

COMMUNICATION 301/O5 - Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials/Ethiopia)

Summary of the Facts:

1. The present Communication was received at the Secretariat of the African Commission (the Secretariat) on 16 November 2004. It is submitted pursuant to Article 55 of the African Charter on Human and Peoples' Rights (the African Charter or Charter). The Secretariat later received a letter from the Institute for Human Rights and Development in Africa (hereafter the IHRDA) dated 29th March 2006, whereby the IHRDA sought to join as co-author of the Communication.
2. The Complaint is thus submitted by Haregewoin Gabre-Selassie and IHRDA (the Complainants) on behalf of "the *Dergue* officials" (former officials of the Mengistu regime in Ethiopia) who have been detained by the Government of the Federal Democratic Republic of Ethiopia (Respondent State) since 1991.
3. The Complainants alleged that following the overthrow of the former Mengistu regime in Ethiopia (commonly referred to as the *Dergue*¹ regime) by the Ethiopian People's Revolutionary Democratic Front (EPRDF), in 1991, the *Dergue* officials surrendered to the new government and they were arrested and detained on account of collective responsibility for policies or abuses by the *Dergue* regime rather than on an account of individual responsibility for particular criminal offences. The Complainants submit that they have been in detention since then.
4. The Complainants also claim that a year after their detention a new legislation was enacted whereby the Special Public Prosecutor's Office (SPO) was established and mandated to conduct "investigation and bring to trial [*Dergue* officials] detainees, as well as those persons who are responsible for having committed offences and are at large, both within and [outside] the country".
5. They submit that upon coming into force, the SPO Proclamation barred and suspended the applicability of provisions concerning time limitation of criminal action to proceedings instituted by the SPO office; thereby giving the SPO the liberty to submit charges, evidence

¹ *Dergue* means "Council or Committee" in Amharic and it is usually associated with the Mengistu regime that toppled Haile-Selassie's Monarchic regime in 1974, and ruled the country from 1974-1991.

and other matters pertaining thereto whenever it pleased, without any concerns about the statute of limitation running against its actions, and *foreclosing their right to fair trial*. Such offences may not be commuted by amnesty or pardon...”

6. They aver that the SPO Proclamation also ousted the applicability of the provisions of *habeas corpus* under the Civil Procedure Code to persons detained *prior to the coming into force* of the Proclamation in matters under the jurisdiction of the Special Prosecutor, thereby wiping out the possibility of challenging the excessively prolonged detention without trial of the detainees. According to the Complainants this ouster is discriminatory as it applies to the targeted groups only, and was applied retroactively, as it narrowed down the rights of the detainees to judicially challenge their prolonged detention.
7. The Complainants further submit that although the law demands a speedy trial, the victims stayed in detention without access to legal counsel from 1991-1994, and that the SPO trial finally commenced only in October 1994. The *Dergue* officials discovered during the trial that they have been charged with the crime of Genocide and Crime Against Humanity under Article 281 of the Ethiopia Penal Code of 1957. The allegations included the killing and torture of secessionists, political activists and farm owners.
8. The Complainants submit that after fifteen (15) years of detention of the alleged victims and twelve (12) years of the commencement of the trial, the proceeding are yet to be concluded.
9. They aver further that the *Dergue* officials were collectively charged solely on basis of being members of the Council of the defunct Provisional Military Administration, and accordingly, they have been defending their cases collectively; which procedure has made it difficult to individualise guilt, or to prove/rebut individual innocence and guilt, and according to the Complainants will lead to collective guilt and collective punishment.
10. This situation is alleged to have also manifestly contributed to the delay of the proceedings. In order to expedite the trial therefore, it is submitted that the *Dergue* officials have pleaded with the Court for individual trials, and that their request was overruled. It is also noted that an appeal on this issue, being an “interlocutory matter” is permissible only if or when the party lodges an appeal on the conviction or sentencing of the final verdict, and that since the final judgment is yet to be handed down, the detainees do not have a right of appeal on this issue at this stage of the proceedings.

11. The Complainants claim that although all the *Dergue* officials were collectively charged with the crime of Genocide, they raised an objection through their defence lawyers that the charge filed by the Prosecution did not clearly stipulate which cases fall under Genocide and which ones fall under crime against humanity, however, the court proceeded without making a ruling on the issue. They submit that to their dismay, they later learnt that most of those indicted had all been convicted and sentenced to rigorous prison terms, including capital punishment for the crime of Genocide. Those sentenced to death are waiting for the decision of the Head of State whether they would be pardoned or executed.
12. They allege that Genocide has an international definition, and by adding illegal and clandestine political parties and organizations to the list of protected entities under the Genocide Convention, the Ethiopian courts have created a new crime of genocide by analogy. The Complainants submit that the Ethiopian courts by creating crimes by analogy have not only deviated from the international Genocide Convention to which Ethiopia is a party, but also Article 9 of the Constitution of Ethiopia, which stipulates that all the laws of the land must be interpreted in conformity with international conventions, treaties and agreements.
13. They averred that when trial commenced, they had requested for an impartial and international tribunal to be set up to investigate the allegations but the Respondent State refused. The judges were mostly fresh University graduates, civil servants and ex-combatants from the new regime. Regarding the right to be represented by legal counsel, Complainants submit that the Court *ordered* legal practitioners to represent them in the subsequent trials, and that they did not have the chance to make a choice of counsel, but had to contend with the legal counsels assigned them by the State.
14. It is also alleged that the lawyers assigned to the detainees did not have the right to decline the order of the State to take up the cases, even if they indicated that they were not interested and/or that they did not have the expertise in defending cases dealing with the crimes of genocide and crimes against humanity. The lawyers were allegedly underpaid for the work, with no incentives and many of them are said to have given up going to Court to defend the detainees, consequently leaving many of the detainees virtually without legal counsel.
15. They submit that the detainees fall under the following categories:
 - Those that have been sentenced from, rigorous imprisonment up to death;

- Those that have presented their defence and are awaiting judgment at the Federal High Court;
 - Those that are in the process of presenting their defence.; and
 - Those that have appealed to the Supreme Court after having been sentenced by the Federal High Court.
16. The Complainants submit that the detainees have been frustrated by the long adjournments, shortages and frequent change of judges and absenteeism. This has been exacerbated by the movement of judges on circuit basis to different regions of the capital.
17. The Complainants informed the African Commission on Human and Peoples' Rights (the African Commission or the Commission), that out of the 109 *Dergue* officials, only 76 survived to be charged including those in the Diaspora; only 46 appeared in court; while 9 have died during the proceedings in prison; and that to date, only 37 have remained to defend their case collectively. However, the African Commission was later informed by the IHRDA that not less than ten (10) of the detainees have died in detention before they were able to know their conviction or acquittal, and that some of the deaths occurred after the submission of the present Communication; with the last one in March/ April 2006.
18. The Complainants claim that the Government is using this case as a means of precluding certain groups or a sector of a population from participating in political activities. They submit that while the Government is using the judiciary to create an image and sense of justice to the international community and advocates of human rights, the truth is that the charges, convictions and sentences are all politically motivated, the end result of which is a "Victor's Justice".
19. The Complainants submitted that the delay and procedural irregularities in the case have been unprecedented in judicial history and reminded the African Commission that "Justice threatened anywhere is justice threatened everywhere".

Articles alleged to have been violated

20. The Complainants allege violation of Articles 1, 2, 3, 5, 6, 7 (1) (a), (b), (c), (d), 7(2), 25 and 26 of the African Charter by the Respondent State.

Prayers

21. The Complainants request the African Commission to:
- Declare specifically that the Proclamation setting up the Special Prosecutor Office and the conduct of officials of the Federal Government of Ethiopia during the trial of the *Dergue* Officials

constitute a violation of the right to be presumed innocent guaranteed in Article 7 (1) (b) of the Charter;

- Declare specifically that by failing to try the victims within a reasonable time after their detention and subjecting them to a trial that lasted for more than 12 years, Ethiopia has violated their right to a speedy trial guaranteed in Article 7 (1) (d) of the Charter;
- Declare that by failing to recognize the victims' right to a fair trial as enshrined in the African Charter, the Federal Government of Ethiopia has violated Articles 1 and 2 of the Charter;
- Award compensation to those who remained in detention pending the completion of their trial and were eventually found innocent, and recommend that the period of detention be counted into the time of imprisonment of the victims;
- Strongly recommend the Ethiopian Courts not to pass death sentences against any of the victims of the trials considering the fact that several rights of the victims have been violated in the process of the trials;
- Strongly recommend that the Ethiopian Courts, which may be approached by way of appeal, to commute the capital sentences passed against the victims to terms of imprisonment. In the alternative or as complementary, should recommend to the authorities (the Head of State and the Prime Minister) in accordance to the powers conferred upon them by Ethiopian laws to reduce capital punishments to imprisonment terms;
- Strongly recommend the Federal Government of Ethiopia that legislative and other measures should be taken to ensure that all citizens of Ethiopia enjoy the right to a fair trial guaranteed in the African Charter.

Procedure

22. The Complaint was received at the Secretariat on 16 November 2004.

23. On 14 January 2005, the Secretariat wrote to the Complainants through the office of the Commissioner for Political Affairs asking them whether the complaint should be considered as a Communication before the Commission.

24. On 14 April 2005, the Secretariat received a letter from the Complainants confirming that the complaint should be treated as a Communication.
25. At its 37th Ordinary Session held in Banjul, The Gambia, the African Commission considered the Communication and decided to be seized thereof.
26. By Note Verbale of 24 May 2005, the Respondent State was notified of the African Commission's decision and requested to submit its arguments on admissibility within three months of the notification. By letter of the same date, the Complainant was notified of the African Commission's decision.
27. On 23 August 2005, the Secretariat received the arguments of the Respondent State on the admissibility of the Communication.
28. On 25 August 2005, the Secretariat received the Complainant's arguments on admissibility.
29. By Note Verbale of 25 August 2005, the Secretariat acknowledged receipt of the Respondent State's submissions and transmitted the Complainant's submission to the State. By letter of the same date, the Secretariat informed the Complainant of the Respondent State's submissions.
30. On 23 September 2005, the Secretariat received additional submission on admissibility from the Respondent State.
31. At its 38th Ordinary Session held in Banjul, The Gambia, the African Commission deferred consideration of the Communication to allow the Complainant to submit further arguments on admissibility.
32. By Note Verbale dated 15 December 2005 and letter of the same date, the Secretariat of the African Commission notified both parties of the African Commission's decision and the Complainant was requested to submit arguments within thirty days.
33. On 6 March 2006, the Secretariat sent by DHL, all the submissions of the State on the admissibility of the Communication to the Complainant and requested the latter to send submissions within 30 days.
34. On 29 March 2006, the Secretariat of the African Commission received a letter from the IHRDA indicating its intention to assist the

Complainant in dealing with the case and its intention to become a co-author to the Communication.

35. On 29 March 2006, the Secretariat of the African Commission acknowledged receipt of the IHRDA's letter.
36. At its 39th Ordinary Session held in Banjul, The Gambia, from 11 – 25 May 2006, the African Commission deferred further consideration on the admissibility of the Communication in order to make a preliminary determination of the status of the co-author.
37. By a *Note Verbale* dated 29 May 2006 and by a letter of the same date, both parties were notified of the African Commission's decision, and the IHRDA was requested to explain how it intends to become a co-author to the Communication.
38. On 7 August 2006, the Secretariat received a brief from the IHRDA explaining its status as co-author of the Communication.
39. By letter dated 15 August 2006, the Secretariat acknowledged receipt of the IHRDA's letter and submissions, and by a *Note Verbale* of the same date, transmitted both documents to the Respondent State.
40. By Note Verbale dated 10 October 2006, the Secretariat reminded the Respondent State to submit its comments on the submissions made by the IHRDA before 31 October 2006.
41. At its 40th Ordinary Session held from 15 to 29 November 2006, the African Commission considered the Communication in light of submission of the IHRDA, and decided to defer further consideration of the Communication to its 41st Ordinary Session in order to allow the Respondent State reply to the IHRDA's submissions on admissibility, in line with *Rule 117 (2)* of the Commission's Rules of Procedure.
42. By letter and a Note Verbale dated 9 and 15 February 2007, the parties were respectively informed about the African Commission's decision. The African Commission further reminded the Respondent State to submit its comments of the submissions made by the IHRDA before 15th March 2007.
43. By Note Verbale dated 24 April 2007, the African Commission reminded the Respondent State to respond to the IHRDA's submissions on admissibility; and requested the State to make the said submissions by 10 May 2007.

