tenth Annual Activity Report(1997) at para. 12.
7. Exceptions and Exhaustions of Domestic Remedies (Art. 46(1)), 46(2)(A) and 46(2)(B) American Convention on Human Rights, Ser. A, No.11, Advisory Opinion OC-11/90 of (10th August 1990) at para. 23; Velasquez Rodriguez Case, Ser. C, No.4 (29th July 1988) at para. 166

The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

; and Godinez Cruz Case, Ser. C, No.5 (20th January 1999) at para. 175

The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

8. Loayza Tamayo Case, Preliminary Objections, Ser. C, No. 25 (31st January 1996) at para. 40
The Court wishes to stress that it has established criteria that must be taken into consideration in this case. Indeed, the generally accepted principles of international law, to which the rule of exhaustion of domestic remedies refers, indicate, first, that this a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see Viviana Gallardo et al. [Judgment of November 13, 1981], No. G 101/81. Series A, para. 26). Second, the objection asserting non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming

non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective (Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 88; Fairén Garbi and Solís Corrales Case, Judgment of June 26, 1987. Series C No. 2, para. 87; Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 90; Gangaram Panday Case, Preliminary Objections, Judgment of December 4, 1991. Series C No. 12, para. 38; Neira Alegría et al., Preliminary Objections, Judgment of December 11, 1991. Series C No. 13, para. 30 and Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996. Series C No. 24, para. 40).

9. Article 37(3) of the Regulations adopted in OAS Doc. OAE.Ser.L.V/II.82 doc. 6, rev.1 at 103 (1992).

10. *Famara Kone v. Senegal*, Comm. No. 386/1989, views adopted 21st October 1994, at para 5.3.

11. See *Akdivar v. Turkey* at para. 68.

12. *Ibid.*

13. *Ibid.*

14. Commission nationale des droits de l'Homme at des libertés vs. Chad, comm. No. 74/92. Ninth Annual Activity Report (1996) at paras. 1-6.

15. see *Sudan Case* at para. 37.

16. Doebbler, C.F. and Suleiman, G., "Human Rights in Sudan in the Wake of the New Constitution." 6(1) *Human Rights Brief* 1,2 (1998).

17. see *Ibrahim Yusif Habani et al v. Government of Sudan*, Case No. MD/GD/1/2000 (unreported, 8th March 2000), cited and discussed in Bantekas, I. and Abu-Sabeib, H., "Reconciliation of Islamic Law with Constitutionalism: The Protection of Human Rights in Sudan's New Constitution." 12 *RADIC* 531 (2000).

18. *Amal Aba al-Ajab v. Government of Sudan*, Case No. MD/GD/8/99, Judgment of 10th August 1999 (unreported).

19. *Abdelraham, et al, v. Sudan*, Case No. 7/98 of 13th August 1998.

20. International Human Rights Watch and the Lawyers Committee for Human Rights. These include UN Doc. E/CN.4/1999/38/Add1 (17th May 1999) at para.34

An independent and impartial judiciary is a prerequisite for respect for the rule of law and protection of individual rights against abuse of power on the part of the executive or legislative branches of government. Article 101 (1) provides that "judges are independent in the performance of their duties and have full judicial competence with respect to their functions; and they shall not be influenced in their judgments". However, the Constitution also assigns pervasive powers to the President, who, with the consent of the National Assembly can appoint members of the Constitutional Court, the Chief Justice and his deputies, as well as lower court judges, upon the recommendation of the Supreme Council of the Judiciary. It is the opinion of the Special Rapporteur that it would be preferable for the Supreme Council of the Judiciary to exercise control over the selection and appointment of all judges. The law regulating the Supreme Council should empower it to be a truly independent organ of self-government of the judiciary.

, UN Doc. E/CN.4/2000/36 (19th April 2000) at para. 11b

11. In spite of this new climate, the Special Rapporteur continues to be seriously concerned about the continuation of patterns adversely affecting human rights: ... (b) The independence of the judiciary is often undermined;

, as well as reports by Amnesty.

21. Free Legal Assistance Group, Lawyers Committee for Human Rights, Union interafricaine des droits de l'Homme, *Les témoins de Jehovah v. Zaire*, Comms. 25/89, 47/90, 56/91 and 100/93, Ninth Annual Activity Report (1996) at para.[4]0.

22. See *Malawi African Association et al versus Mauritania*, Consolidated Comm. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97 and 210/98, para. 85.

23. Convention relating to the Status of Refugees, 189 UNTS 150, entered into force 22nd April 1954.

24. Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001, UNTS 45, entered into force 20 June 1974 and ratified by the Government of Sudan on 24th December 1972.

25. 1155 UNTS 331, which entered into force on 27th January 1980.

26. 2 Preambular para. 2 and para. 1(g) of Commission Resolution No.72(XXXVI) 04.

27. Article 1(A) (2) of the Convention Relating to the Status of Refugees . Although this treaty was once temporally limited to events occurring before 1st January 1951, this temporal restriction has been removed in countries like Sudan which have ratified the additional 1967 Protocol relating to the status of refugees, 606 UNTS 267 (entered into force 4th October 1967).

28. Paras 3 and 4 of the *Respondent State Submission on the Merits*.

29. Guy S. Goodwin-Gill, *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 120. See also Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* (UNHCR), ¶ 2

Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.
(2001).

30. Convention Relating to the Status of Refugees, adopted July 28th, 1951, Art. 33, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (entered into force 22nd April 1954) [hereinafter "1951 Convention"].

31. Organisation of African Unity Convention Governing the Specific Aspects of the Refugee Problem in Africa (10th September 1969) 1001 UNTS 45.