



# **Fundamental rights and freedoms in the African Commission on Human and Peoples' Rights**

**An overview of the interpretation of the articles 6, 7, 9 and 26 of  
the African Charter on Human and Peoples' Rights.**

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## ***INTRODUCTION***

In May 2001, 11 former Eritrean Government members wrote an open letter to ruling party members criticising the Government. These individuals were part of a group of 15 officials of the Peoples Front for Democracy and Justice (hereafter, PFDJ). This group wrote in May 2001 an open letter criticising the Government. After the arrest of the eleven, they have been detained. The whereabouts of the detainees are currently unknown. They have reportedly not been given access to their families or lawyers. On November 26th 2001, a petition for *habeas corpus* is filed with the Eritrean Authorities. The right to petition a court of law for a Writ of Habeas Corpus is guaranteed in the draft Constitution of Eritrea.

Based on the noted facts, it might be concluded that a violation of the articles 6, 7, 9 and 26 of the African Charter on Human and Peoples' Rights occurs in the present case. Article 6 of the Charter guarantees for every individual the right to liberty and security of his person. Article 7 states that every individual shall have the right to have his case heard. Article 9 guarantees the freedom of expression. Furthermore, article 26 requires states to safeguard the independence of the courts and to establish appropriate national institutions to entrust the rights and freedoms constituted in the Charter. Client probably wants to file a complaint with the African Commission on Human and Peoples' Rights. In this report the case law of the African Commission will be examined in connection to the fore-mentioned articles. In conclusion, it will be explored whether the interpretations of the Commission apply to the present case. In this report, the possibilities for compensation and release for the alleged victims will be left out of consideration.



**Chapter 1      ARTICLE 6 ACHPR**

Article 6 of the African Charter on Human and Peoples' Rights stipulates:

*"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".*

Possibility for appeal in the case of an arrest should exist before an independent body. The court that ordered the arrest can not be regarded as being independent.<sup>1</sup> In case the statements of the parties on the facts diverge seriously, the Commission is reluctant in the judgement of those facts. The Commission leaves the responsibility to determine the facts to the national courts.<sup>2</sup> It has to be noted that it is uncertain whether the Commission in general is reluctant to judge the facts.

The Court, in its case law, established a few criteria which are applicable in considering whether or not an arrest can be considered as arbitrary. In case an arrest can be considered to be arbitrary, a violation of article 6 occurs. Not only an arbitrary detention or arrest causes a violation of article 6. A retroactive prohibition will also contravene this article.

The establishment of a tribunal under a decree may constitute a violation of article 6 of the Charter when it is alleged that there are no appropriate possibilities to appeal against the decisions of the tribunal before a court of law.<sup>3</sup> The detention of individuals for the reason that they protested against being tortured, causes a violation of article 6.<sup>4</sup> The arrest of

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<sup>1</sup> Communications 64/92, 68/92, 78/92, *Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa v. Malawi* (8th Report), para. 108.

<sup>2</sup> Communication 40/90, *Njoku v. Egypt*, November 11th, 1997.

<sup>3</sup> Communications 137/94, 139/94, 154/96, 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr., Civil Liberties Organisation v. Nigeria*; decision taken at the 24th session, October 1998. Comment by Rachel Murray, *South African Journal on Human Rights*, Vol. 17, part 1, 2001, p. 165. The Commission ruled that "to arbitrarily hold people critical of the government for up to three months without having to explain themselves and without the opportunity for the complainant to challenge the arrest and detention before a court of law" is a violation of article 6.

<sup>4</sup> Communications 25/98, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des droites de l'homme, les Temoins de Jehovah v. Zaire*, taken at the 18th



believers of a particular religion without any charges being brought, constitutes a violation of article 6<sup>5</sup>, as well as arrests and detentions based on ethnic origin alone.<sup>6</sup> An arrest based on such grounds has to be considered as arbitrary.