44. At its 41st Ordinary Session held from 16 to 30 May 2007, in Accra Ghana, the African Commission, in the absence of any response from the Respondent State, acted on the evidence before it in line with Rule 117 (4). It therefore made a preliminary determination on the IHRDA's status as a co-author to the Communication and declared the Communication admissible.
45. By Note Verbale of 25 June 2007 and by letter of the same date, both parties were notified of the African Commission's decision, and requested to make submissions on the merits.
46. By letter dated 31 July 2007, the Complainant requested the African Commission to postpone consideration on the merits of the Communication to its 43rd Ordinary Session to give it adequate time to prepare its arguments.
47. By Note Verbale of 24 September 2007, the Respondent State submitted its arguments on the merits.
48. At its 42nd Ordinary Session, the African Commission considered the Communication and deferred its decision to the 43rd Ordinary Session to allow the complainant to make its submissions on the merits.
49. By Note Verbale of 19 December 2007 and by letter of the same date, both parties to the Communication were notified of the African Commission's decision.
50. On 18th April 2008, the Secretariat received the Complainant's submissions on the merits of the Communication.
51. By Note Verbale of 24 April 2008, the Secretariat forwarded the Complainant's submissions to the Respondent State.

SUBMISSIONS ON *LOCUS STANDI* AND JOINDER OF PARTIES

Submissions from the IHRDA

52. The IHRDA submits that it is a pan-African organisation with an interest in the protection and promotion of human rights in Africa, and with a specialization in litigation before the African Commission.
53. The IHRDA informs the African Commission that it has information about blatant violations of Charter-guaranteed human rights in the Respondent State, being the detention of over 106 former *Dergue* officials, and that it had been interested in bringing these to the

attention of the Commission. However, having discovered that there is a pending Communication before the Commission – i.e., based on the same facts and alleged violations, it decided to apply to the African Commission to be joined as a co-author of this Communication, rather than bring a fresh Communication. The IHRDA notes that the original author of the Communication has abandoned it *and will not appear before the Commission anymore due to clear and present threat against her life*, and as a consequence has refused to speak with the Institute or anyone.

54. The interest of the IHRDA in this matter, especially now that original author has abandoned the matter is stated to be related to its principal objective, which is “*providing necessary assistance and expertise...*” and supported by the principle of *actio popularis*.

Response from the Respondent State

55. The Respondent State argues in their oral submissions that the IHRDA is not registered in Ethiopia and has no relationship with the victims, and therefore does not have a “legal interest” in the Communication.

The IHRDA’s Response to the Submissions of the Respondent State

56. The IHRDA argues that there is no requirement of “citizenship” or “legal interest” in the provisions of Article 56(1) of the Charter which refers to the authorship of Communications (under the admissibility requirements) before the Commission. More so, it argues, neither the Charter’s provisions nor the practice of the Commission imposes any limitation on the *locus standi* of authors of Communications.

57. According to the IHRDA, Article 56 of the Charter provides for seven admissibility requirements, and that the list therein is exhaustive, adding that “Legal Interest” and “Citizenship” requirements as argued by the Respondent State do not feature under the admissibility requirements under Article 56, and are therefore at odds with the Charter. It further argues that introducing these additional requirements to the admissibility requirements under the Charter would be tantamount to reviewing the Charter, which the Respondent State lacks the power to do. It notes that respect for the existing text is the practice of international mechanisms in general and of the African Commission, in particular. The IHRDA notes further that introducing additional requirements to the admissibility requirements under the Charter would render the Commission inaccessible, thereby defeating the intention of the drafters of the Charter, which encourages, rather than stifles, the submission of human rights violations to the Commission.

58. Thus, the IHRDA contends that it is not required to prove legal interest, but that it suffices to show that it is interested in the protection and promotion of human rights through the African regional mechanism. Similarly, it notes that the “citizenship” of the IHRDA, which is not registered in Ethiopia, is irrelevant to the admissibility of the Communication; and argues that such a restrictive approach would complicate matters where, for one reason or another, the “domestic actors” are unable to lodge complaint themselves before the Commission. It argues that such an approach would insulate the violating states against international scrutiny and foster the culture of impunity, which is at odds with the purpose of the Charter to promote and protect the rights and freedoms of Africans.
59. It further contends that its line of argument is in consonance with the practice of other regional and UN mechanisms, whereby complaints may be lodged on behalf of alleged victims of human rights violations.
60. The IHRDA further contends that with respect to Article 56(1) of the Charter, the provision merely requires that a Communication should “indicate their authors”, and that is designed ‘to enable the Commission’s Secretary to remain in contact with the author, to keep him or her informed about the status of the Communication, and to request further information if it is required. The IHRDA disagrees with the Respondent State’s argument that there is no author to the present Communication, and submits that this is a misconception of the “victim-author” difference.

The African Commission’s Decision on *Locus standi* and Joinder of Parties

Locus standi

61. The African Commission notes that neither the African Charter nor the Rules of Procedure of the Commission makes provisions on the *locus standi* of parties before it. The Commission has however, through its practice and jurisprudence adopted the *actio popularis* principle allowing everyone the legal interest and capacity to file a Communication, for its consideration. For this purpose, non-victim individuals, groups and NGOs constantly submit Communications to the Commission. Thus, the Commission upholds the argument of the IHRDA on their capacity to approach the Commission in its capacity as an *organisation with an interest in the protection and promotion of human rights in Africa* under the *actio popularis* principle.
62. With respect to the argument of the Respondent State that there is no *legal interest for the Institute to deal with the case*, the Commission has

made it clear, *inter alia*, in *WOAT/OMCTs vs. Zaire*² that the author of a Communication need not be the victim nor related to the victim(s) of the human rights violations alleged. This position is put succinctly in the Commission's decision in *Malawi African Association and Others v Mauritania*³, where it held that "Article 56(1) of the Charter demands that any persons submitting communications to the Commission relating to human and peoples' rights must reveal their identity. They do not necessarily have to be the victims of such violations or members of their families. This characteristic of the African Charter reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims."⁴

63. As a result of the foregoing, the Commission is disagrees with the Respondent State's argument that the Institute lacks legal interest in the matter.
64. With respect to the argument of the Respondent State that the Institute is not a citizen of or an organization registered in Ethiopia, the Commission made it clear in *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi)/ Botswana*⁵ that the person or NGO filing the Communication need not be a national or be registered in the territory of the Respondent State. There is no requirement of "citizenship" for the authorship of a Communication.⁶ Any interested individual or organisation can bring a Communication on behalf of a victim and such individual or organisation need not be a citizen or be registered within a States party to the African Charter.
65. Thus, the fact that the Institute is not registered in Ethiopia is immaterial. As long as it satisfies the conditions set out in Article 56 of the African Charter, the African Commission will entertain the Communication as it has done, in several other cases where

² Communications No. 25/89, 47/90, 56/91, 100/93.

³ Communications: 54/91, 61/91, 164/97 to 196/97, 210/98.

⁴ *Ibid.*, (Comm: 210/98) para 78.

⁵ Communication **277/2003**. See also Communications 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 – Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme/Mauritania. See e.g., cases submitted by Amnesty International, Interights, and also Communication 31/89, Maria Baes/Zaire, instituted by a Danish national and Communication 235/2000 – Curtis Doebbler/ Sudan instituted by an American citizen.

⁶ See generally, "Capacity to Bring a Communication before the African Commission on Human and Peoples' Rights (*Locus Standi*)", Working Document of the African Commission, 40th Session, 15th-29th November 2006, Banjul, The Gambia.

Communications have been instituted by non-nationals of the State against which the Communication is instituted.

66. Accordingly, the African Commission holds that the Institute can appear before it in respect of the present Communication under its much espoused *actio popularis* principle.

Joinder of Parties

67. Joinder of parties is a legal term which refers to the act of uniting as parties to an action all persons who have the same rights or against whom rights are claimed, as either co-plaintiffs or co-defendants.⁷ Joinder of parties therefore allows multiple plaintiffs or defendants to join in an action if each of their claims arises from the same transaction or occurrence, or are of a similar nature or if there is a common question of law or fact relating all their claims.

68. Notably, neither the African Charter nor the Rules of Procedure of the Commission makes provisions on the joinder of parties before the Commission. The closest to this is Rule 114(2) which provides that the Commission, may, if it deems it good, jointly consider two or more Communications. Consequently, it is the prerogative of the Commission, from the facts presented, to join Communications, and the same would apply to the joinder of parties.

69. The IHRDA has applied to join the present Communication as co-authors, and indeed, as shown above, there is no jurisprudential or legal bar that precludes them from joining as co-authors. Indeed, if the African Commission were to deny the Complainant access to its Communications procedure, there is the possibility of the alleged victims, on whose behalf this Communication has been brought to continue to suffer the alleged violations of their fundamental rights; especially as the first Complainant has refused to proceed with the Communication, even though he has not formally communicated this decision to the Commission. Such denial of access to the Institute would indeed be contrary to the spirit of the Charter which mandates the African Commission to “ensure the protection of human and peoples’ rights in Africa.

70. More specifically, in respect of the Respondent State’s argument that there is no author to the present Communication, the Commission notes that even if the original Complainant has formally withdrawn from the present Communication, as the ultimate protector of human rights on the African continent, the Commission may still proceed to

⁷ See generally, Black’s Law Dictionary, 6th Ed. p. 836-837.

examine the Communication if it deems it appropriate. The Commission hereby alludes to the practice of other similar bodies such as the Inter-American Commission on Human Rights.⁸ In this respect, the Commission notes that while there is no provision to this effect in its current rules of procedure, there is also nothing therein precluding it from adopting this progressive approach to the protection of human rights.

71. Accordingly, the African Commission hereby joins the IHRDA as co-author to the present Communication, in line with its widely espoused *actio popularis* principle, as an *organisation with an interest in the protection and promotion of human rights in Africa* under the *actio popularis* principle. The Communication will henceforth be cited as *Haregewoin Gebresellaise and Institute for Human Rights & Development in Africa/ Federal Democratic Republic of Ethiopia*.

The Law on Admissibility

Respondent State's Submissions on Admissibility

72. The Respondent State's submissions on admissibility are divided into two parts. In Part One, the Respondent State provides a background of the conflict in Ethiopia that led to the overthrow of the *Dergue* Regime in 1991. The State notes the alleged gross human rights violations that were perpetrated by the said regime and notes further that domestic mechanisms were put in place to prosecute perpetrators of gross human rights violations. These mechanisms, according to the Respondent State, includes the Special Prosecutor Office set up in 1992 to, among other things, establish a historical record of human rights violations under the Mengistu regime; and to bring officials, members and auxiliaries of the armed and security forces of the *Dergue* regime who participated in the commission of serious human rights violations to justice.
73. The Respondent State also notes that it has an independent judiciary dealing with the cases of the officials and insists that most of the cases have been disposed of and some people have been tried, some set free, others have been convicted while some are still being tried.
74. In Part Two of its submission, the Respondent State addresses itself to the question of Admissibility and argues that the Communication should be declared Inadmissible for the following reasons: that the Complainant failed to comply with the burden and standard of proof;

⁸ Article 35 of the Rules of Procedure of the Inter-American Commission on Human Rights; <http://www.cidh.org/Basicos/basic16.htm> (accessed on 25/10/06).

that the case is pending before the courts of the Respondent State, that remedies are available, effective and sufficient to address the matters raised in the Communication. The Respondent State also insists that the Special Prosecutor Office has sufficient and independent mechanism to address the grievances and that the remedies sought are beyond the mandate of the African Commission. The State submits further that the Communication does not make reference to the African Charter and fails to indicate the provisions of the Charter alleged to have been violated, adding that the case has already been settled by another international organ.

75. According to the State, the Complainant is required to provide a *prima facie* evidence of an attempt to exhaust local remedies, noting that in the present case, there are effective, and sufficient local remedies which the Complainant's have not exhausted. The State pointed out that the Complainants could have addressed their grievances to the High Court or the Judicial Administration Officer or the Human Rights Commission.
76. The State further avers that the right to a speedy trial alleged to have been violated is embodied in Ethiopian laws, including in the Constitution, and is a fundamental right recognized by international human rights treaties Ethiopia has ratified, which by virtue of Article 9 (4) is an integral part of the laws of Ethiopia. Thus, according to the State, the courts are bound to ensure the realization of this right.
77. The State acknowledges that in terms of Article 19 of its Constitution "...where the interest of justice so requires, the court may order the arrested person to remain in custody, or when requested, remand him for a time strictly required to carry out the investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigations respecting the arrested person's right to a speedy trial".
78. According to the State, these are legal safeguards that cancel the risk of breach of the right of the accused to speedy trial. The State points out that if the Prosecution's office or any other organ was therefore engaged in an act that violates the victims' right to a speedy trial, they could and should have called the attention of the court to the violation. According to the State, there was no indication that the Complainants resorted to this.
79. Regarding the Judicial Administration Council established by Proclamation No. 24/1996, the State indicates that one of its powers is to discipline judges who act in breach of disciplinary rules and if the

judge turned a deaf ear to the pleas of the Complainants, they could and should have brought their complaints before the Judicial Administration Council, a recourse which the State claims was not sought by the Complainants.

