
Democratic Republic of the Congo v Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2003)

Communication 227/99, DR Congo v Burundi, Rwanda and Uganda

Decided at the 33rd ordinary session May 2003, 20th Activity Report

Rapporteurs: 25th session: Ben Salem; 26th-28th sessions: Ben Salem, Nguema, Dankwa; 29th-33rd sessions: Ben Salem, Dankwa, Rezag Bara

Interstate complaint alleging massive violations of human rights in the territory of the complaining state by the respondents

Inter-state complaints (procedure, 55-61; exhaustion of local remedies, 62, 63; jurisdiction, 64, 65; conciliation, 57, 61)

International law (peaceful settlement of disputes, 66, 75; military occupation, 68, 73, 74, 76)

Peoples' right to self-determination (military occupation, 68, 77)

International humanitarian law (69-71, 78, 79; siege of hydroelectric dam, 82-84; rape, 86)

Interpretation (international standards, 69, 70, 78, 83, 86, 87)

Peoples' right to peace (military occupation, 73, 75, 76)

Equality, non-discrimination (discrimination on the grounds of ethnicity, origin or nationality, 79, 80)

Life (arbitrary deprivation, 79, 80, 88)

Family (right to return to home country, 81)

Movement (right to return to home country, 81)

Property (effects of occupation, 85, 88)

Peoples' right to development (cultural development, 87; plunder of natural resources, 95)

Health (effects of occupation, 88)

Education (effects of occupation, 88)

Peoples' right to natural resources (plunder, 90-95; evidence, 91-93)

Summary of facts

1. On 8 March 1999, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr Léonard She Okitundu, Minister of Human Rights of the Democratic Republic of Congo, a letter with reference CABMIN/MDH/MM/201/MZ/99, dated 24 February 1999, a communication presented on behalf of the Congolese government based on the provisions of article 49 of the Charter.

2. The communication is filed against the Republics of Burundi, Rwanda and Uganda (hereinafter referred to, respectively, as 'Burundi', 'Rwanda' and 'Uganda'). It alleges grave and massive violations of human and peoples' rights committed by the armed forces of these three countries in the Congolese provinces where there have been rebel activities since 2 August 1998, and for which the Democratic Republic of Congo blames Burundi, Uganda and Rwanda. In support of its complaint the Democratic Republic of Congo states that the Ugandan and Rwandan governments have acknowledged the presence of their respective armed forces in the eastern provinces of the Democratic Republic of Congo under what it terms the 'fallacious pretext' of 'safeguarding their interests'. The complaint states, furthermore, that the Congolese government has 'sufficient and overwhelming evidence of Burundi's involvement'.

3. In particular, the Democratic Republic of Congo asserts that on Monday, 3 August 1998, 38 officers and about 100 men of the Congolese forces were assassinated, after being disarmed, at Kavumu airport, Bukavu, in the Congolese province of South Kivu. Relatedly, on Tuesday, 4 August 1998, over 50 corpses were buried in Bukavu, about twenty of them near the fuel station at the Nyamwera market, opposite Ibanda mosque. Other corpses (mostly civilians) were found at the military camp called 'Sa'Yo camp' in Bukavu. On 17 August 1998, the Rwandan and Ugandan forces that had been on Congolese territory for many weeks, besieged Inga hydroelectric dam, in Lower Congo province, a wholly civilian facility. The presence of these forces disrupted the lives of millions of people and the economic life of the Democratic Republic of Congo. It also caused the death of many patients including children in hospitals, due to the cutting off of electricity supply to incubators and other respiratory equipment.

4. On Monday, 24 August 1998, over 856 persons were massacred in Kasika, in Lwindi chiefdom, and Mwenga. The bodies found over a distance of 60 kilometres from Kilungutwe to Kasika (in South Kivu province) were mainly those of women and children. The women had been raped before being killed by their murderers, who slashed them open from the vagina up to the abdomen and cut them up with daggers. On 2 September 1998, in a bid to ambush the

men of the Congolese army based in Kamituga, the Rwandan and Ugandan forces in Kitutu village massacred 13 people. On 6 October 1998, 48 civilians were killed in Lubarika village. In Uvira town, on the banks of Lake Tanganyika, a massacre of the population including intellectuals and other able-bodied persons took place. This was partly evidenced by the discovery of 326 bodies in Rushima river, near Luberizi. 547 bodies were also discovered buried in a mass grave at Bwegera, and 138 others were found in a butcher's shop in Luvingi village. From 30 December 1998 to 1 January 1999, 612 persons were massacred in Makobola, South Kivu province. All these atrocities were committed by the Rwandan and Ugandan forces which invaded territories of the Democratic Republic of Congo, according to the complaint of the Democratic Republic of Congo.