A detention is considered to be arbitrary when it is established that the applicant was held in prison after the expiration of his sentence.<sup>7</sup> In case the applicants are granted state pardons but still not freed, a violation of article 6 occurs.<sup>8</sup> Particularly in case of elections, the detention of individuals without any charges being brought constitutes an “arbitrary deprivation of their liberty” and can therefore be considered as a violation of article 6.<sup>9</sup> A detention of a political figure for a long time period without charge or trial is considered arbitrary and thus violates article 6.<sup>10</sup>

A retroactive prohibition will not only violate article 7(2) but will also violate article 6.<sup>11</sup> A government may state in a written provision the criteria, which have to be fulfilled before the police can arrest someone. These criteria, however, may not permit individuals to be arrested

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Ordinary Session. Review of the African Commission on Human and Peoples' Rights, Ninth Annual Activity Report of the Commission, p. 183. In this case, it was alleged that 15 persons were tortured by a Military Unit. When they protested their treatment, they were detained and held indefinitely.

<sup>5</sup> *Ibid.* In this case, several Jehovah's Witnesses were persecuted. The Commission stated: "*The government has presented no evidence that the practice of their religion in any way threatens law and order. The arbitrary arrests of believers of this religion likewise constitutes a contravention of article 6 (...)*".

<sup>6</sup> Communications 27/89, 46/91, 49/91, 99/93, *Organisation Mondiale Contre La Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Inter africaine des Droits de l'Homme v. Rwanda*, para. 28. Taken at the 20th Ordinary Session, October 1996. Review of the African Commission on Human and Peoples' Rights, Tenth Annual Activity Report of the ACmHPR.

<sup>7</sup> Communication 39/90, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, Taken at the 21st Ordinary Session, April 1997. Review of the African Commission on Human and Peoples' Rights, Tenth Annual Activity Report of the ACmHPR, p.142.

<sup>8</sup> Communication 148/96, *Constitutional Rights Project v. Nigeria*, November 15th, 1999, para. 33.

<sup>9</sup> Communication 102/93, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, para. 55, Review of the African Commission on Human and Peoples' Rights, Twelfth Annual Activity Report of the ACmHPR, p. 112. In this case, applicants were detained for more than three years since the time of the elections without charges being brought. According to the Commission, this constituted an arbitrary deprivation of their liberty and thus violated article 6.

<sup>10</sup> *Supra* n. 1. In this case, the victim was held in detention for 12 years. The fact that he had no access to the courts violated article 6. International and Comparative Law Quarterly, Vol. 46, April 1997: Catherine J. Redgwell, *The African HR Commission*, p. 429.

<sup>11</sup> Communication 101/93, *Civil Liberties Organisation in respect of Nigerian Bar Association v. Nigeria* (8th Report).



for vague reasons.<sup>12</sup> Individuals may only be arrested for actions they presumed to have committed, not only upon mere suspicion.<sup>13</sup>

The African Charter contains in its provisions many ‘clawback clauses’. Article 6 provides for an example of a clawback clause. This article states that “reasons and conditions previously laid down by law” can limit the right to liberty. There has been some criticism on the clawback clauses. The core of this criticism is that ‘clawback’ clauses could render previously granted rights meaningless.<sup>14</sup> The African Commission tends to construe the ‘clawback’ clauses in favour of human rights.

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<sup>12</sup> Communications 48/90, 50/91, 52/91, 89/93; *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of Episcopal Conference in East Africa v. Sudan*, November 15th, 1999, para. 107.

<sup>13</sup> *Ibid*; *Pagnouille (on behalf of Mazou) v. Cameroon*, 21th Ordinary Session, April 1997.

<sup>14</sup> Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights, Practice and Procedures*, Martinus Nijhoff Publishers, 1996, p. 176.



**Chapter 2**      **ARTICLE 7 ACHPR**

Article 7 of the African Charter on Human and Peoples' Rights reads:

*"1. Every individual shall have the right to have his case heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.*

*2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender".*

Article 7 is often violated in addition to violations of other rights guaranteed in the Charter, such as arbitrary detentions.<sup>15</sup> A violation of article 7 occurs when the state failed to permit the applicant to pursue administrative measures.<sup>16</sup> The state should provide for the opportunity for an individual to be heard by the national judicial authorities. Depriving an applicant from the opportunity to have his case heard in the national courts and the impossibility of any appeal in the national courts constitutes a violation of article 7.<sup>17</sup>

There ought to be enough possibilities to appeal against decisions in the state itself, even when the punishments do not constitute violations of human rights. This means that the state may not foreclose "any avenue of appeal to competent national organs in criminal cases (...)".<sup>18</sup>

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<sup>15</sup> *Supra* n. 1.