80. The State argues further that the Complainants did not bring their grievances to the attention of the Judicial Administration Offices and the Human Rights Commission. According to the State, the Complainants have not shown that the judicial process was unduly prolonged and do not show why they did not attempt to exhaust all these remedies available to them.
81. The State also notes that for local remedies to be exhausted, the Complaint must have been dealt with by the highest court of the land, but in the instant case, there is no evidence to show that the Complainants have submitted a case with the Federal Supreme Court of Ethiopia. The State however notes that many of the suspects have just recently brought their cases to the Supreme Court after being convicted by lower courts and these cases are still awaiting judgment. The State notes further that with respect to senior government officials of the *Dergue* regime, their cases were still being heard in the Federal High Court Criminal Branch and they still have an opportunity to appeal to higher courts, if convicted.
82. Regarding the allegation of the Complainants that the process is unduly long, the State notes that measures have been taken to reduce the time that will be taken to effectively try the victims to meet international fair trial standards. It states that it is intended that all the trials will be completed by the beginning of 2006. The state notes further that the delay has been caused by both the defence and the prosecution due to the many witnesses they had.
83. The State claims the remedy sought by the Complainants is beyond the competence of the Commission, claiming that the latter is being requested to not only review the ongoing trial process in Ethiopia but also to instruct Ethiopia on what form of domestic mechanism it should adopt in prosecuting and trying of persons accused of gross human rights violations. In particular, the State argues that the complainants are asking the Commission to order Ethiopia to agree to the setting up of an international tribunal similar to the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the Former Yugoslavia. The State notes that different countries have adopted different approaches in bringing human rights perpetrators to book, such as the establishment of the truth and reconciliation commission, international tribunals, etc, but in Ethiopia, the government has established the Special Prosecutions Offices, making a

clear choice to prosecute former Dergue officials who committed serious offences and this decision has been widely supported by the international community.

84. The State avers that the Complainants claim the right to pardon and amnesty under international law have been infringed. According to the State, there are no such rights under international law, adding that, the Ethiopian constitution precludes any blanket amnesty.
85. According to the State, the Complainants' requests are not directly related to any human right guaranteed in the African Charter and thus the Communication is not compatible with the provisions of the Charter.
86. The State went on to state that the Communication does not refer to the Charter and fails to indicate the provisions of the Charter that have been violated, noting that the African Commission has indicated that Communications must illustrate a *prima facie* violation of the Charter by invoking specific provisions of the Charter alleged to have been violated. It also notes that the African Commission has rejected Communications which failed to make reference to the provisions of the Charter, that even though they cited provisions under UN texts, made only general allegations of human rights violations without making any specific breaches of the Charter.
87. The State also argues that the Communication has been settled by another international organ. The State indicates that in its report E/CN.4/1994/27, Decision Nos 45/1992 and 33/1993, the UN Working Group on Arbitrary Detention issued decisions regarding the detention and prosecution process involving the victims. The State argues that following this decision, the government took the necessary measures in order to comply. The State argues that the Communication should therefore be declared inadmissible as it has been settled by the Working Group on Arbitrary Detention.
88. The state also argues that the Communication does not conform with the procedures in the African Charter and the Commission's rules of procedures. The State notes that the present Communication does not meet the requirements of a Communication, as it is simply a letter of appeal sent to the Special Rapporteur on Prisons and Conditions of Detention in Africa. The State argues that the Special Rapporteur was engaging the Commission on issues which "it is already addressing and is adequately seized of through its promotional mandate". The State concludes that the present Communication was not addressed to the Secretariat as a Communication but rather as a feed back from alleged victims of human rights to the Special Rapporteur during her

visit to Ethiopia. The Respondent State therefore requests the Commission to also reject the Communication on this ground.

Complainants' submissions on Admissibility

89. The Complainants note that Article 56 of the Charter provides for seven admissibility requirements, and that the list therein is exhaustive. They submit that the present Communication fulfils all the requirements stipulated in Article 56 of the Charter and should therefore be declared admissible by the African Commission.
90. With respect to Article 56(1) the Complainants submit that the authors of the Communication are clearly identified as Heregewoin Gabre-Sellasie and the Institute for Human Rights and Development in Africa (on behalf of the over 106 Officials of the *Dergue* Regime). They thereby deny the Respondent State's argument that the Communication has no author.
91. In respect of Article 56(2) which requires that Communications must be compatible with the African Charter or the OAU Charter, the Complainants note that neither the Charter nor the Commission's Guidelines on the Submission of Communications requires the Complainants to cite the precise violations of the Charter alleged, and that in fact, the Guidelines clearly provide that "...the Complainant need not mention the specific articles of the Charter alleged to have been violated". They also reject the argument of the Respondent State in this regard.
92. The Complainants argue that their subsequent submission on admissibility actually specified the articles of the Charter allegedly violated by the Respondent State.
93. In respect of Article 56(3) which requires that Communications should not be written in insulting or disparaging language directed at the State, its institutions, or the African Union; the Complainants submit that the present Communication is based entirely on the factual situation giving rise to the complaint, and is written in a manner that is both polite and respectful.
94. In respect of Article 56(4) which provides that the Communication must not be based exclusively on news disseminated through the mass media, the Complainants submit that the present Communication is

based on information verified by first-hand accounts of the events, supported by means of affidavits.⁹

95. In respect of Article 56(5) which requires that Complainants exhaust all local remedies before approaching the Commission, the Complainants submit that the State has been given sufficient notice of the continuing violations and has had ample opportunity to remedy the situation. They argue that “the laws, procedures and practices have conspired to make it impossible for the *Dergue* Officials to seek any viable local remedies and/or made the remedies ineffective at best”.
96. The Complainants rebut the argument of the Respondent State on their access to the High Court or the Judicial Administration Commission (JAC) or the Human Rights Commission. In respect of the High Court, they note that the SPO Proclamation forecloses the detainees’ rights to *habeas corpus* or a speedy trial, and that their request for individual charge cannot be appealed against until the final verdict is given.¹⁰
97. In respect of the accessing the Human Rights Commission, they argue that apart from the fact that the Human Rights Commission was established nine years after the effective detention of the victims; the former is expressly precluded by its establishing law from interfering in cases before the courts at any level. Article 7 of the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 provides that “The [Human Rights] Commission shall have full powers to receive and investigate all complaints on human rights violations made against any person, save cases brought before ... the courts of law, at any level”.
98. In respect of the JAC, the Complainants submit that the body has always been fully aware of the trials of the *Dergue* Officials, and has chosen to remain a “disinterested spectator”.
99. They conclude that there is no remedy left for the *Dergue* Officials to exhaust as they have exhausted all available local remedies. Alternatively, they submit that should there be any reason to believe otherwise,¹¹ the Commission should allow them to be exempted from

⁹ The Institute noted that these affidavits could not be submitted at this stage of the proceedings, until such time that it can bring the Commission’s attention to the threat against the security of the individuals who have earnestly requested to remain anonymous for fear of possible government harassment. They however noted that the affidavits would be submitted at a later stage if the Commission devises a mechanism of keeping the names of the individuals confidential.

¹⁰ Para 14 of Complainants’ submission on Admissibility.

¹¹ Here, the Complainants note that where a State argues that a Communication before the African Commission must be declared inadmissible because local remedies have not been exhausted, then it has the burden of demonstrating the existence of such remedies. They thereby cited *Communication 71/92, Recontre Africaine pour la Defense des Droits de l’Homme vs. Zambia*.

exhausting them as these remedies would be ineffective and/or their exhaustion would be 'undesirable'. This, according to the Complainants, is because the process of exhaustion of local remedies has been unduly prolonged, and the reasons for the delays are all attributable to the Respondent State.¹² They therefore urge the Commission to follow its jurisprudence in *Institute for Human and Development in Africa (on behalf of Collectif des Veuves et Ayants droits)/Mauritania*¹³ where it held that the duty on the Complainant to pursue legal avenues at the national level may be waived if it is 'impractical'¹⁴ or 'undesirable' for the Complainant to do so¹⁵.

100. In respect of Article 56(7) which requires that Communications must not deal with cases which have been settled in accordance with the Charter of the United Nations (UN), or the Charter of the OAU (now AU) or the provisions of the African Charter; the Complainants note the argument of the Respondent that the present Communication has been settled by another international organ, namely the UN Working Group on Arbitrary Detention (UNWGAD), by its Decisions Nos. 45/1992 and 33/1993.¹⁶ The Complainants however argue that there is no overlap between the complaint submitted to the UNWGAD and the present Communication. They argue that the substance of the present Communication varies with the one dealt with by the UNWGAD, as do the victims, the facts making up the present Communication and the period over which the alleged violations have been committed.

101. They note specifically that the complaint to the UNWGAD was submitted and decided before the commencement of the trial of the *Dergue* Officials, and therefore did not cover the subsequent period of trial which the present Communication is dealing with. They also note that the complaint to the UNWGAD was concerned solely with five members of the *Dergue*, and therefore does not cover the over 106 *Dergue* Officials in respect of whom the present Communication has been submitted before the Commission. Hence, they submit that the present Communication does not deal with any *settled* matter. They further argue that for the matter to have been settled there should have been a decision on the merits complained of herein, which is not the case. In support of this argument, they cite the Commission's decision

¹² The reasons for this submission are detailed in para 32 of Complainants' submission on Admissibility.

¹³ Communications 164/97 and 196/97.

¹⁴ They cite Communication 215/91 – Malawi African Association and Others/ Mauritania; Communication 61/91 – Amnesty International/Mauritania, 98/93 – Mme Sarr Diop, Union Interfricaine des Droit de l'Homme et RADDHO/Mauritania.

¹⁵ Ibid.

¹⁶ Para 71 above and paras 33 – 42 of the State and Complainants' submission on admissibility.

in *Bob Njoku vs. Egypt*,¹⁷ where the Commission “had rightfully rejected the argument of the Respondent States on similar grounds and declared the Communication Admissible”.¹⁸

102. The Complainants conclude that the seven admissibility requirements have been effectively complied with in the present Communication and respectfully requested the African Commission to declare the Communication admissible.

The African Commission’s analysis on Admissibility

103. The admissibility of Communications submitted before the African Commission pursuant to Article 55 of the African Charter is governed by the seven conditions set out in Article 56 of the African Charter. The Complainants submit that they have complied with all the requirements. However the Respondent State argues that the Communication does not meet certain requirements under Article 56, in particular, Article 56(2), (5) and (7).

104. The African Commission notes that only three of the requirements seem to be in dispute between the parties, but will proceed to examine all seven requirements to ensure they meet the admissibility test.

105. Article 56(1) of the African Charter states that “*Communication relating to Human and Peoples’ Rights... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity...*” The Communication indicates the authors as well as the victims of the alleged violations, and the African Commission therefore holds that the requirement under Article 56(1) of the African Charter is fulfilled.

106. Article 56(2) of the African Charter states that “*Communications... received by the Commission shall be considered if they are compatible with the Charter of the Organization of African Unity or with the present Charter.*” The facts reveal that the Communication is brought against the Republic of Ethiopia which became a party to the African Charter 1998, secondly the Communication alleges violations of rights contained in the African Charter. The State argues that the Communication is incompatible with the Charter as it does not indicate any provision of the Article alleged to have been violated. The Commission notes that the Complainants submissions on admissibility details the rights allegedly violated and specifically cited the corresponding Articles of the Charter. The Commission concurs with the Complainants that the Complainants

¹⁷ Communication 40/90.

¹⁸ Comm 40/90 : *Bob Njoku vs. Egypt*, Para 56.

does not necessarily need to list the articles of the Charter alleged to have been violated. The African Commission is satisfied that the requirement of Article 56(2) has been fulfilled.

107. Article 56(3) of the African Charter states that *“Communications ...received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity now African Union (AU)”*. The present Communication is not written in disparaging or insulting language directed to the State, its institutions or the AU and for these reasons the African Commission holds that the requirements of Article 56(3) have been complied with.
108. Article 56(4) of the African Charter states that *“Communications relating to human and Peoples’ Rights... shall be considered if they are not based exclusively on news disseminated through the mass media*. The Communication is not based on news disseminated through the mass media and there is evidence to show that the Communication is based on statements and affidavits from the victims. For these reasons, the African Commission holds that the requirements under Article 56(4) have been fulfilled.
109. Article 56(5) of the African Charter states that *“Communications relating to human and Peoples’ Rights... shall be considered if they: are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged”*. The Respondent State submits that the Complainants failed to avail themselves of the local remedies within the State. The State contends that the Complainants could have approached the High Court, the Human Rights Commission as well as the Judicial Administration Council. The Complainants argue that the state has had ample notice of the alleged violations and ought to have taken steps to deal with the same. They add with respect to the Human Rights Commission that the latter was established nine years after the arrest and detention of the victims and that the Commission does not have the power to deal with matters already being handled by the courts.
110. In the present Communication therefore, the fact that the Complainants have not sufficiently demonstrated why they could not exhaust 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.