5. The Democratic Republic of Congo also claims that the forces of Rwanda and Uganda aimed at spreading sexually transmitted diseases and committing rape. To this end, about 2 000 AIDS suffering or HIV-positive Ugandan soldiers were sent to the front in the eastern province of Congo with the mission of raping girls and women so as to propagate an AIDS pandemic among the local population and, thereby, decimate it. The Democratic Republic of Congo notes that 75 per cent of the Ugandan army are suffering from AIDS. A white paper annexed to the communication enumerates many cases of rape of girls and women perpetrated by the forces of Rwanda and Uganda, particularly in South Kivu province. It further states that on Monday, 5 October 1998, in Lumunba quarter, Babozo division, Bagira commune, under the instructions of a young Rwandan officer nicknamed 'Terminator', who was then commanding the Bagira military camp, several young Congolese girls were raped by soldiers based at the said camp. Similar cases of rape have been reported from Mwenga, Walungu, Shabunda and Idjwi.

6. The Democratic Republic of Congo avers that since the beginning of the war in its eastern provinces, the civilian population has been deported by the Rwandan and Ugandan armies to what it refers to as 'concentration camps' situated in Rwanda. It further states that other people are simply massacred and incinerated in crematories (especially in Bugusera, Rwanda). The goal of these operations is to make the indigenous people disappear from these regions and thus, to establish what it terms 'Tutsiland'.

7. The Democratic Republic of Congo also accuses Rwanda and Uganda of carrying out systematic looting of the underground riches of the regions controlled by their forces, just as the possessions of the civilian population are being hauled away to Burundi, Rwanda and Uganda. To substantiate its accusations, it states that on 4 September 1998, the contents of all the safes of the local branch of the Central Bank of Congo in Bukavu town were looted and the booty taken away to Rwanda. In Kalema, a town in Maniema province, all the minerals in the factory of the Somniki firm were looted by the same forces. The Democratic Republic of Congo claims that between October and December 1998, the gold produced by the Okimo firm and by local diggers, yielding US\$100 000 000 was carted to Rwanda. Still according to its estimation, the

coffee produced in the region and in North Kivu yielded about US\$70 000 000 to Uganda in the same period. As for the wood produced by the Amexbois firm based in Kisangani town, it is exported to Uganda. Rwanda and Uganda have also taken over control of the fiscal and customs revenue collected respectively by the Directorate General of Taxes. The plunder of the riches of the eastern provinces of Congo is also affecting endangered animal species such as okapis, mountain gorillas, rhinoceros, and elephants.

The Complaint

8. The Democratic Republic of Congo claims, among other things, that it is the victim of an armed aggression perpetrated by Burundi, Rwanda and Uganda; and that this is a violation of the fundamental principles that govern friendly relations between states, as stipulated in the Charters of the United Nations and the Organization of African Unity; in particular, the principles of non-recourse to force in international relations, the peaceful settlement of differences, respect for the sovereignty and territorial integrity of states and non-interference in the internal affairs of states. It emphasises that the massacres and other violations of human and peoples' rights that it accuses Burundi, Rwanda and Uganda of, are committed in violation of the provisions of articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the African Charter on Human and Peoples' Rights.

9. It also claims violation of the provisions of the International Covenant on Civil and Political Rights, the Geneva Conventions of 12 August 1949 and of the Additional Protocol on the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

10. From the foregoing, the Democratic Republic of Congo, based on the facts presented and the law cited, requests the Commission to:

Declare that the violations of the human rights of the civilian population of the eastern provinces of the Democratic Republic of Congo by Rwanda, Uganda and Burundi are in contravention of the relevant provisions of the African Charter on Human and Peoples' Rights cited above; and Examine the communication diligently, especially in the light of article 58(1) & (3) of the Charter with a view to producing a detailed, objective and impartial report on the grave and massive violations of human rights committed in the war-affected eastern provinces and to submit it to the Assembly of Heads of State and Government of the Organization of African Unity.

