

**Rapporteur:**

31<sup>st</sup> Session: Commissioner Rezag Bara  
32<sup>nd</sup> Session: Commissioner Rezag Bara  
33<sup>rd</sup> Session: Commissioner Rezag Bara  
34<sup>th</sup> Session: Commissioner Rezag Bara

**Summary of Facts**

1. The complaint is filed by Dr. Liesbeth Zegveld, an international lawyer at a Netherlands based firm - **Böhler Franken Koppe De Feijter**, and Mr. Mussie Ephrem, an Eritean living in Sweden.
2. The Complainants allege that 11 (eleven) former Eritrean government officials, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie were illegally arrested in Asmara, Eritrea on 18<sup>th</sup> and 19<sup>th</sup> September 2001 in violation of Eritrean laws and the African Charter on Human and Peoples' Rights. They were part of a group of 15 senior officials of the ruling Peoples Front for Democracy and Justice (PFDJ) who had been openly critical of the Eritrean Government policies. In May 2001, they wrote an open letter to ruling party members criticising the government for acting in an "illegal and unconstitutional" manner. Their letter also called upon "all PFDJ members and Eritrean people in general to express their opinion through legal and democratic means and to give their support to the goals and principles they consider just." The government subsequently announced that the 11 individuals mentioned above, on whose behalf the present complaint is being filed, had been detained "because of crimes against the nation's security and sovereignty."
3. The complaint also alleges that the detainees could be prisoners of conscience, detained solely for the peaceful expression of their political opinions. Their whereabouts is currently unknown. The Complainants allege that the detainees may be held in some management building between the capital Asmara and the port of Massawa. They have reportedly not been given access to their families or lawyers. The Complainants fear for the safety of the detainees.
4. The Complainants state that they have made a request for *habeas corpus* to the Minister of Justice of Eritrea. They claim that they could not submit the same to the courts, as the place of detention of the 11 former officials was unknown. They allege that in the *habeas corpus* the Eritrean authorities were asked, among others, to reveal where the 11 detainees were being held, to either charge and bring them to court or promptly release them, to guarantee that none of them would be ill treated and that they have immediate access to lawyers of their choice, their families and adequate medical care. The Complainants allege that no reaction has been received from the Eritrean authorities.

5. Together with their complaint the Complainants submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission.

### **Complaint**

6. The Complainants allege violations of Articles 2, 6, 7(1), and 9(2) of the African Charter on Human and Peoples' Rights.
7. The Complainants pray that should the detainees be tried, the trial should be held in accordance with international human rights standards and without recourse to the death penalty. They claim that such a trial should not be before the Special Court, which they allege fails to meet international standards of fair trial.

### **Procedure**

8. The complaint was dated 9<sup>th</sup> April 2002 and received at the Secretariat on 9<sup>th</sup> April 2002 by fax, and on 9<sup>th</sup> and 11<sup>th</sup> April 2002 by email.
9. On 19<sup>th</sup> April 2002, the Secretariat wrote to the Complainants acknowledging receipt of the complaint, and informing them that their request for provisional measures was noted and would be acted upon accordingly.
10. On 3<sup>rd</sup> May 2002, the African Commission wrote a letter of appeal to His Excellency Issayas Afewerki, President of the State of Eritrea, respectfully urging Him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the Commission.
11. At its 31<sup>st</sup> Ordinary Session held from 2<sup>nd</sup> to 16<sup>th</sup> May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.
12. On 20<sup>th</sup> May 2002, the Ministry of Foreign Affairs of the State of Eritrea responded to the Commission appeal and confirming to the latter that the alleged victims on whose behalf the complaint was filed had their quarters in appropriate government facilities, had not been ill-treated, have had continued access to medical services and that the government was making every effort to bring them before an appropriate court of law as early as possible.
13. On 28<sup>th</sup> May 2002, the Secretariat wrote to the Complainants and the Respondent State of the Commission's decision to be seized of the matter and requested them to forward their submissions on admissibility before the 32<sup>nd</sup> Ordinary Session of the Commission.
14. The Secretariat of the African Commission forwarded the Ministry's response to the Chairperson of the African Commission on 7<sup>th</sup> June 2002 and to the Complainants on 18<sup>th</sup> June 2002.
15. On 25<sup>th</sup> October 2002, the African Commission wrote, by way of follow up on its urgent appeal in the matter, to the Respondent State reminding it that it was the responsibility of the Member State's General Prosecutor to bring the accused before a competent court of law in accordance with the rules guaranteeing fair trial under relevant national and international instruments.
16. The two parties made submissions on admissibility.