111. 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.¹⁹ 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.
112. In the present Communication, this seems to be the case. The victims cannot access the courts to claim protection of their rights, either because they have been displaced, or because they are being harassed, intimidated and persecuted, the prevalence of violence in the region makes any attempt at exhausting local remedies by the victims an affront to common sense, good conscience and justice.
113. 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 Respondent State has had ample time and notice of the alleged violation to at least create conducive environment for the enjoyment of the rights of the victims. If it is shown that the State has had ample notice and time within which to remedy the situation, as is the case with the present Communication, the State may be said to have been properly informed and expected to have taken appropriate steps to remedy the violations alleged. The fact that the State did not effectively deal with the alleged human rights violations means that domestic remedies were either not available, or if they were, not effective or sufficient to redress the violations alleged.
114. On the claim that the Communication has been settled by UN mechanisms, the African Commission wishes to state that a matter is settled within the context of Article 56 (7) of the African Charter if it has been dealt with by any of the human rights treaty bodies or the Charter bodies of the United Nations system.
115. The UN treaty bodies include bodies created under international human rights treaties. They presently include *inter alia* the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial

¹⁹ Inter-American Court of Human Rights, *Case of Velásquez Rodríguez. Preliminary Exceptions*, cit., 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-9/87 of October 6, 1987. Series A. N° 9, para 24.

Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC) and the Committee on Migrant Workers (CMW).

116. The Charter bodies are those created under the UN Charter and include the Human Rights Council (HRC), Special procedures of the Human Rights Council, in particular, the 1503 procedure²⁰ and the Sub-Commission for the Promotion and Protection of Human Rights.
117. To be settled also requires that the treaty or Charter body dealing with the matter has taken a decision which addresses the concerns, including the relief being sought by the Complainant. It is not enough for the matter to simply be discussed by these bodies. In the opinion of this Commission, the present Communication was never submitted to any of these bodies, either by the present Complainant or any other individual or institution. The general human rights situation in the region was rather discussed by the UN Security Council following reports from different organizations, including agencies of the UN itself. None of these bodies specifically dealt with, or was intended to deal with the allegations raised in the present Communication and it can thus not be said that the matter has been dealt with or settled as required under Article 56 (7) of the African Charter.
118. The African Commission agrees with the Respondent State's argument that the Complainants' argument relating to Ethiopia's protection of political groups from genocide is irrelevant to the present issue of admissibility. In same vein, the Commission notes that the Respondent State's argument relating to the nature of the remedy sought by the complainants is irrelevant to the present issue of admissibility, and prematurely raised at this stage. The Commission cannot therefore pronounce upon it at the present stage, and notes that the proceedings on the merits would thus place the Commission in a better position to make a finding in this regard.
119. Finally, in respect of the Respondent State's submission that the present Communication does not conform with the procedures in the African Charter, as it was done by way of a mere letter of appeal sent to the (then) Special Rapporteur on Prisons and Conditions of Detention in Africa. The African Commission notes that while Article 47 of the African Charter and Rule 88 of its old Rules of Procedure, which relate only to Inter-State Communications, prescribe that

²⁰

See Amnesty International v. Tunisia, African Commission on Human and Peoples' Rights, Comm. No. 69/92 (1994) where the communication had been dealt with under the 1503 procedure and later brought to the African Commission. The Commission declared it inadmissible in accordance with Article 56(7) of the African Charter.

Communications should be submitted in written form, and addressed to the Secretary General of the OAU (now Chairperson of the AU Commission) and the Chairperson of the African Commission; there is no provision either in the Charter or its Rules of Procedure relating to the prescribed form for Non-State/Individual Communications.

120. The Commission further notes that Article 56 of the Charter has an exhaustive list of admissibility requirements, which do not include the form of the Communication or the manner in which it was received. The Commission therefore holds that the prescribed (and not authorised) form for submission of Communications is not a prerequisite for the admissibility of Communications, and is extraneous to the present issue before the Commission. More so, the present Communication was brought in a written form, albeit addressed to a Commissioner of the African Commission, and the then Special Rapporteur on Prisons and Conditions of Detention in Africa. A letter to a visiting Special Rapporteur on Prisons and Conditions of Detention in Africa seemed to have been *the most practicable and reliable means* for the Complainants to bring the plight of the victims to the African Commission.

121. For these reasons, the African Commission declares this Communication **Admissible**.

THE MERITS

COMPLAINANTS' SUBMISSIONS ON THE MERITS

Clarifications Submitted by the Complainants

122. Since the submission of their brief on Admissibility the Complainants have informed the African Commission that they are making some substantial amendments and clarifications to their initial submissions.

123. It says that in paragraph two of the brief on Admissibility it had alleged violations of Articles 1, 2, 3, 5, 6, 7(1)(a), (b), (c), (d), 7(2), 25 and 26 of the African Charter and the right to privacy guaranteed under the international conventions to which the Respondent State is a party to. It states that in spite of its efforts and the fact that the violations appear very probable, it has not been able to get evidence to support some of the alleged violations. It has therefore decided to drop its previous claim that Articles 3, 5, 6 and 7(2) are violated for lack of evidence. It

states that it will only argue violations of Articles 1, 2, 7 (1) (b) (d) of the African Charter.

124. The Complainants further state that Paragraph four of its brief on Admissibility stated that the victims were detained on account of collective responsibility for policies or abuses by the Dergue regime rather than on account of individual responsibility for particular criminal offences. In addition paragraph 13 stated that the 106 detainees were collectively charged under one file, and have been defending their case collectively and that the procedure of collective trial has made it difficult to individualize guilt, or to prove/rebut individual's innocence and guilt.

125. The Complainants say that they wish to qualify the above statement to the effect that although there was joinder, the charges, the conviction and the sentences are individualized. They argue that the trial of all those who have been alleged to have committed crimes during the era of the former Government were not conducted in a single case or in a single venue.²¹ Rather, there have been several trials going on at different locations throughout the country both at the Federal High Court divisions and the Supreme Courts of the regional states of the Ethiopian Federation.

126. They also state that from the former Dergue Officials accused jointly, for example, one defendant was acquitted, while others were convicted and sentenced to terms of imprisonment ranging from 23 years to life. They state that the Victims were able to present separate arguments of their own, and so they are accordingly clarifying their previous submissions. It nevertheless argues that the joinder of the trials has immensely contributed to the undue delay in the trial of the former Dergue Officials.

127. The Complainants also informs the African Commission that paragraph nine of its brief on Admissibility indicates that the proceedings are yet to come to a conclusion fifteen years after the detention of the Complainants and twelve years after the commencement of the proceedings. They state that the statement was true over a year ago, however, some developments have taken place subsequently. They state that on 12 December 2006, the Ethiopian Federal High Court convicted many of the victims, among others, on charges of genocide and crimes against humanity. They also state that on 11 January 2007 prison sentences ranging from 23 years to life

²¹ See also D Hailegebriel 'Prosecution of genocide at international and national courts: A comparative analysis of approaches by ICTY/ICTR and Ethiopia/Rwanda' (a dissertation submitted in partial fulfilment of the degree LLM in Human Rights and Democratisation in Africa – University of Pretoria (2003)) 26.

imprisonment were passed, while some of the convicted persons were sentenced to death. They also inform the African Commission that the SPO has since filed an appeal to the Federal Supreme Court demanding capital punishment for many of the 55 sentenced to life imprisonment. Some of the convicted persons have also appealed while others are expected to file cross appeals. Therefore the trials, at least for some of the 55 victims, are yet to be completed.

128. The Complainants also stated that the major violations argued, hereunder, relate to prolonged pre-trial detention and trials lasting for more than 12 years, thus resulting in violations of the Complainants' right to fair trial.²² Thus article 7 of the African Charter on Human and Peoples' Rights is the main legal basis on which it anchors its argument. They also state that in recognition of Article 60 of the African Charter by which the African Commission is empowered to draw inspiration from other international instruments for the protection of human and peoples' rights, they are drawing the attention of the African Commission to Article 14 of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the American Convention on Human Rights (American Convention) and Article 6 of the European Convention on Human Rights (European Convention).

129. In additional they draw the attention of the African Commission to, among others, the Guidelines on the Role of Prosecutors, the Basic Principles of the Role of Lawyers and the Statutes of the International Criminal Court and the International Criminal Tribunals for Rwanda and the former Yugoslavia.

Alleged Violation of Article 1 and 2 of the African Charter

130. The Complainants allege that the Respondent State failure to recognize the rights of the former *Dergue* officials enshrined in the African Charter violates Article 1 and 2 of the African Charter. They argue that States Parties to the Charter are obliged not only to recognize the rights, duties and freedoms enshrined in it but also undertake to adopt legislative and other measures to give effect to them. States are also required to ensure that these rights are available to all without discrimination. The Complainants submit that where a

²² The concept of fair trial encompasses the following major components: (1) equality of arms, (2) right to legal aid, (3) right to be presented in person at the trial, (4) public character of the hearing, (5) trial within a reasonable time, (6) independent, competent and impartial tribunal established by law, (7) presumption of innocence and protection against self-incrimination, (8) prompt and adequate information on the accusation, (9) adequate time and facilities for the preparation of the defence, (10) free assistance of an interpreter, (11) right of appeal, (12) right to compensation and (13) *ne bis in idem*.

State neglects to protect the rights in the Charter, this can constitute a violation of Article 1, even if the State or its agents are not the immediate cause of the violation.

131. The Complainants further submit that by failing to respect the Victims right to a fair and speedy trial guaranteed in Article 7 of the African Charter, the Respondent State is similarly in violation of Articles 1 and 2 of the Charter as a violation.

Alleged Violation of Article 7(1)(b) – right to have ones cause heard.

Article 7(1)(b) of the African Charter states:

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

132. The Complainants argue that the Respondent State has violated the rights of the former Dergue officials to be presumed innocent until proved guilty by a competent court or tribunal. The Complainants state that the presumption of innocence is universally recognized²³ and proclaimed by all major legal systems of the world.²⁴ They stated that the Respondent State violated the right to be presumed innocent enshrined in Article 7 (1) (b) of the Charter in the following ways:

a. Proclamation No. 22/1992 which provides for the establishment of the special prosecutors office violates the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter. Proclamation No. 22/1992 provides, inter alia, as follows:

WHEREAS the people of Ethiopia have been deprived of their personal human and political rights and subjected to gross oppression under the yoke of the fascistic rules of the Dergue-WPE regime for the last seventeen years;

WHEREAS heinous and horrendous criminals which occupy a special chapter in the history of the peoples of Ethiopia have been perpetrated against the people of Ethiopia by officials, members and auxiliaries of the security and armed forces of the Dergue-WPE regime;

WHEREAS officials and auxiliaries of the Dergue-WPE dictatorial regime impoverished the economy of the Country by plundering illegally confiscating and destroying the property of the people as well as misappropriating public and state property;

WHEREAS it is the interest of a just historical obligation to record for posterity the brutal offences the embezzlement of property perpetrated

²³ Communication No. 218/98, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/ Nigeria*, as in n 26 above, paragraphs 40 -41.

²⁴ See Antonio Cassese, as in n 24 above, page 390. See also UDHR, ACHR, ECHR and the Statutes of the ICTY (Article 21 (3)), the ICTR (Article 20 (3)), and the ICC (Article 66).

against the people of Ethiopia and to educate the people and make them aware of those offences in order to prevent the recurrence of such a system of government.

133. The Complainants argues that it is clear from this Proclamation that even before the Victims were brought to court, they were branded criminals by the Proclamation. Thus, it argues, in the eyes of the Transitional Government, the Victims had subjected Ethiopians to gross oppression under the yoke of a fascistic rule; they had perpetrated 'brutal', 'heinous' 'horrendous' crimes which occupy a special chapter in Ethiopia's history; they had impoverished the Ethiopian economy through illegal plundering, destruction and misappropriation of public property.

134. It argues that the Proclamation looks more like a legislative sentence which only ran short of declaring the Victims guilty even before they were charged. It avers that legislation is conceived as a system of rules with a generality of application for the regulation of the life and activities of the community as a whole and singling out a person for individualized treatment by legislation may not only be arbitrary and discriminatory, it can lend itself to oppression, favoritism or other kinds of abuse.

135. They further aver that in the performance of their duties, the Special Prosecutor and his officials are expected to be impartial and to protect the public interest with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.²⁵ However, they aver that, from the way the law setting up the Special Prosecutor's Office was couched, this was not the role envisaged for the Office of the Special Prosecutor. They state that the Proclamation made the Special Prosecutor more of a "persecutor" than "prosecutor" and that it was obvious based on the Proclamation that the Special Prosecutor began the prosecution and investigation of the cases against the complainants on the basis that they were already guilty and needed to prove their innocence.

b. statements made by the Respondent State officials during and after the trial of the Victims violate the violates the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter.

²⁵ See Rule F (h) (i) (2) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, as in n 25 above.

136. The Complainants state that Dergue officials were treated as if they were guilty of the offences with which they were charged even before their guilt was established by a competent court. They argue that statements from the Respondent State at the pre-trial and trial period clearly demonstrate the government's hostility and bias towards the Victims.