11. The Democratic Republic of Congo also requests the Commission to:

Take due note of the violations of the relevant provisions of the Charters of the United Nations, the Organization of African Unity, and the one on Human and Peoples' Rights; Condemn the aggression against the Democratic Republic of Congo, which has generated grave violations of the human rights of peaceful peoples; Deploy an investigation mission with a view to observing in loco the accusations made against Burundi, Rwanda and Uganda; Demand the unconditional withdrawal of the invading troops from Congolese territory in order to put an end to the grave and massive violations of human rights; Demand that the countries violating human and peoples' rights in the Democratic Republic of Congo pay just reparation for the damages caused and the acts of looting; and Indicate the appropriate measures to punish the authors of the war crimes or crimes against humanity, as the case may be, and the creation of an ad hoc tribunal to try the crimes committed against the Democratic Republic of Congo. The ad hoc tribunal may be created in collaboration with the United Nations.

The procedure

12. The communication was received at the Secretariat of the Commission on 8 March 1999. The same day, two letters were dispatched by fax, to the Ministry of Human Rights and the Ministry of Foreign Affairs of the Democratic Republic of Congo respectively, acknowledging receipt.

13. In compliance with the relevant provisions of the Charter and the Rules of Procedure, the Secretariat then submitted the communication to the Commission, meeting at its 25th ordinary session from 26 April to 5 May 1999, in Bujumbura (Burundi).

14. At its 25th ordinary session held in Bujumbura, Burundi, the Commission took a decision of seizure on the communication and requested the complainant state to forward an official copy of its complaint to the Secretary-General of the OAU.

15. On 28 May 1999, notes verbales together with a copy of the communication were each sent to the Ministries of External Affairs/External Relations of the respondent states informing them

of the communication filed against them by the Democratic Republic of Congo.

16. On 2 June 1999, the Secretariat wrote to the authorities of the Democratic Republic of Congo informing them of the decision of seizure taken by the Commission and requesting them to comply with the provisions of article 49 of the Charter.

17. At the 26th session of the Commission held in Kigali, Rwanda, the communication was not examined, as the Commission considered it necessary to allow the respondent states more time to communicate their reactions.

18. On 14 December 1999, the Secretariat wrote to the various parties requesting their reactions regarding the issue of admissibility.

19. At the 27th ordinary session held from 27 April to 11 May 2000 in Algiers, Algeria, the Commission heard oral submissions on the admissibility of the case from representatives of the complainant state and from two respondent states (Rwanda and Uganda). The Commission, after examining the case according to the provisions of its Rules of Procedure, thereafter declared the communication admissible and requested parties to furnish it with arguments on the merits of the case.

20. The parties were accordingly informed of the above decision on 14 July 2000.

21. At the 28th session of the Commission held from 23 October to 6 November 2000 in Cotonou, Benin, the communication was not considered as the Commission had not received any response from respondent states on the request that was extended to them following the 27th session.

22. During the session, however, the delegation of Rwanda transmitted to the Secretariat of the Commission, a submission, which stated that the Commission should not have declared communication 227/99 admissible because the procedure followed by the Democratic Republic of Congo was not valid and that the Commission itself had not respected the provisions of its own Rules of Procedure. The submission further stated that the matters addressed by the

communication were pending before competent authorities of the Organization of African Unity and other international bodies like the UN Security Council and ECOSOC. Finally, Rwanda refuted allegations of human rights violations made against it by the Democratic Republic of Congo and justified the presence of its troops in this country on grounds of security, while accusing the Democratic Republic of Congo of hosting groups hostile to Rwanda.

23. The submission of Rwanda was transmitted to all states concerned by communication 227/99.

24. In October 2000, the Secretariat of the Commission received from Uganda a submission on communication 227/99 in which the respondent state recognised and justified the presence of its troops in the Democratic Republic of Congo. The troops were said to be in the Democratic Republic of Congo to prevent Ugandan rebels from attacking the Ugandan territory.

25. Uganda stated in its submission that since the early 1990's the territory of the Democratic Republic of Congo (then the Republic of Zaire) has provided sanctuary to bands of armed rebel groups. These rebel groups, which Uganda claims support former dictator Idi Amin, have posed a significant danger for Uganda since 1996.