17. At its 33<sup>rd</sup> Ordinary Session held from 15<sup>th</sup> to 29<sup>th</sup> May 2003, in Niamey, Niger, the African Commission heard oral submissions from both parties to the communication and decided to declare the communication admissible.
18. On 10<sup>th</sup> June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and requested them to forward their submissions on the merits of the communication within 3 months.
19. The Chairperson of the African Commission forwarded a letter dated 10<sup>th</sup> June 2003 appealing to H.E the President of Eritrea to intervene in this matter and urge the authorities holding the 11 individuals to release them or bring them before the courts in Eritrea.
20. At its 34<sup>th</sup> Ordinary Session, held from 6<sup>th</sup> to 20<sup>th</sup> November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

## **LAW**

### **Admissibility**

21. The admissibility of communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which must generally be fulfilled by a Complainant for a communication to be declared admissible.
22. At issue in the present communication is whether the Complainants have pursued and exhausted the domestic legal remedies of Eritrea, and if not, whether the exception to the exhaustion of domestic remedies rule should apply. This issue of exhaustion of domestic remedies is governed by Article 56(5) of the African Charter and it provides -:  
Communications ... received by the Commission shall be considered if they-:  
(5) *are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged*
23. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and is premised on the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.
24. In determining whether this communication should be declared admissible or otherwise, the African Commission must have regard to the arguments put forward by the Complainants and the Respondent State.
25. The Complainants submit they have attempted to exhaust local remedies in Eritrea. They state that on 26<sup>th</sup> November 2001 and on 9<sup>th</sup> April 2002, they submitted a *habeas corpus* request through the Eritrean Minister of Justice asking the Eritrean Authorities to disclose where the 11 detainees were being held and why. The Complainants also requested that the detainees be brought to court and charged in accordance with the law, however, there was no response to their request. A similar request was made on 26<sup>th</sup> June 2002 (which is after the African Commission was seized of their complaint) to the Eritrean High Court in Asmara to which there was no reply either.

26. In her oral submissions during the 33<sup>rd</sup> Ordinary Session of the African Commission, Zegveld stated that in an attempt to access the local courts, they had requested locally based legal practitioners (whom she declined to name) to bring the matter before the local courts. However, the said lawyers later informed her that they would not be able to pursue the detainees' case in the domestic courts for fear of persecution by the authorities and for fear of jeopardising their legal practice.
27. The Complainants further submit that for more than 18 months, the 11 detainees have been held in detention without formal charges and with no access to their lawyers or families thus rendering them unable to seek legal or administrative redress. Furthermore, there has been no response from the government of Eritrea or High Court of Asmara, in relation to the Complainants' requests of 26<sup>th</sup> November 2001 and 9<sup>th</sup> April 2002.
28. Under the circumstances presented above, the Complainants aver that the requirement to exhaust local remedies can no longer apply because even where such remedies would have been existent they have been unduly prolonged in this case.
29. The Complainants refer the African Commission to a decision of the European Court of Human Rights in *Ocalan vs Turkey*<sup>1</sup> where the court held that Ocalan's isolation and the fact that the Turkish police obstructed his access to lawyers made it impossible for the applicant to have effective recourse to a domestic remedy under Turkish Law.
30. In its written submissions, the Respondent State argues that the Complainants addressed their *habeas corpus* request to the Minister of Justice who is a member of the Executive branch with no capacity to address and take decisions on this matter either in substance or in procedure. They submit that only the judiciary has the authority to take action on any civil, criminal and other issues of judicial nature including, the matter of *habeas corpus*.
31. During the 33<sup>rd</sup> Ordinary Session, the Representative of the Respondent State submitted that to date the Complainants have not submitted themselves to the courts in Eritrea. He informed the African Commission that he had personally checked with the High Court of Asmara to establish whether the matter had been brought to the court's attention but there was no case file on this matter.
32. The Representative of the Respondent State argues that the Complainants' assertion that they have not been able to access the domestic courts is speculative. He stated that Zegveld should accredit herself to the courts in Eritrea to enable her bring this matter before the local courts.
33. The Respondent State further submits that they have been unable to bring the 11 detainees before a court of law because of the nature of the criminal justice system in Eritrea. The Representative of the Respondent State informed the African Commission that the criminal justice system in Eritrea was inherited from Ethiopia and is therefore lacking. Within the High Court of Asmara, there is only one chamber responsible for handling criminal cases including criminal matters from the lower courts. As such, the Court's calendar is highly congested and difficult to manage. Therefore cases are bound to take time before they are heard by the courts and this is the very reason for the delay in bringing the matter of the 11 detainees before a court of law.
34. There are exceptions to the rule of exhaustion of domestic remedies and the Complainants have argued that they could not exhaust the domestic remedies because