137. The Complainants state that while the SPO gathered evidence and the Respondent State trained and appointed judges, the former Dergue Officials were subjected to 'massive media propaganda and untold defamation by top government officials and their cadres'.²⁶ They state that the SPO repeatedly appealed to the public through the Government media and promised to pay compensation, house rent and jobs to people who were willing to testify against the former Dergue Officials. It states that workshops and mass demonstrations were organized and red-terror victims committees set up to help in gathering evidence against the former Dergue Officials. They say that Prime Minister Meles Zenawi also repeatedly stated that having the former Dergue Officials punished was part and parcel of their armed struggle and that whatever these officials did in hours of darkness 'would be retaliated through the courts and in the manner he so desires in broad daylight'.

138. The Complainants also state that talking to the New York Times about the activities of the Dergue regime, the Special Prosecutor Girma Wakjira stated that "it was not simply eliminating your enemy, it was showing savagery at its utmost."²⁷ They stated that the hostility and bias continued even after their trial and in a letter addressed to the Ministry of External Affairs, the Special Prosecutor stated: "The genocide started as soon as the Derg came to power and only stopped in May 1991, when the Derg was military (sic) defeated and removed from power."²⁸

139. Quoting the Respondent State submissions on the Merit, they observe that its own submissions disclose that: "All these unlawful acts

²⁶ See page 2 of letter dated April 14, 2004, written by Filke Selassie Wogderes to Commissioner Dr. Vera MlangazuwaChirwa.

²⁷ See James c. Mckinley Jr.: Ethiopia Tries Former Rulers In 70's Deaths, The New York Times, April 23, 1996, available on <http://query.nytimes.com/gst/fullpage.html?res=9D05E6D81F39F930A15757C0A960958260> , last accessed 02/04/08.

²⁸ See Letter Ref. No. 3-1/581/99 dated 12 August 2007 from the Office of the SPO and addressed to the Ministry of Foreign Affairs of the Deferal Democratic Republic of Ethiopia, especially paragraphs 1.1 to 1.10. It is attached to the Ethiopian Government's brief on the merits. The letter accuses the Derg officials committing heinous crimes.

were committed in violation of the existing domestic laws of the country and relevant international obligations of Ethiopia. These heinous criminal acts were committed in extremely sophisticated and covert circumstances. What makes the Dergue very unique is that it continued its atrocious acts up to its overthrow in May 1991”²⁹

140. It says that the Respondent State’s brief goes on to outline the ‘grave human rights violations’, ‘multitude of crimes committed against humanity’, ‘heinous criminal acts’, ‘heinous crimes of genocide and crimes against humanity’ committed all over Ethiopia by the Dergue regime.

141. The Respondent State argues that faced with such ‘heinous’ and ‘grave’ ‘crimes against humanity’ and ‘genocide’, the Respondent State took it for granted that the Victims were guilty and even portrayed them as ‘criminals’ even before they were tried. They further argue that the officials of Respondent State did not conceal their bias against the victims and the Special Prosecutor and his officials saw their task as prosecuting criminals thereby violating the principle on presumption of innocence enshrined in Article 7 (1) (d) of the Charter. They aver that the Dergue Trials looked more as revenge when “the ultimate desideratum should be to engrave the rule of law into the social fabric of Ethiopian society”.³⁰

c. Excessive long preventive detention or pre-trial imprisonment is a violation the the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter

142. The Complainants submit that the procedure adopted by the Respondent State in bringing the accused persons to justice failed to assign blame within a reasonable length of time. The Complainants argue that the Victims were detained for three years before their trial finally started in 1994. They state that the trial dragged on for more than thirteen years before a final judgment was reached in 2007. It avers that pre-trial detention of the Victims and their long continuous detention even after they were charged essentially meant substituting pre-trial detention for their punishment. They state that their long preventive custody thus lost its purpose as an instrument to serve the interests of sound administration of justice. They also argues that the prolonged imprisonment without conviction of the Victims for a period of about 16 years clearly violates their right to be presumed innocent in that it was meant as a sanction prior to the delivery of the judgment. The Complaint concludes that it is safe to say that the

²⁹ See Respondent State Brief [on Merits] paragraph 7, as in n 70.

³⁰ See Respondent State Response on Merits.

Victims were criminally punished by presuming their guilt even before they were heard, in violation of the principle of presumption of innocence established in Article 7 (1) (b) of the African Charter, Article XX of the Universal Declaration and rule XXX of the Principles and Guidelines on fair trial.³¹

Alleged Violation of Article 7(1)(d) – right to have ones cause heard.

Article 7(1)(d) of the African Charter states:

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

143. The Complainants allege that the Respondent State has violated the former Derg official's right to a fair trial by deliberately denying them the right to be tried by an impartial court within a reasonable time as enshrined in Article 7(d) of the African Charter.

144. The right to an impartial hearing within a reasonable time is one of the cardinal elements of the right to fair trial. The Article is specifically designed to ensure that the charges which the penal procedure places on the individual are not unremittingly protracted and do not produce permanent harm. An individual who is accused and held in custody is entitled to have his or her case resolved on a priority basis and conducted with diligence.

145. With regards to the Dergue trials, the Complainants submit that even though several causes have been attributed for delays in the trials, none of these causes are attributable to the former Dergue Officials. The Complainants state that the delay in rendering a judgment was therefore not due either to negligence or lack of interest on the part of the Victims rather, to the inactivity and failure of the State to proceed with the cases against the complainants with the diligence required and without undue delay. They aver that the Dergue officials, had their rights violated for several years and the Respondent State failed to put in place the necessary structures for them to be tried expeditiously. They state that the causes for the delay include the following:

- a. Dismantling of the Ethiopian Court system by the Government
- b. ambitious nature of the transitional justice ethiopia pursued
- c. absence of appropriate legal checkpoints

³¹ See also *Waldemar Gerónimo Pinheiro and José Víctor dos Santos v. Paraguay*, as cited in n 89 above, paragraphs 85-86.

- d. joinder of cases and accused persons
- e. the charges were not clear and specific which hampered their speedy trial
- f. other causes of delays in the dergue trials

Dismantling of the Ethiopian Court system by the Government

146. The Complainants state that immediately upon seizing power, the new Respondent State dismantled almost all state institutions, including the court system, by summarily dismissing close to 300 judges on the alleged ground that the judiciary had been an ally to the Dergue regime. Consequently they aver, the Respondent State could not afford a speedy trial to the Dergue officials due to shortage of judges. It argues that there were many instances where cases were adjourned for lack of quorum of judges.

147. The Complainants aver that at the beginning, the Special First Bench of the Federal High Court, composed of three Judges, was exclusively dealing with the trial of the Dergue officials. However, from the year 2001 there to the end of the trial date, it has been additionally charged with the equally complicated and numerous anti-corruption cases, thereby reducing significantly the amount of time the Bench could devote to the Dergue officials' trials. This additional assignment, it argues, was given to the Bench when the judicial authorities were fully aware of the fact that the Bench was exclusively constituted for the trial of the Dergue officials and that their trials have not been concluded ages after they were charged.

Ambitious Nature of the Transitional Justice Ethiopia Pursued

148. The Complainants aver that another cause is the ambitious nature of the model of transitional justice Ethiopia pursued. The SPO was established with two mandates: (1) to establish for public knowledge and for posterity a historical record of the abuses of the Mengistu regime and (2) to bring those criminally responsible for human rights violations and/or corruption to justice.³² They say from these two it was very clear that the SPO gave more attention and priority to its first mandate.³³

³² See Preamble to Proclamation No.22/1992.

³³ In this regard Y. Haile-Mariam observed: 'The recording function, while very important, cannot take precedence over the right to a speedy trial. It seems the Ethiopian court has two functions that may be contradictory--trying the accused and acting as a Truth Commission.'

149. By the opening of the trials in December 1994, the SPO had gathered 309,215 pages of relevant government documents, many with clear signatures of high ranking officials.³⁴ They state that in addition to this kind of documentation, forensic teams continued searching for and exhuming dozens of mass graves which allegedly contained the bodies of murdered civilians. They said that the SPO stated in February 1994 that it had "tens [sic] times more evidence than needed to successfully prosecute several of the detained and many of the exiles for serious criminal offenses." By August 1998, the Complainants allege, the SPO presented five hundred prosecution witnesses and warned that he had another five hundred to go. The Complainants argue that the SPO, therefore, insisted on and indeed introduced thousands of witnesses while a smaller number could establish and prove the charges against the former Dergue Officials. They argue that with such extensive documentary evidence, one thousand prosecution witnesses is excessive and unduly infringes upon the right of the accused to a fair and speedy trial. They aver that the SPO did not have to wait until it gathered 'ten times' more evidence to try the complainants bearing in mind the fact that they remained in detention throughout the investigation and trial of their cases.

Absence of Appropriate Legal Checkpoints

150. The Complainants state that the absence of appropriate legal checkpoints that could force the Respondent State to diligently and expeditiously work to investigate, charge and conduct trials also contributed to the delay. It states that the right to petition for writ of *habeas corpus*, for example, was not available to many of the victims and the statute of limitation with regard to the crimes the victims were alleged to have committed was removed.³⁵

Joinder of Cases and Accused Persons

151. The Complainants state that Articles 116 and 117 of the Ethiopian Criminal Procedure Code provide for joinder of charges and accused persons. They state that even though joinder *per se* is permissible, where there is conflict of interests that may cause serious prejudice to the accused or to the interests of justice, which is the case with the Dergue trials, the courts should order separate trials. They aver, for instance, that if the joinder of accused persons would cause undue delay to the trials of others, the court should not permit joinder and, if any, it should order for separate trials. They argue that in the Dergue Trials, the SPO brought cases joining several accused and

³⁴ A U.S. attorney who visited Ethiopia later wrote: 'Not since Nuremberg has such documentary evidence been assembled suggesting the degree of complicity on the part of senior government officials. In many instances, there were verbatim transcripts made of critical meetings. There are over 200 volumes of these transcripts as well as audio tapes of many of these meetings.'

³⁵ See Article 7 (3) of Proclamation No 22/1992.

counts together. They state that more than seventy accused persons were charged with numerous counts. They argue that one could find one accused charged with only one count while another accused in the same file charged with many counts.

152. The Complainants also state that the Dergue trials were also delayed because of the problem of joinder of cases, especially when it came to the hearing of witnesses. They state that where an accused person who was jointly charged with others was absent for various reasons, the other co-accused persons would have no option but to wait for his return because that accused person had the right to be tried in his presence and to cross-examine witnesses called in his case. They also state that where an accused who was jointly charged with the other accused persons was tried in absentia, the other accused persons were also obliged to wait until all the evidence was concluded, including the evidence adduced against the accused person (s) tried in absentia. They argue that these situations led to periodic adjournments of the case and thereby caused delays for the rest of the accused persons. The Complainants argue that the Dergue trials were, therefore, unduly delayed mainly because of the numerous adjournments occasioned by the joinder of the accused persons and the cases against them. They state that a large number of charges were unnecessary to secure a conviction because it created unnecessary delay in processing those defendants as well as those waiting for trial.

The charges were not Clear and Specific which Hampered their Speedy Trial

153. The Complainants state that the charges filed against the Dergue officials were not clear and specific and this hampered their speedy trial. In many respects, the indictments were not as clear and succinct as they needed to be for the accused to understand them. They state that this is a defect that goes to the form of the indictment and a violation of Articles 111 and 112 of the Ethiopian Criminal Procedure Code.³⁶ It says that the SPO, for example, filed charges of genocide, crimes against humanity and other crimes against the former high-level Dergue Officials.

154. The Complainants say that the accused were held for the murder of 1,823 persons, causing grave bodily injury to ninety-nine persons and the disappearance of 194 individuals. The Complainants say that the original Ethiopian indictments written in Amharic were more than two hundred pages long and alleged 211 criminal counts. They state that according to the indictment, persons who allegedly

³⁶ These articles of the Ethiopian Criminal Procedure Code (Articles 111 and 112) spell out the content and form of the charges and descriptions of the circumstances under which the crimes have been committed "so as to enable the accused to know exactly what charge he has to answer."

committed "offenses" cited in the Proclamation were charged with violations of Articles 281 and 286 of the Ethiopian Penal Code, which provides for the crime of genocide, crimes against humanity, and incitement to genocide and crimes against humanity. They further state that in the alternative, the defendants were charged with aggravated homicide under Article 522 of the Ethiopian Penal Code, grave willful injury under Article 538, abuse of power under Article 414 and unlawful arrest or detention under Article 416. It states that the indictments further accused the defendants of establishing themselves as a provisional military council or government and setting up committees and sub-committees for the purpose of committing genocide and crimes against humanity against various political groups whom the accused referred to as "anti-people" and "counter-revolutionary" in violation of Articles 32 and 281 of the Penal Code of Ethiopia.

155. The Complainants further state that the indictments alleged that the defendants incited and encouraged people to massacre thousands of members of different political groups in violation of Articles 32(1)(a) and 286(a) of the Penal Code. They argue that the fundamental problem with these indictments was that the details of the crimes were unclear because several concepts and legal doctrines were lumped together in one very long sentence.