26. Uganda stated that supported by both Sudan and Mobutu's government in the Democratic Republic of Congo, these groups grew to 6 000, posing a serious security threat to Uganda and that therefore Ugandan troops were present in the Democratic Republic of Congo in order to prevent Ugandan rebels from attacking the Ugandan territory.

27. The submission further states that after Mobutu's overthrow in 1997, the Kabila government invited Uganda to enter eastern Congo to work together to stop the activities of the anti-Uganda rebels and that Ugandan armed forces remained in the Democratic Republic of Congo at the request of President Kabila, since his forces 'had no capability to exercise authority' in the remote eastern region. Uganda attached the Protocol between the Democratic Republic of Congo and the Republic of Uganda on Security along the Common Border to show that both sides recognised the problem of armed groups and decided to co-operate.

28. According to Uganda, President Kabila revoked the above-mentioned agreement in August 1998 as a new rebellion started in the Democratic Republic of Congo (when the coalition that

had overthrown Mobutu disintegrated) and blamed this 'internal rebellion', on the invasion of Uganda and Rwanda. The Democratic Republic of Congo then started looking for allies in its struggle against the rebels and it turned to forces hostile to the governments of Rwanda and Uganda, specifically the Allied Democratic Force and pro-Idi Amin groups. Uganda said it therefore had no option but to keep its troops in the Democratic Republic of Congo, in order to deal with the threat of attacks posed by these foreign-sponsored rebel groups.

29. To support its actions, Uganda cited provisions of international instruments: article 51 of the UN Charter; article 3 of the UN General Assembly Resolution on the Definition of Aggression; The UN General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States; and article 23 of the African Charter on Human and Peoples' Rights.

30. In its submission, Uganda also points to the lack of evidence implicating it in the alleged human rights violations, stating for example that, Ugandan troops have never been in some places mentioned in the communication. The submission characterises the violations relating to HIV/AIDS as 'the most ridiculous allegation'. Referring to the joint case against itself, Rwanda, and Burundi, Uganda claims that '[t]here is never group responsibility for violations'. In addition, 'allegations of human rights violations must be verified by an independent body or by a fact-finding Commission.' Uganda contrasts the allegations it faces with evidence of the Democratic Republic of Congo government's involvement in violations in its eastern provinces.

31. As for the withdrawal of Ugandan troops from the Democratic Republic of Congo, the submission relies on the Democratic Republic of Congo's failed request to the International Court of Justice (ICJ) to order the unconditional withdrawal of Ugandan troops.

32. Regarding payment of reparations, Uganda points to the lack of documentation on this issue and, concerning the illegal exploitation of the Democratic Republic of Congo's natural resources, Uganda denied involvement and affirmed its 'unconditional support to the United Nation's efforts to set up a panel of experts [that the Democratic Republic of Congo has also approved] to investigate' the issue.

33. On the issue of investigation of human rights violations, while Uganda welcomed the Democratic Republic of Congo's call for independent investigation, it portrayed the Democratic Republic of Congo's uninvestigated allegations as 'disturbing'.

34. Uganda also noted that the Democratic Republic of Congo has accused Uganda in several other fora: the UN Security Council, the ICJ, the Lusaka Initiative, and the OAU. According to the respondent state, these actions 'present a dilemma to the conduct of international affairs ... and adjudication', undermining the credibility of these institutions and the Commission as divergent opinions may be reached.

35. In conclusion Uganda contends that 'there is no legal basis on which the African Commission can deal with the communication and declare any of the remedies sought by the Democratic Republic of Congo against Uganda'.

36. Copies of the submissions of Uganda on communication 227/99 were transmitted to all states concerned by the communication.

37. In December 2000, the Secretariat of the Commission received a set of five submissions from the Democratic Republic of Congo containing reports on alleged violations of human rights by armed forces of the respondent states and their alleged allies in the territory of the Democratic Republic of Congo. The submissions also stated that the foreign uninvited troops in the Democratic Republic of Congo were looting the resources of the country.

38. The Secretariat of the Commission transmitted these submissions to the respective parties to the communication.

39. At the 29th session, which was held from 23 April to 7 May 2001 in Tripoli, Libya, the communication was not considered because the Commission had still not received any submission from one of the respondent states, namely, Burundi. On that occasion, all relevant letters and submissions by the other states were transmitted to the delegations of all the respondent states including Burundi, for their consideration and reaction to the Commission.