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<sup>1</sup> Application No. 46221/99, 12<sup>th</sup> March 2003

the domestic legislation of the Eritrea does not afford due process of law for the protection of the rights that have allegedly been violated.

35. At this stage, it should be made clear that, when a person is being held in detention and accused for committing a crime, the African Commission holds that it is the responsibility of the Member State, through its appropriate judicial bodies, to bring this person promptly before a competent court of law in order to enable him/her to be tried in accordance with rules guaranteeing the right to a fair trial in accordance with national and international standards.
36. The Inter-American Court of Human Rights in the *Velasquez case*<sup>2</sup> while interpreting Article 46 of the American Convention (similar to Article 56(5) of the African Charter) which relates to the issue of exhaustion of domestic remedies, stated that, for the rule of prior exhaustion of domestic remedies to be applicable, the domestic remedies of the State concerned must be available, adequate and effective in order to be exhausted. The Court also opined that where a party raises non-exhaustion of local remedies because of the unavailability of due process in the State, the burden of proof will shift to “the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.”
37. In *Consolidated communication 147/95 and 149/96*<sup>3</sup>, the African Commission also ruled that domestic remedies must be available, effective and sufficient; A domestic remedy is considered available if the petitioner can pursue it without impediment, it is effective if it offers a prospect of success and it is sufficient if it is capable of redressing the complaint.
38. The African Commission notes that by its own admission, the Respondent State has indicated that it has not yet put in place structures that would ensure that cases are handled “within reasonable time”. However, the Respondent State goes ahead to assure the African Commission that the detainees will be brought before a court of competent jurisdiction in due course.
39. The State has a constitutional or statutory requirement to provide an accessible, effective and possible remedy whereby alleged victims can seek recognition and restoration of their rights before resorting to the international system for protection of human rights. Such procedures should not be mere formalities that, rather than enable the realisation of those rights, to the contrary, dilute with time any possibility of success with respect to their assertion, recognition or exercise.
40. Very clearly, the situation as presented by the Respondent State does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the remedies under domestic law and have thus been prevented from exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.
41. For these reasons, the African Commission declares this communication admissible.

*Ruling by the African Commission on request by the Respondent State to revisit the decision on admissibility*

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<sup>2</sup> Velasquez Rodríguez Case, Judgement of July 29, 1988, Inter-Am.Ct.H.R (Ser.C) No.4 (1988)

<sup>3</sup> Consolidated communication 147/95 and 149/96 – Sir Dawda K. Jawara/The Gambia

42. The present communication was declared admissible at the 33<sup>rd</sup> Ordinary Session of the African Commission's held in May 2003. In response to the African Commission's request for written submissions on the merits, the Respondent State in a Note Verbale expressed its dismay at the African Commission's decision to declare the matter admissible. They stated that they found the African Commission's decision on admissibility unacceptable and therefore requested that the African Commission revisits its decision on admissibility.
43. Before dealing with the merits of the communication, the African Commission would like to pronounce itself on the request by the Respondent State to revisit its decision on admissibility.
44. Firstly, it should be noted that the Respondent State did not bring any new element, either on the facts of the case as considered by the African Commission or on the legal grounds upon which he is making such a request.
45. Secondly, Rule 118(2) of the African Commission's Rules of Procedure stipulate that:  
*If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration....*

The Rules of Procedure do not make provision for the African Commission to revisit its decision once a communication has been declared admissible. Furthermore, it has been the practice of the African Commission not to reconsider a decision declaring a communication admissible.

For these reasons the African Commission upholds its decision on admissibility in this matter.