Other Causes of Delays in the Dergue Trials

156. The Complainants state that apart from the above, there were other factors which caused the delays. Firstly, there was a delay by the Respondent State to decide how to handle the matter. They argue that the Respondent State made its decision to take the matter through the legal machinery after having arrested the former government officials for more than one year. When the Special Prosecutors Office was established, they say, some ex-officials had been jailed for 18 months without charges, taking almost five years for the prosecution finally to come up with a charge of genocide against the majority of the defendants. They say that even after the opening of the case against the Victims before the court there were still some problems associated with the prosecution. It also states that the failure of the prosecution to present evidence on time was the major problem. They aver that though the prosecutor gathered the necessary exhibits and they are found in its control, it was common to see the Prosecutor asking the court for additional adjournment to present them.
157. They submit that the Respondent State should be found liable for violating Article 7 (1) (d) of the Charter in the absence of evidence from it attributing the delay to the negligence or lack of interest of the complainants. They note that since the conduct of the Dergue officials

has not contributed to slowing down the proceedings, the delay in the proceedings can be only attributed to the Respondent State. they argue that the long and unnecessary delay in the Dergue Trials was occasioned by the inactivity and failure of the Respondent State to proceed with the trials with the diligence required and without undue delay.

158. They conclude that the Victims were entitled to have their case decided expeditiously and with priority by the national authorities. They urge the African Commission to find for the Victims that the length of time for which they had been held in custody pending trial and the number of years it took for the trial court to come up with a judgment on the merits to be excessive and unreasonable in the light of the Respondent State's constitutional principles and international commitments. This they say is in line with national and international jurisprudence, including that of the African Commission, on the matter.

Respondent State's Submissions on the Merits

159. The Respondent State for its part, argues that local remedies are yet to be exhausted. It argues that the Complainants have not yet completed the local remedies available to them and therefore submit that it is sufficient ground for dismissing the Communication.

160. The Respondent State further alleges that there is no conflict between the Penal Code of Ethiopia and the International Convention on the Prevention and Punishments of the Crime of Genocide. It argues that the Complainant have made a lengthy argument regarding a conflict between Article 281 of the Penal Code of Ethiopia and the 1948 International Convention on the Prevention and Punishments of Crimes of Genocide to which Ethiopia is party and argue that their acts would not constitute a criminal act.

161. The Respondent State further argues that firstly, the Complainants were wrong in arguing that political crimes should be seen as out of the purview of the Conventions as the Conventions do not prohibit anywhere in its provisions the inclusion of broader definitions under national laws. It underlines the fact that from the outset, the Penal Code was issued in 1957 well before the *Dergue* came to power and was not targeting any specific political or other group of *Dergue* Regime.

162. Secondly, the Respondent State underlines the fact that the *Dergue* officials have not denied that they have extra-judicially killed and harmed innocent civilians and that they were committing the crimes in violation of the existing criminal law to stay in power. It is worth

emphasizing, the Respondent state submits, that the *Dergue* amended the Penal Code in 1982 and issued a Special Penal Code through Proclamation No.114/1982 and did not bother to amend this part of the Penal Code including the provision they are contesting hereunder. The Respondent State explains that the *Dergue* were applying the Penal Code in Ethiopia until the downfall of their regime and contested its application when it was found that it came to regulate their past criminal activities.

163. Thirdly the Respondent State argues that the Federal High Court had rejected, with the appropriate legal reasoning, when the Complainants raised the Penal Code in their preliminary objections during the trial and finally, the Respondent State argues that even if one could allege that there could be a conflict between the Penal Code and the Convention, this type of issue that raises constitutional interpretation shall be the mandate of the House of Federation in accordance with Article 62(1) and 83(1) of the Constitution of the Republic of Ethiopia. Thus the Respondent State submits that the African Commission cannot replace national mechanisms for local remedies and could not be regarded as a tribunal substituting national court.

164. The Respondent State further argue that full judicial independence is guaranteed by domestic laws in Ethiopia as is provided for in Article 78 of the Constitution. It argues that in the Constitution further guarantees in Article 78(4) that special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established. The Constitution, the Respondent State submits, also guarantees in Article 79(2) and (3) that the courts from any level shall be free from interference by government or any other source and that the judges shall exercise their functions in full independence and shall be directed solely by law.

165. The Respondent State say that every person in Ethiopia has the right to access impartial and independent courts and judges having jurisdiction over any alleged infringements including violations of human rights. It further submits that the Complainants' submission regarding the partiality of Ethiopian judiciary is unfounded and not substantiated by any evidence whatsoever.

166. The Respondent State maintains that the African Commission should dismiss the Communication on the following grounds:

- For lack of exhaustion of local remedies because the subject matter of the petition before the African Commission is still pending before a national court and entertaining it will interfere in the appeal and might lead to contradictory findings with the Supreme Court;
- The Communication lacks *Locus Standi* because the Communication does not have a legal basis;
- The allegation that elimination of political groups that was perpetrated all over the country on a large-scale does not constitute genocide, fails to pass the criteria for criminal act constituting genocide and that the line of argument of the Complainants concerning the inconsistency between the Penal Code of Ethiopia and the International Convention on the Prevention and Punishments of the Crime of Genocide, does not hold water. According to the Respondent State, if there arises a conflict, the matter should be referred to the House of Federation in accordance with the Constitution of Ethiopia;
- It mentions the African Commission's Communication Procedure which clearly stipulates that a Communication which does not illustrate *prima facie* violations of the African Charter by invoking specific provisions of the Charter shall not be examined. In this regard the Respondent State underscores that a number of Communications presented to the African Commission were rejected because the Communications, while they cited provisions in the UN texts, failed to make any reference to the provisions of the African Charter;³⁷

167. The Respondent State also refer to the African Commission's Guidelines on Submitting Communications, where applicants are expected to indicate the courts where they sought domestic remedies and must attach copies of court judgments, writs of habeas corpus and other relevant documents. They submit that the Complainants have not attached any such evidences and documents and therefore their application fails to comply with the Guidelines for Communication to the African Commission.

168. Finally the Respondent State argues that under paragraph 23 of the Complainants' letter to the Chairperson of the African Commission, their prayer of relief makes it very clear that the Complainants do not see the African Commission as a source of their relief but are rather seeking the establishment of another impartial

³⁷ See Comm 68/92, 8/92 and 69/92.

independent investigative body, which is not within the mandate of the African Commission.

169. The Respondent State therefore request the African Commission to dismiss Communication 301/05 as unfounded for the foregoing reasons.

The African Commission's Decision on the Merits

170. The Complainants base their claims against the Respondent State on the violations of Articles 1, 2, and 7(1)(b)(d) of the African Charter.

171. **Alleged Violation of Article 1:** Article 1 of the African Charter requires all the States Parties to the African Charter to recognize the rights guaranteed therein and to adopt legislative and other measures to give effect to these rights, duties and freedoms.

172. **Alleged Violation of Article 2:** Article 2 of the African Charter further imposes a duty on States Parties to the African Charter to ensure that every individual enjoys the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

173. The Complainants discuss the two Articles together. They argue that the Respondent State's failure to recognize the rights of the former Dergue Officials enshrined in the African Charter violates Articles 1 and 2 of the African Charter.

174. The Complainants argue that Article 1 gives the African Charter a legally binding character³⁸ while Article 2 "abjures discrimination on the basis of any grounds set out, among them "language... national or social origin... birth or other status..."³⁹ it argues that States Parties to the African Charter are obliged not only to recognize the rights, duties and freedoms enshrined in it and to undertake to adopt legislative and other measures to give effect to them, but also to ensure that these rights are available to all without discrimination. Thus, by ratification, it argues, States are obligated to diligently undertake the harmonization of their legislation with the provisions of the Charter.⁴⁰ Where a State neglects to protect the rights in the Charter, this can

³⁸ See Communications 147/95 and 149/96, *Sir Dawda Jawara/The Gambia*, paragraph 46.

³⁹ Communication 211/98 *Legal Resources Foundation/Zambia* paragraph 63.

⁴⁰ Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others/Sudan*, paragraph 40

constitute a violation, even if the State or its agents are not the immediate cause of the violation.⁴¹

175. The Complainants state that the Respondent State ratified the African Charter on 15 June 1998 and is obligated to give effect to the rights guaranteed therein without discrimination. They argue that as stated by the Commission in *Purohit and Moore/The Gambia*,⁴² 'when a state ratifies the African Charter it is obligated to uphold the fundamental rights contained therein. Otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated.'

176. They argue that by failing to respect the Victim's right to a fair and speedy trial guaranteed in Article 7 of the African Charter, the Respondent State is in violation of Articles 1 and 2 of the African Charter. They further state that a violation of any provision of the African Charter automatically means a violation of Article 1.⁴³

177. The African Commission notes that in its submission of the Merits, the Respondent State did not specifically address the allegations made against it that it had violated Articles 1 and 2 of the African Charter.

178. According to the African Commission's long-standing practice, in cases of human rights violations, the burden of proof rests on the government (See, [ACHPR/59/91](#), [ACHPR/60/91](#), [ACHPR/64/92](#), [68/92](#), [78/92](#), [ACHPR/87/93](#), [ACHPR/101/93](#)).⁴⁴ If the government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at the least probable or plausible. On the information available, the Commission considers that there was a violation of Articles 1 and 2 the African Charter.

179. To reiterate in the instant matter if the government provides no evidence to contradict an allegation of human rights violation made against it, the African Commission will take it as proven, or at the least probable or plausible. This principle conforms with the practice of other international human rights adjudicatory bodies and the African Commission's duty to protect human rights. Since the Respondent State did not respond to the allegations, the African Commission must, regrettably, come to a conclusion based on the facts and opinions submitted by the Complainants.

⁴¹ See Communication 74/92, *Commission Nationale des Droits de L'Homme et des Libertes/Chad*, paragraph 20.

⁴² See Communication 241/2001, *Purohit Moore v. The Gambia*, paragraph 43.

⁴³ Communications 147/95 and 149/96, *Sir Dawda Jawara/The Gambia*, as in n 14 above.

⁴⁴ (See, [ACHPR/59/91](#), [ACHPR/60/91](#), [ACHPR/64/92](#), [68/92](#), [78/92](#), [ACHPR/87/93](#), [ACHPR/101/93](#)).

The African Commission,

180. Declares that the Respondent State has violated both Articles 1 and 2 of the African Charter.

Alleged Violation of Article 7(1)(b) – right to have ones cause heard.

Article 7(1)(b) of the African Charter states:

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

181. The Complainants argue that Respondent State has violated the rights of the former Dergue officials to be presumed innocent until proved guilty by a competent court or tribunal. It argues that the presumption of innocence is universally recognized⁴⁵ and proclaimed by all major legal systems of the world.⁴⁶ They state that the Respondent State violated the right to be presumed innocent enshrined in Article 7 (1) (b) of the Charter in the following ways:

- a. *Proclamation No. 22/1992 which provides for the establishment of the special prosecutors office violates the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter.*
- b. *. statements made by the Respondent State officials during and after the trial of the Victims violate the violates the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter.*
- c. *Excessive long preventive detention or pre-trial imprisonment is a violation the the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter.*

The African Commission's Analysis on Article 7(1)(b)

182. The Respondent State have not specifically addressed the allegation that *Proclamation No. 22/1992 violated the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter.*

183. It merely stated that after the Dergue regime was overthrown in 1991, cases had to be instituted in ten federal and regional courts against 6000 defendants. It stated that the complexity of bringing all those responsible for crimes committed during the Dergue regime would be

⁴⁵ Communication No. 218/98, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/ Nigeria*, as in n 26 above, paragraphs 40 -41.

⁴⁶ See Antonio Cassese, page 390. See also UDHR, ACHR, ECHR and the Statutes of the ICTY (Article 21 (3), the ICTR (Article 20 (3), and the ICC (Article 66).

a very daunting task. It stated that taking into account the voluminous nature of the cases, the Transitional Government of Ethiopia established an independent body known as the Special Prosecutor's Office on 8 August 1992 by Proclamation No 22/1992 for the purpose of conducting prompt investigation and bringing to trial arrestees as well as those persons responsible for having committed offences and at large within and outside the country.

184. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the African Commission reiterated that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The presumption of innocence, the African Commission further stated, places the burden of proof during trial in any criminal case on the prosecution. In its Resolution on the Right to Recourse and Fair Trial (1992), the African Commission further recognised the essential elements of a fair hearing to include, among other things, that persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court.⁴⁷

185. It is generally agreed that the presumption of innocence specifically entails that the person charged with a crime must be treated, within and outside criminal proceedings, as being innocent until proven guilty. As guaranteed in the African Charter, the principle constructs a presumption in favor of an individual accused of a crime according to which he or she is considered innocent until criminal responsibility is established in the case before the courts. In accordance with general opinion, which is also specifically confirmed by the European Court of Human Rights, the presumption of innocence is available not only to the defendant in the strictest sense of the word but also to an accused person prior to the filing of a criminal charge. A person has this right 'until proved guilty according to law', i.e., until conviction becomes binding following final appeal.⁴⁸ The presumption applies during the pre-trial investigations and should be considered even stronger with regard to a person against whom 'not even a prima facie case has been confirmed'.⁴⁹

186. The African Commission agrees with the Complainants that the principle of the presumption of innocence constitutes a fundamental principle which protects everybody against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court. It agrees that the Proclamation setting up the Special Prosecutor Office in itself clearly presumed the

⁴⁷ ACHPR /Res.4(XI)92.