<sup>16</sup> Communication 212/98, *Amnesty International v. Zambia*, Decision taken at the 25th session, May 1999, Comment by Rachel Murray, *South African Journal on Human Rights*, Vol. 17, part 1, 2001, p. 170.

<sup>17</sup> *Ibid.*, p. 171.

<sup>18</sup> Communications 60/91 and 87/93, *Constitutional Rights Project (in respect of Waheb Akamu, G. Adegan and others) and Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v. Nigeria*. (8th Report).



The right following from article 7(1) to have one's case heard includes the duty of the state "to respect and follow" the judgements of national courts.<sup>19</sup> When the individuals are expelled from the country without being heard for a national court, a violation of article 7(1) occurs.<sup>20</sup> Often, special tribunals are constituted. The jurisdictional power of the normal national courts is often ousted by the institution of such tribunals. The ousting of a court's jurisdiction by the government mostly constitutes a violation of article 7(1).<sup>21</sup> The statement of having not enough resources to man the normal law courts is not considered to be a justification for certain tribunals. A high volume of cases caused by a so-called "breakdown of law and order" can not be a valid excuse for instituting a special tribunal.<sup>22</sup>

When it is established that applicant had no opportunity to seize the national courts to challenge his detention or deportation, a violation of article 7(1)(a) occurs.<sup>23</sup> The nullification of suits in progress constitutes a violation of article 7(1)(a).<sup>24</sup> A violation of article 7(1)(a) is also established in case the right to file for habeas corpus is denied to the accused individuals.<sup>25</sup> In case there is a prohibition on litigation against a governing body, this, also, is a violation of article 7(1)(a).<sup>26</sup>

Detention of an individual only because it is presumed that he is going to cause problems in the future is a violation of the right to be presumed innocent guaranteed by article 7(1)(b).<sup>27</sup>

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<sup>19</sup> Communications 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Decision taken at the 24th session, October 1998, Comment by Rachel Murray, *South African Journal on Human Rights*, Vol. 17, part 1, 2001, p. 161.

<sup>20</sup> *Supra* n. 6, para. 34.

<sup>21</sup> *Supra* n. 19. "(...) for a government to oust the jurisdiction of the courts on a broad scale reflected a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law". Communication 129/94, *Civil Liberties Organisation v. Nigeria*, para. 14: "The ousting of jurisdiction of the courts of Nigeria (...) constitutes an attack of incalculable proportions of article 7".

<sup>22</sup> Communication 151/96, *Civil Liberties Organisation v. Nigeria*, para. 36. November 15th, 1999.

<sup>23</sup> Communication 71/92, *Rencontre Africaine pour la Defence des Droits de l'homme v. Zambia*. Taken at the 20th Ordinary Session, October 1997, Review of the African Commission on Human and Peoples' Rights, Tenth Annual Activity Report of the ACmHPR, p. 151, para. 29.

<sup>24</sup> Communications 140/94, 141/94, 145/95, *Constitutional Rights Project, Civil Liberties Organisation, Media Rights Agenda v. Nigeria*, November 15th, 1999.

<sup>25</sup> Communication 153/96, *Constitutional Rights Project v. Nigeria*, para. 35. November 15th, 1999 and Communications 143/95, 150/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*. The Commission stated: "Habeas corpus has upcome a fundamental facet of common law legal systems. The writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and demand that the authority either release or justify all imprisonment".

<sup>26</sup> *Supra* n. 11.





Article 7(1)(c) is violated in case the defendants at a criminal trial are not represented by counsel.<sup>28</sup> The right to counsel is essential for the assurance of a fair trial. A tribunal may never have the power to veto the choice of counsel of defendants. As the Commission states, “this is an unacceptable infringement of this right. There should be an objective system for licensing advocates, so that qualified advocates cannot be barred from appearing in particular cases”.<sup>29</sup> Article 7(1)(c) is also violated in case the applicant is denied access to his relatives or to a counsel.<sup>30</sup> The individual has to get informed of the nature of his offence and of the reasons for his arrest and detention. If this is not the case, a violation of article 7(1)(c) occurs. The complainant is entitled to counsel not just during the trial but already on the moment of detention.<sup>31</sup>