## **Merits**

46. The African Commission delivered its decision on admissibility of this communication at its 33<sup>rd</sup> Ordinary Session and informed the parties of its decision on 10<sup>th</sup> June 2003. The Secretariat of the African Commission further requested the parties to forward their submissions on the merits of the communication within 3 months. Whereas the Complainants forwarded their written submissions on the merits of the communication, none were received from the Respondent State. It is an established principle of the African Commission that where allegations of violations of provisions of the African Charter go uncontested by the Government concerned, the African Commission must decide on the facts as given. This principle also conforms to the practice of other international human rights adjudicatory bodies. In the present communication therefore, the African Commission is left with no alternative but to proceed and deliver a decision on the merits based on the submissions of the Complainants.<sup>4</sup> Although the African Commission has in this decision referred to the oral submissions made by the Respondent State during the 33<sup>rd</sup> Ordinary Session, especially as they relate to some issues that touch upon the merits of the communication, the Respondent State's failure to present comprehensive submissions on the merits has been done at its own peril.

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<sup>4</sup> Communication 74/92 – Commission Nationale des Droits de l'Homme et des Libertes/Chad and 232/99 – John D. Ouko/Kenya

47. By Note Verbale dated 20<sup>th</sup> May 2002, the Respondent State informed the African Commission that the 11 persons had indeed been detained for “*conspiring to overthrow the legal government of the country in violation of relevant OAU resolutions, colluding with hostile foreign powers with a view to compromising the sovereignty of the country, undermining Eritrean National Security and endangering Eritrean society and the general welfare of its people*”. The Respondent State further stated that such detention was in conformity with the criminal code of the country. In their oral submissions made during the 33<sup>rd</sup> Ordinary Session in May 2003, the Respondent State further admitted that they had not at the time brought the 11 detainees before any court of law.
48. The Complainants aver that the 11 persons who were former Eritrean Government officials, had been openly critical of the Eritrean government policies and as a direct result of their open letter criticising the government of Eritrea for acting in an illegal and unconstitutional manner, they were arrested and detained for committing “crimes against the nation’s security and sovereignty.”
49. The Complainants state that the 11 detainees have since September 2001 been held incommunicado and have never been brought before any courts of law in violation of Article 17(4) of the Constitution of the State of Eritrea and Article 6 of the African Charter. Article 17 (4) of the Constitution provides that every person who is held in detention must be brought before a court of law within 48 hours of his arrest and no person shall be held in custody beyond such a period without the authority of the court.
50. The Complainants submit that the abovementioned acts by the Respondent State violate Articles 2, 6 and 7(1) of the African Charter.
51. Article 2 of the African Charter provides  
*“Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, or any other opinion, national or social origin, fortune, birth or other status.”*
- Article 6 of the African Charter provides  
*“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”*
- Article 7(1) of the African Charter provides  
*Every individual shall have the right to have his cause 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;*
52. Although Article 6 of the African Charter guarantees the right to liberty and security of the person, this is not an absolute right because the African Charter allows the deprivation of this right through lawful means. The African Charter specifically prohibits arbitrary arrests and detention.
53. Evidence before the African Commission indicates that the 11 persons have been held incommunicado and without charge since they were arrested in September 2001. This fact has not been contested by the Respondent State. They are being held in custody and

have been cut off from communication with the outside world, with no access to their lawyers or families. Their whereabouts are unknown putting their fate under the exclusive control of the Respondent State.

54. The African Commission on two occasions wrote letters of Appeal to the President of the State of Eritrea informing him about the communication before the African Commission and requested him to intervene in the matter to ensure that the 11 persons are removed from secret detention and brought before the courts of law in Eritrea. In a Note Verbale dated 20<sup>th</sup> May 2002, the Ministry of Foreign Affairs of the State of Eritrea informed the African Commission that the 11 persons were being held in appropriate government facilities, that they had not been ill-treated and had access to medical services. The Ministry assured the African Commission that the government was making every effort to bring them before an appropriate court of law as early as possible. The African Commission notes that to date it has not received any information or substantiation from the Respondent State demonstrating that the 11 persons were being held in appropriate detention facilities and that they had been produced before courts of law.
55. Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Of itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment. The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and States must disclose the fact that someone is being detained as well as the place of detention. Furthermore, every detained person must have prompt access to a lawyer and to their families and their rights with regards to physical and mental health must be protected as well as entitlement to proper conditions of detention<sup>5</sup>.
56. The African Commission holds the view that the lawfulness and necessity of holding someone in custody must be determined by a court or other appropriate judicial authority. The decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. Therefore, persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the State should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its ***Resolution on the Right to Recourse and Fair Trial***<sup>6</sup> and elaborated upon in its ***Guidelines on the Right to Fair Trial and Legal Assistance in Africa***<sup>7</sup>
57. In the present communication, the Respondent State did not provide the African Commission with any details regarding the specific laws under which the 11 persons were detained but instead generally states that their detention is in “*consonance with the existing criminal code ...and other relevant national and international instruments*”. The 11 persons