⁴⁸ See Manfred Nowak, page 254.

⁴⁹ See Antonio Cassese, as in above.

complainants' guilt, thereby violating the principle of presumption of innocence. In *Communication 224/98: Media Rights Agenda v Nigeria*, the African Commission agreed with the Complainant that that prior to the setting up of the tribunal, the military Government of Nigeria organised intense pre-trial publicity to persuade members of the public that a coup plot had occurred and that those arrested in connection with it were guilty of treason. The African Commission agreed further that any possible claim to national security in excluding members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore in breach of the right to fair trial, particularly, the right to presumption of innocence.

187. As in the case of *Communication 224/98: Media Rights Agenda v Nigeria*, in the instant matter the Respondent State has not really contested the veracity of the Complainant's allegation. In this circumstance, the African Commission is obliged to accept this as the facts of the case and therefore finds the Respondent State in violation of Article 7(1)(b) of the African Charter.

188. Again, the Respondent State have not specifically addressed the allegation that Proclamation No. 22/1992 violated the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter. Statements made by the Respondent State officials during and after the trial of the Victims violate the violates the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter. The Respondent State have not specifically addressed the allegation in the Proclamation.

189. The Respondent State have not addressed the allegation that *statements made by the Respondent State officials during and after the trial of the Victims violate the violates the right to be presumed innocent as guaranteed in Article 7(1)(b) of the African Charter*

190. The presumption of innocence implies a right to be treated in accordance with this principle. In *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* the African Commission stated that the principle of the presumption of innocence constituted a fundamental principle, which protects everybody against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court.⁵⁰ By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt should be presumed until a charge has been proved beyond reasonable doubt. It is, therefore, a duty for all public authorities to

⁵⁰ See Communication No. 218/98, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, paragraphs 40 -41.

refrain from prejudging the outcome of a trial. The African Commission has found a violation of the right to be presumed innocent based on a State's negative pre-trial publicity. In the above mentioned case of *Media Rights Agenda/Nigeria*, the African Commission agreed with the Complainant that adverse negative publicity violated the defendants rights to fair trial.

191. In *Law Office of Ghazi Suleiman/ Sudan*⁵¹, the African Commission again examined the right to presumption of innocence. Here, the complainant alleged that high-ranking government officials and investigators had publicly asserted the defendants' guilt. Furthermore, it was alleged that government-orchestrated publicity stated that the defendants were behind a *coup* attempt against the state. Sudan did not conceal its bias against the defendants, showing 'open hostility towards the victims by declaring that 'those responsible for the bombings' will be executed'. Because Sudan had publicly pre-judged the defendants before a proper court had established their guilt, the African Commission found that the State had violated the right to be presumed innocent under Article 7(1)(b) of the African Charter.

192. This position of the African Commission is further reinforced by its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, where it stated that: 'Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect'. The African Commission agrees with the Complainant that the Dergue officials were treated as if they were guilty of the offences with which they were charged even before their guilt was established by a competent court. It agrees that statements by the Respondent State at the pre-trial and trial period clearly demonstrate the government's hostility and bias towards the Victims.

193. In its General Comment on Article 14, the Human Rights Committee stressed the duty of all public authorities to 'refrain from prejudging the outcome of a trial'.⁵² In particular, the Committee held

⁵¹ Communications 222/98 & 229/99.

⁵² The Complainant cite the seminal case of *Alenet de Ribomont v. France*, the applicant, a French national, was arrested in connection with the murder of a member of parliament. That same day, at a press conference, the Minister for the Interior and senior police officers made several conclusory statements asserting that the applicant was an instigator in the murder. Two French television channels reported these statements in their news programs. On 14 January 1977, the applicant was charged with aiding and abetting intentional homicide and taken into custody. In his complaint to the European Commission, the applicant claimed that the statements made by the Minister for the Interior violated his right to the presumption of innocence. In its defence, the government argues that the presumption of innocence could be infringed only by judicial authorities. The European Court held, firstly, that the right to presumption of innocence secured by Article 6 (2) may be infringed by public authorities other

that ministers or other influential government officials may, in this respect commit a violation of Article 14 (2) of the International Covenant on Civil and Political Rights. In the case of excessive 'media justice' or the danger of impermissible influencing of lay or professional judges by other powerful social groups, one also has to assume that the State is under a corresponding positive duty to ensure the presumption of innocence.⁵³ Similarly, in the Inter-American case of *Juan Humberto Sánchez vs. Honduras*⁵⁴, it was held that the right of the victim to presumption of innocence, set forth in Article 8(2) of the American Convention, was breached, as the head of the armed forces repeatedly referred to the victim as "nothing other than a criminal."

194. The African Commission agrees with the Complainants that the existence of a growing suspicion of a person in the course of the criminal proceeding is not *per se* contrary to the principle of presumption of innocence. Neither is the fact that such mounting suspicion justifies the adoption of safeguards--such as pre-trial incarceration--in regard to the suspect's person. However, these must be implemented with the 'discretion and circumspection necessary to respect the presumption of innocence'. As stated by the African Commission in its 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', public officials, are allowed to inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.⁵⁵

195. In the instant matter the Respondent State has again not contested the veracity of the Complainant's allegation. The African Commission is thus obliged to accept this as the facts of the case and therefore finds the Respondent State in violation of Article 7(1)(b) of the African Charter.

196. *Unlike the above two strands of how Article 7(b) had been violated, the Respondent State attempted to address the allegation of excessive long preventive detention or pre-trial imprisonment.*

than a judge or court. According to the Court's decision, Article 6 (2) does not prevent public authorities from discussing criminal investigations in progress, but it does require that they do so with the discretion and circumspection necessary to respect the presumption of innocence. In the case at hand, the Court found that the declaration of the applicant's guilt by some of the highest ranking police officials in the presence and under the authority of the Minister for the Interior not only encouraged the public to believe the applicant to be guilty, but also prejudiced the assessment of the facts by the competent judicial authority.

⁵³ See General Comment 13, paragraph 11 and Manfred Nowak (See n 111 above, page 254).

⁵⁴ Series C No. 99 [2003] IACHR 2 (7 June 2003).

⁵⁵ See Rule N of the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

197. In its submission, the Respondent State informs the African Commission that taking into consideration the volume of the cases under review and the time it would require to adjudicate on it, the Federal Supreme Court, as the highest organ in charge of the administration of justice in the country, was obliged to allocate a special Bench in the Criminal Divisions of the Federal High Court. It says that this was done to facilitate the process of fair and speedy trial in accordance with Article 19 (4) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia and the Criminal Procedure Code of Ethiopia. It stated that the process of allocating dedicated benches was pursued even within the criminal divisions of regional courts. In this regard, perpetrators of genocide crimes were being tried in courts in different parts of the country.
198. The Respondent State argues that Government even provided competent legal counsels to defendants at its own cost when they are unable to do so themselves, all in an attempt to facilitate the trial process as expeditiously as possible and respect the rights of the defendants for fair and speedy trial.
199. The Respondent State argues that after charges were filed, the defendants were then informed of the particulars of charges brought against them. It says that copies of the charges were given to them and the charges read to them as prescribed by the relevant provisions of the criminal procedure Code of Ethiopia. It says that the defendants in exercise of their rights to challenge the charges brought against them in accordance with Article 130 of the Criminal Procedure Code submitted their respective preliminary objections to the charges, which amounted to about 800 pages of preliminary objections.
200. The Respondent State says that the Special Prosecutor was then asked by the court to reply to the preliminary objections – and the whole process of reviewing all the preliminary objections and replies and the adjudication of the preliminary objections took the court about one year, that is, from November 1995 to September 1996. The Respondent state avers that after examining the defendants preliminary objections to the charges and replies of the Special Prosecutor, the Court dismissed most of the objections during its hearing on 9 October 1994 and ordered amendments of some of the charges.
201. It stated that the Special Prosecutor then amended the charges as per the court order and filed the amended charges to the court in November 1994. It says that the charges were again read out to the defendants by the court and they were asked to enter their plea. All of them pleaded not guilty. It says that thereafter, the court ordered the

Special Prosecutor to present its documentary evidences and witnesses. It says that the Prosecutor submitted a list of 2500 witnesses and the hearing of witnesses started in January 1996.

202. The Respondent State argues that defense lawyers cross-examined the witnesses presented by the Prosecutor during the various levels examinations and it was not uncommon for a witness to come back to the court for several weeks because of the endless cross-examinations by the defendants and their defence counsels. It says that the court ordered the Special Prosecutor to present witnesses twice every week on Tuesdays and Thursdays considering the length of time it took to examine one witness as well as the large amount of evidences to be presented, an exercise which took many years.

203. The Respondent State avers that in the year 2000, after presenting 726 witnesses, the Special Prosecutor, convinced that justice would be delayed if the hearing of the large number of witnesses from all over the country continued, applied to the court to stop the presentation of witnesses and started presenting other documentary evidences. It says that the court accepted the application of the Special Prosecutor and the presentation of witnesses came to an end on June 2000. By then, the Respondent State avers, the Special Prosecutor had presented 2,500 documentary evidences in 24 volumes with a 192 pages of explanation. In addition, it says, films, audios, and other technical evidences were presented against the defendants. However, the Respondent State say, the defendants were also given the evidence presented against them according to Article 20 (4) of the Federal Constitution as well as the criminal Procedure Code. The presentation of evidence was completed in December 2001 and the court set a date to review the files and render its verdict.

204. The Respondent State avers that after examining the charges and the evidence vis-à-vis the statements of defence brought by the defendants, the court issued a 587- page verdict on 21 January 2003, to prove the charges against the defendants. In its ruling, the Respondent State say, the court, then, called on the defendants to start their defenses and informed them that they could make defense statements in answer to the charges and call witnesses in their defence.

205. It says that one-year after the court's ruling, on 15 December 2003, the defendants brought a list of their own three hundred witnesses and documentary evidences. It argues that each defendant was alllowed to give his own testimony which was exceedingly long. The Respondent State says that 22 defendants presented 787 pages of documentary evidences, while those that opted to invidually present their own defence submitted 1,416 pages of evidences. It says that the

whole process of hearing the defendants was completed on 5 January 2005, at which time the court had set a date for judgement. It avers that to render its judgement, the court had to cautiously review a total of 3703 pages of evidence presented by both sides.

206. The Respondent State argues that after examining the evidences provided by the parties, the court had to cautiously review a total of 3,703 pages of evidences and written arguments. It says that on 11 December 2006, the judgment written in 792 pages found all the defendants, except one, guilty of the charges. It says that on 11 January 2007, the court found most of the defendants guilty as charged and sentenced them to twenty three years to life imprisonment. It also stated that as most were dissatisfied with the judgement they lodged appeals in March 2007.

207. As an accused person enjoys the presumption of innocence until proven guilty, it is only appropriate to establish whether he or she is innocent or guilty as rapidly as possible. Proceedings should therefore be as expeditious as possible, especially where the accused person is in prison. The African Commission is yet to come up with a decision on the matter. However, Articles 60 and 61 of the African Charter enjoins the African Commission to draw inspiration from, *inter alia*, other international law instruments and bodies.⁵⁶ By virtue of this Article, therefore, the Commission can draw inspiration from the decisions of the Inter-American Commission and Court, particularly bearing in mind the similarities within the two systems.

208. In the case of *Dayra María Levoyer Jiménez v. Ecuador*, the Inter-American Commission again emphasized a similar interpretation of the right to be presumed innocent under Article 8 (2) of the American Convention. It maintained that depriving Mrs. Levoyer Jiménez, the petitioner, of her liberty for a period that exceeded one half the maximum penalty established for the offence is a violation of the principle of presumption of innocence established in the American Convention. It noted that in the present case the imposition of preventive detention for an indefinite period was tantamount to anticipating the punishment of Mrs Jimenez. The Commission held further that 'universally accepted general principles of law prohibit anticipating the punishment before sentencing'. Stressing the interrelatedness of anticipatory punishment and violation of the presumption of innocence, the Inter-American Commission found that Ecuador had violated Jiménez's right to be presumed innocent.

⁵⁶ See for example Communication 211/98- *Legal Resources Foundation/Zambia*, paragraph 58 and Communication 155/96- *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria* paragraphs 48, 52, 57 and 63.