A court of which the majority of the members belong to the executive branch of the government, being members of the armed forces, police and judiciary, is not in conformity with article 7(1)(d).<sup>32</sup> The composition of a tribunal or court may not create the impression, if not the actual, lack of impartiality.<sup>33</sup> This means that it is prohibited for the executive branch to appoint judges case by case.<sup>34</sup>

Article 7(1)(d) is violated in case in a time period of two years, no hearing or projected trial date is pronounced.<sup>35</sup> A time period of seven years detention without trial also, clearly, violates the “reasonable time” standard constituted in article 7 (1)(d).<sup>36</sup>

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<sup>27</sup> *Supra* n. 7, p. 142, *para.* 21.

<sup>28</sup> Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v. Nigeria*. (8th Report). The defence counsel had to resign from the trial after harassment. The trial continued without the defence counsel and a judgment was given.

<sup>29</sup> *Supra* n. 1, *para.* 123.

<sup>30</sup> Communication 215/98, *Rights International v. Nigeria*, November 15th, *para.* 32. In this case, the applicant was only granted a five minutes discussion with his grandfather. However, the argument that there exists a right to have contact with any relatives has only been addressed upon before the Commission in one case.

<sup>31</sup> Communication 144/95, *Courson (on behalf of Moto) v. Equatorial Guinea*, November 11th, 1997.

<sup>32</sup> *Supra* n. 18, The Commission stated that “it was improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles”.

<sup>33</sup> *Supra* n. 1, *para.* 130; *Constitutional Rights Project (in respect of Akamu, Adegade and Others) v. Nigeria*, October 2nd, 1995; *Constitutional Rights Project (in respect of Lakwot and 6 others) v. Nigeria*, October 2nd, 1995.

<sup>34</sup> *Supra* n. 22, *para.* 39.

<sup>35</sup> *Supra* n. 9, *para.* 19.

<sup>36</sup> Communication 103/93, *Alhassan Abubakar v. Ghana*, Taken at the 20th Session, October 1996, Review of the African Commission on Human and Peoples’ Rights, Tenth Annual Activity Report of the ACmHPR.



Article 7(2) prohibits retroactivity, even if it is clear that no individual had yet suffered from the provision that is declared retroactive.<sup>37</sup> A person can not be convicted in case he violated a legal norm that did not exist before he committed his act.<sup>38</sup>

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<sup>37</sup> *Supra* n. 19.

<sup>38</sup> Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights, Practice and Procedures*, Martinus Nijhoff Publishers, 1996, p.129



**Chapter 3      ARTICLE 9 ACHPR**

Article 9 of the African Charter on Human and Peoples' Rights reads:

- "1. Every individual shall have the right to receive information.*
- 2. Every individual shall have the right to express and disseminate his opinions within the law"*

According to the Commission, article 9 "reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the public affairs of his country".<sup>39</sup> The Commission held that "article 9 does not seem to permit derogation, no matter what the subject of the information or opinions and no matter the political situation of a country".<sup>40</sup> The failure to provide individuals with reasons for, for example, their deportation, constitutes a violation of article 9(1).<sup>41</sup> Since the Charter does not provide for limitations of the right to express one's opinions, this kind of limitations are not justified by emergencies or special circumstances.<sup>42</sup> The only legitimate reasons for limitations on the rights and freedoms of the African Charter can be found in article 27(2).<sup>43</sup> National law can not set aside the right to express one's opinions guaranteed at the international level.<sup>44</sup> The prohibition of a publication without giving the writer the opportunity to defend himself and without the clarity that the publication is a threat to national security or public order, constitutes a violation of article 9(2). Harassment of the press not only has the effect of hindering certain persons in disseminating their opinions, but also poses a risk that journalists and writers will subject themselves to self-censorship in order to be allowed to carry on their work.<sup>45</sup>

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<sup>39</sup> *Supra* n. 19.

<sup>40</sup> *Supra* n. 24.

<sup>41</sup> *Supra* n. 16.