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<sup>5</sup> Consolidated communication 143/95, 150/96 – Constitutional Rights Project and Civil Liberties Organisation/Nigeria

<sup>6</sup> Adopted by the African Commission at its 11<sup>th</sup> Ordinary Session held from 2<sup>nd</sup> to 9<sup>th</sup> March 1992 in Tunis, Tunisia.

<sup>7</sup> Adopted by the African Commission at its 33<sup>rd</sup> Ordinary Session held from 15<sup>th</sup> to 29<sup>th</sup> May 2003 in Niamey, Niger.



were detained on account of their political beliefs and are being held in secret detention without any access to the courts, lawyers or family. Regrettably, these persons' rights are continually being violated even today, as the Respondent State is still holding them in secret detention in blatant violation of their rights to liberty and recourse to fair trial<sup>8</sup>.

58. The Complainants further allege that the 11 persons were arrested and detained because they expressed opinions that were critical of the Respondent State. The Complainants submit that this amounts to a violation of Article 9 (2) of the African Charter, which provides

*“Every individual shall have the right to express and disseminate his opinions within the law”*

59. The right to freedom of expression has been recognised by the African Commission as a fundamental individual human right which is also a cornerstone of democracy and a means of ensuring the respect for all human rights and freedoms.<sup>9</sup> Nonetheless, this right carries with it certain duties and responsibilities and it is for this reason that certain restrictions on freedom of expression are allowed. However, Article 9(2) as well as Principle II(2) of the ***Declaration of Principles on Freedom of Expression in Africa*** categorically state that such restrictions have to be *provided for by law*.<sup>10</sup>

60. It is a well settled principle of the African Commission that any laws restricting freedom of expression must conform to international human rights norms and standards relating to freedom of expression<sup>11</sup> and should not jeopardise the right itself. In fact, the African Charter in contrast to other international human rights does not permit derogation from this or any other right on the basis of emergencies or special circumstances.

61. Consequently, if any person expresses or disseminates opinions that are contrary to laws that meet the aforementioned criteria, there should be due process and all affected persons should be allowed to seek redress in a court of law.<sup>12</sup>

62. The facts as presented leave no doubt in the mind of the African Commission that the Respondent State did indeed restrict the 11 persons' right to free expression. No charges have been brought against the 11 persons and neither have they been brought before the courts. Such restrictions not only violate the provisions of the African Charter but are also not in conformity with international human rights standards and norms.

**For the above reasons, the African Commission,**

**Finds** the State of Eritrea in violation of Articles 2, 6, 7(1) and 9(2) of the African Charter on Human and Peoples' Rights;

**Urges** the State of Eritrea to order the immediate release of the 11 detainees, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre

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<sup>8</sup> Consolidated communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria; UNHRC Communication 440/1990

<sup>9</sup> Preamble to the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission at its 32<sup>nd</sup> Ordinary Session held from 17<sup>th</sup> to 23<sup>rd</sup> October 2003 in Banjul, The Gambia

<sup>10</sup> Principle II(2) of the Declaration of Principles on Freedom of Expression in Africa provides *“any restrictions on freedom of expression shall be provided for by law, serve a legitimate interest and be necessary and in a democratic society*

<sup>11</sup> Consolidated communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria

<sup>12</sup> Communication 232/99 – John Ouko/Kenya

Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie; and

**Recommends** that the State of Eritrea compensates the abovementioned persons

*Done at the 34<sup>th</sup> Ordinary Session of the African Commission  
held from 6<sup>th</sup> to 20<sup>th</sup> November 2003, in Banjul, The Gambia*