209. The African Commission agrees with the Complainants that the procedure adopted by the Respondent State in bringing the accused persons to justice failed to assign blame within a reasonable length of time. The Victims were detained for three years before their trial finally started in 1994. Their trial dragged on for more than thirteen years before a final judgment was reached in 2007. The pre-trial detention of the Victims and their long continuous detention even after they were charged essentially meant substituting pre-trial detention for their punishment. The African Commission agrees that their long preventive custody thus lost its purpose as an instrument to serve the interests of sound administration of justice. The prolonged imprisonment without conviction of the Victims for a period of about 16 years clearly violates their right to be presumed innocent in that it was meant as a sanction prior to the delivery of the judgment. As held by the Inter-American Court, the deprivation of a person's liberty for a disproportionate time is the same as serving a sentence in advance of the judgment. The African Commission agrees with the Complainant that the Victims were criminally punished by presuming their guilt even before they were heard, in violation of the principle of presumption of innocence established in Article 7 (1) (b) of the African Charter, Article XX of the Universal Declaration and rule XXX of the Principles and Guidelines on fair trial.⁵⁷

The African Commission,

210. Declares that the Respondent State has violated Articles 7(1)(b) of the African Charter.

Alleged Violation of Article 7(1)(d) – right to have ones cause heard.

Article 7(1)(d) of the African Charter states:

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

211. The Complainants allege that the Respondent State has violated the former Derg official's right to a fair trial by deliberately denying them the right to be tried by an impartial court within a reasonable time as enshrined in Article 7(1)(d) of the African Charter.⁵⁸ It states that the causes for the delay include the following :

- a. Dismantling of the Ethiopian Court system by the Government;
- b. ambitious nature of the transitional justice ethiopia pursued;
- c. absence of appropriate legal checkpoints;

⁵⁷ See also Waldemar Gerónimo Pinheiro and José Víctor dos Santos v. Paraguay.

⁵⁸ See submissions on Merit.

- d. joinder of cases and accused persons;
- e. the charges were not clear and specific which hampered their speedy trial;
- f. other causes of delays in the Dergue trials.

212. The African Commission will now proceed to analyse Article 7(1)(d) of the African Charter under the above rubrics to determine if a violation has occurred according to the allegation levied by the Complainant.

Dismantling of the Ethiopian Court System by the Government

213. In their submission on the Merits, the Complainants argue that the Respondent State immediately upon seizing power, dismantled almost all state institutions, including the court system, by summarily dismissing close to 300 judges on the ground that the judiciary had been an ally to the Dergue regime. Consequently, they state, the Respondent State could not afford a speedy trial to the Dergue officials due to shortage of judges. It argues that there were many instances where cases were adjourned for lack of quorum of judges.

214. The Respondent State did not address this allegation.

215. The African Commission, however, wishes to restate that the right to an impartial hearing within a reasonable time is one of the cardinal elements of the right to fair trial. Article 7(1)(d) of the African Charter not only provides that every person charged with a criminal offence has the right to be tried without undue delay/within a reasonable time by an impartial court or tribunal, but that an individual who is accused and held in custody is entitled to have his or her case resolved promptly.

216. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the African Commission stated that anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. The purpose of the review before a judicial or other authority includes to assess whether sufficient legal reason exists for the arrest; assess whether detention before trial is necessary; determine whether the detainee should be released from custody, and the conditions, if any, for such release; safeguard the well-being of the detainee; prevent violations of the detainee's fundamental rights; give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights.

217. The right to an impartial hearing within a reasonable time is further reinforced by the Commission's Resolution on Fair trial, which provides that persons arrested or detained or facing criminal charges shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released.⁵⁹ The African Commission is unable to determine whether the delays in promptly concluding the trial in the instant case was due partly to the fact that the Respondent State dismantled almost all state institutions, including the court system, as the Respondent State has not specifically addressed this allegation.

218. Accordingly, the African Commission is left with no alternative but to apply its long-standing practice that if the government provides no evidence, as in the instant matter, to contradict an allegation of human rights violation made against it, it will take it as proven, or at the least probable or plausible.

Ambitious Nature of the Transitional Justice Ethiopia Pursued

219. The Complainants aver that justice was delayed and therefore denied by the very ambitious nature of the model of transitional justice the Respondent State pursued. The Complainant allege that the SPO had stated in February 1994 that it had tens times more evidence than needed to successfully prosecute several of the detained and many of the exiles for serious criminal offences.

220. Unfortunately, the Respondent State again chose not fully respond to this particular allegation. It commented generally that because of the multitude of crimes committed against humanity all over the country and the complexity involved in bringing all those responsible for these crimes to justice, the task would become, at the very least, daunting. In a statement that seem to support the allegation of the Complainant, the Respondent State said that during the trial process, while the total number of prosecution witnesses presented in the Mengistu HaileMariam case alone was 726, those of the defendants were 303, making the total number of witnesses to be heard by the court to be 1029. It further stated that the documentary evidences presented by both parties became heavily insurmountable when they presented their replies and counter-replies in addition to the original charges constituting the several counts.

221. Again applying its long-standing practice, that in cases of human rights violations, the burden of proof rests on the government, and where the government provides no evidence, as in the instant matter, to contradict an allegation of human rights violation made

⁵⁹ See paragraph 2 (b) of ACHPR /Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial (1992).

against it, the Commission will take it as proven, or at the least probable or plausible.

Absence of Appropriate Legal Checkpoints

222. The Complainants allege that the absence of appropriate legal checkpoints that could force the State to diligently and expeditiously work to investigate, charge and conduct trials also contributed to the delay. Giving the example of the right to petition for writ of *habeas corpus* was not available to many of the victims and the statute of limitation with regard to the crimes the victims were alleged to have committed was removed.

223. The Respondent State did not fully address this allegation. It argued that full judicial independence is guaranteed by domestic laws in Ethiopia as is provided for in Article 78 of the Constitution. It argued that in the Constitution further guarantees in Article 78(4) that special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established. The Constitution, the Respondent State argues, also guarantees in Article 79(2) and (3) that the courts from any level shall be free from interference by government or any other source and that the judges shall exercise their functions in full independence and shall be directed solely by law.

224. The Respondent State submit that after establishing the SPO, the Office undertook examining detained defendants, requesting remand in custody to complete investigation and responding to *habeas corpus* demands in the relevant courts. It did not say what the outcome was.

225. Again applying its long-standing practice, that in cases of human rights violations, the burden of proof rests on the government, and where the government provides no evidence, as in the instant matter, to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at the least probable or plausible.

Joinder of Cases and Accused Persons

226. The Complainants argue that though Articles 116 and 117 of the Ethiopian Criminal Procedure Code provides for joinder of charges and accused persons, where there is conflict of interests that may cause serious prejudice to the accused or to the interests of justice, which is the case with the Dergue trials, the courts should order separate trials.

227. The Respondent State did not address this allegation.
228. Applying its long-standing practice, that in cases of human rights violations, the burden of proof rests on the government, and where the government provides no evidence, as in the instant matter, to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at the least probable or plausible.

Charges were not Clear and Specific which Hampered their Speedy Trial

229. The Complainants submit that the charges filed against the Dergue Officials were not clear and specific which hampered their speedy trial. They argue that in many respects, the indictments were not as clear and succinct as they needed to be for the accused to understand them. They aver that this is a defect that goes to the form of the indictment and a violation of Articles 111 and 112 of the Ethiopian Criminal Procedure Code.
230. The Respondent State did not fully address this allegation. It merely stated that once the investigation was completed, the Office of the SPO, began to charge the accused persons before the court of law. It stated that on 24 November 1994, the Office of the SPO brought a charge against Colonel Mengistu Hailemariam et al at the Federal High court. There were also thousands of charges of arbitrary arrest and illegal confiscation of property brought against the defendants.
231. An accused's ability to fully comprehend the charges brought against him is fundamental to a fair trial. In the instant matter, the African Commission will also state that in such serious matter it is imperative that both the accused and their counsel are able to fully understand the charges. The Complainants have for example alleged that the fundamental problem with the indictments was that the details of the crimes were unclear because several concepts and legal doctrines were lumped together in one very long sentence. The respondent state did not challenge that allegation.
232. In its Principles and Guidelines on the Right to Fair Trial, the African Commission outlined the factors relevant to what constitutes undue delay as including the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceedings. However, since the Respondent State chose not to fully address this allegation, the Commission will take the allegation as proven, or at the least probable or plausible.

Other Causes of Delays in the Dergue Trials

233. The Complainants allege that the Respondent State has also contravene Article 7(1)(d) by the failure of the Respondent State to decide how to handle the matter and the the failure of the prosecution to present evidence on time was the major problem.
234. The Complainants submit that what occurred in Ethiopia during the trial of the Dergue officials, was prejudice and lack of activity by the courts handling the cases and thus constituted a violation of Article 7 (1) (d) of the Charter. They argue that the Respondent State was already aware of the facts and seriousness of the cases against the Dergue officials but failed to act with the due diligence required and, thereby violating their right to a speedy trial. They further argue that the nature of the violations against the Victims entitles them to relief. The African Commission agrees. In keeping with the spirit of Articles 7(1)(d) of the African Charter an accused person in detention is entitled to have his case given priority and expedited by the proper authorities.
235. The African Commission also agrees with the Complainants that the complexity of a case should not debar domestic courts from acting with due diligence in dealing with a case on the Merits.⁶⁰ At any rate, it is the responsibilities of States Parties to the African Charter to organize their judiciary in such a way that the right guaranteed in Article 7 (1) (d) of the Charter can be effectively enjoyed. In *Mouvement Burkinabe des Droits de l'Homme et des Peuples/Burkina Faso*⁶¹ the African Commission found that 15 years without a decision on the relief sought or the fate of the people concerned or any action at all on the case amounted to a denial of justice and a violation of the right to an impartial trial within a reasonable time. In *Annette Pagnouille (on behalf of Abdoulaye Mazou)/ Cameroon*,⁶² the African Commission found the Cameroonian Government in violation of Article 7 (1) (d) of the Charter because Mr. Mazou did not have a judgment on his case which was before the Supreme Court for two years and he was not given any reason for the delay.
236. Similarly in *Alhassan Abubakar v Ghana*⁶³, the African Commission held that detaining the Complainant for seven years without trial before his escape “clearly violates the “reasonable time”

⁶⁰ See *Humberto Sánchez vs. Honduras* Series C No. 99 [2003] IACHR 2 (7 June 2003) where the Inter-American Court held, *inter alia*, at paragraph 130 of the decision that “even if this were a complex case regarding the merits, the domestic courts must act with due diligence to decide on hearing of the case”.

⁶¹ Communication No. 204/97.

⁶² Communication No. 39/90.

⁶³ Communication No. 103/93.

standard stipulated in the Charter.” In *CRP v Nigeria*⁶⁴, the Commission held, *inter alia*, that: in criminal case, especially one in which the accused is detained until trial, the trial must be held with all possible speed to minimize the negative effects on the life of a person who, after all, may be innocent. The Commission further held that since nearly two years can pass without even charges being filed there was an unreasonable delay and thus, the detainees rights under Article 7(1)(d) were violated.

237. Where there is unacceptable duration, it is the obligation of the Respondent State to adduce specific reasons for the delay. The African Commission agrees with the Complainants that the Respondent State has to prove that the case is complex to justify the delay under consideration. A mere affirmation that the delay was not excessive, as in the instant case, is not sufficient. The African Commission further agrees with the Complainants that even if the Respondent State did not intend to delay the proceedings the African Commission can still review the prejudice the delay has caused the defendants.

238. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the African Commission observed that ‘no circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial’.⁶⁵ In its Resolution on the Right to Recourse and Fair Trial, the Commission again recognized the right to a fair trial as essential for the protection of fundamental human rights and freedoms and further recommended State Parties to the African Charter to create awareness of the accessibility of the recourse procedure.⁶⁶

239. The Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa adopted by the Commission at its 26th Ordinary Session, held in Kigali, Rwanda, from 1-15 November 1999 also reiterates that: the right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore, the right to a fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogation from the rights it enshrines.⁶⁷

⁶⁴ Communication No. 153/96.

⁶⁵ See Principle R of the Principles and Guidelines entitled Non-derogability Clause

⁶⁶ See ACHPR /Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial (1992). See also Communication No. 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria*.

⁶⁷ This was further confirmed by the African Commission in Communication No. 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria*, as

240. The realization of the right to a fair trial is dependent on the existence of certain conditions. These include:⁶⁸the right to an impartial hearing, trial within a reasonable time and the presumption of innocence.

The African Commission,

Declares that the Respondent State has violated the right of the Victims to *be tried within a reasonable time by an impartial court or tribunal* as recognized in Article 7(1)(d) of the African Charter.

Recommendations

In view of the above, the African Commission finds that the Respondent State is in violation of Article 7(1)(b) and (d) of the African Charter. The African Commission recommends that the Respondent State:

- Pay adequate compensation to the Victims for violation of their right to be presumed innocent until proved guilty by a competent court or tribunal and to be tried within a reasonable time by an impartial court or tribunal as recognized in Article 7(1)(b) and (d) of the African Charter.
- Report on the implementation of these recommendations within three months from the date of notification.

Done in Banjul, The Gambia during the 50th Ordinary Session of the African Commission on Human and Peoples' Rights, 24th October - 7th November 2011.

above. The Commission in this case did not only label the right to a fair trial as non-derogable, but further reiterated that it is essential for the protection of all other fundamental rights and freedoms.

⁶⁸ See Robert P. Barnidge Jr, *The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and presumption of innocence*, African Human Rights Law Journal, Volume 4 No 1 2004, page 108.