<sup>42</sup> *Supra* n. 19. Any limitations of the right to disseminate one's opinion can not set aside the right to express one's opinions. As the Commission states it, "*this would make the protection of the right to express one's opinions ineffective*". International human rights law must have precedence over national laws and therefore limitations must conform with the Charter. Therefore, limitations can only be permitted in conformity with article 27(2). The Commission held that "*a limitation may never have as a consequence that the right itself becomes illusory*".

<sup>43</sup> Article 27(2) stipulates: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest".

<sup>44</sup> *Supra* n. 24.

<sup>45</sup> *Supra* n. 24.



The Commission also found that there is an assumption that "criticism on the government does not constitute an attack on the personal reputation of the head of the state (...). People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether".<sup>46</sup>

Article 9 provides for another example of a "clawback clause". Article 9 namely guarantees the freedom of expression "within the law".

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<sup>46</sup> *Supra* n. 19. The Commission ruled that: "People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether".



**Chapter 4      ARTICLE 26 ACHPR**

Article 26 ACHPR reads:

*"States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter".*

Article 26 is closely related to article 7 of the Charter but is meant to stress the States' Parties obligations.<sup>47</sup> The state has the responsibility to provide for courts that are impartial. By not doing so, the government violates article 26.<sup>48</sup> The state is obliged to establish and protect the national courts. The ouster of the courts' jurisdiction by the Government therefore can constitute a breach of article 26, as well as a breach of article 7(1)(d).<sup>49</sup> The government is in violation of article 26 in case it fails to recognise a grant for bail by the national court. Ignoring a decision militates against the independence of the judiciary.<sup>50</sup> A change of government does not affect the existence of responsibility for human rights abuses by the previous administration.<sup>51</sup>

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<sup>47</sup> Communication 129/94, *Civil Liberties Organization v. Nigeria*, decision taken at the 17th Session, March 1995, para. 15. Review of the African Commission on Human and Peoples' Rights, Ninth Annual Activity Report of the Commission, p. 194. *"This article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's right against the abuses of State power.*

<sup>48</sup> *Supra* n. 1, para. 130.

<sup>49</sup> *Supra* n. 47, para. 19.

<sup>50</sup> Communications 143/95, 150/96: *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, November 15th, 1999, para. 55.

<sup>51</sup> *Achutan (on behalf of Banda) v. Malawi*, October 2nd, 1995, *Amnesty International (on behalf of Chirwa) v. Malawi*, October 2nd, 1995. This general principle applies to any breach of the African Charter.



## **CONCLUSION**

In so far as can be concluded from the known facts in the present case, there might be a violation of the articles 6, 7, 9, and 26 of the African Charter.

An arrest or detention is considered to be arbitrary when it is established that the applicants were arrested or detained without any charges being brought. A detention of a political figure for a long time period without charge or trial is also considered to be arbitrary. An individual can not be arrested only upon suspicion. For this reasons, it might be concluded that, in this case, article 6 is violated. Possibility for appeal in the case of an arrest should exist before an independent body. In this case, there has been no possibility to appeal at all. This, also, constitutes a violation of article 6.

In the present case, there might be a violation of artikel 7(1)(a), because there has been no possibility of appeal for the victims in the national courts to challenge their detention. Article 7(1)(a) is violated in the case a file for *habeas corpus* is denied to the accused individuals. This, also, may be true in the present case.

Article 7(1)(c) is violated in case the defendants at a criminal trial are not represented by council or in case the applicant is denied access to his relatives. The complainant is entitled to council not just during the trial but already on the moment of detention. In the present case, the alleged victims were not defended by council of their choise. Probably, access to their families was denied. Therefore, it might be concluded that artikel 7(1)(c) is violated.

In the present case, the alleged victims were probably not informed about the nature of their offence and the reasons for the arrest and the detention. Therefore, it may be concluded that article 9(1) is violated.

It might be argued that, in the present case, article 9(2) is violated. The eleven members of the former government wrote an open letter criticising the government. This might be a breach of express and disseminate one's opinion, guaranteed in article 9(2).



Article 26 considers the State Parties obligations. Article 26 requires states to safeguard the independence of the courts and to establish appropriate national institutions to entrust the rights and freedoms constituted in the Charter. In the present case, it might be argued that Eritrea did not provide for independent courts and appropriate national institutions to entrust the rights and freedoms guaranteed in the Charter for the alleged victims.