40. In August 2001, the Secretariat of the Commission received a request from the Ministry of Human Rights of the Democratic Republic of Congo, which deplored the delays in the processing of communication 227/99 and invited the Commission to summon an extraordinary session in order to deal diligently with the communication.

41. By notes verbales ACHPR/COMM/044 sent to their respective Ministries of Foreign/External Affairs on 26 September 2001, the Secretariat of the Commission informed all states concerned by communication 227/99 that it was going to consider the said communication on the merits, at its 30th ordinary session scheduled from 13 to 27 October 2001 in Banjul, The Gambia.

42. In October 2001, the Secretariat of the Commission received a note verbale from Rwanda, which restated the objections raised in its submission of October 2000 concerning communication 227/99, adding that if Rwanda's arguments were not taken into account, it should not be called upon to present a defence.

43. At its 30th session, the Commission discussed the request by the Democratic Republic of Congo about organising an extraordinary session to deal with communication 227/99 and resolved to raise the issue with the relevant authorities of the Secretariat of the African Union. The Commission also heard oral statements by the delegations of Rwanda and Uganda on the issue, written copies of which were also handed over to its Secretariat

44. In its statement, the Rwandan delegation reiterated its arguments stated during the 28th session and objected to the proposed extraordinary session to deal with the communication on the grounds that the communication could be considered during an ordinary session and that an extraordinary session will have financial implication. Rwanda therefore recommended that the Commission deals with the communication during its 31st session scheduled for May 2002 in Pretoria, South Africa. The statement further justified the presence of Rwandan troops in the Democratic Republic of Congo by the assistance that the government of this country is granting elements hostile to the government of Kigali and concluded that as long as such a threat exists for Rwanda, it could not withdraw its troops from the Democratic Republic of Congo.

45. In its statement, the Ugandan delegation said that they had not received the documents sent to them on communication 227/99 and could not present their defence at that stage. The delegation further objected to the holding of an extraordinary session to deal with the communication and added that the facts complained of by the Democratic Republic of Congo are also pending before the International Court of Justice and that consideration of the communication by the Commission would prejudice the court hearing.

46. At the 31st session of the Commission, which was held from 2 to 16 May 2002 in Pretoria,

South Africa, the Commission did not consider the Communication because there had been no response from the Organization of African Unity regarding the request from the Democratic Republic of Congo on the holding of the extraordinary session on the communication. During that session, the Commission resolved to proceed as follows: the African Commission would hold the extraordinary session in case the Secretary General of the OAU agree to it, or (in case the OAU did not accept the idea of extraordinary session), the African Commission would arrange its agenda for the 32nd ordinary session in such a way as to have sufficient time to deal with the communication. That decision was communicated to the delegations of all the states concerned who were attending the session.

47. By note verbale ACHPR/COMM 227/99 of 11 June 2002, the Secretariat transmitted that decision to the states concerned by the communication.

48. A reminder was also sent to the same states by notes verbales ACHPR/COMM 227/99 on 8 October 2002.

49. During its 32nd ordinary session which took place from 17 to 23 October 2002 in Banjul, the Gambia, the Commission did not consider this communication because of the circumstances of the session 1 which did not provide enough time to deal with this important communication.

50. The Commission took a decision on the merits of the communication during its 33rd ordinary session, which was held from 15 to 29 May 2003 in Niamey, Niger.

Law

Admissibility

51. The procedure for bringing inter-state communications before the Commission is governed by articles 47 to 49 of the Charter. At this stage, it is important to mention that this is the first inter-state communication brought before the African Commission on Human and Peoples' Rights.

52. It is to be noted that Burundi, 2 a respondent state was provided with all the relevant submissions relating to this communication, in conformity with article 57 of the African Charter. But neither did Burundi react to any of them nor did it make any oral submission before the Commission regarding the complaint.

53. The African Commission would like to emphasise that the absence of reaction from Burundi does not absolve the latter from the decision the African Commission may arrive at in the consideration of the communication. Burundi by ratifying the African Charter indicated its commitment to cooperate with the African Commission and to abide by all decisions taken by the latter.

54. In their oral arguments before the Commission at its 27th ordinary session held in Algeria (27 April - 11 May 2000), Rwanda and Uganda had argued that the decision of the complainant state to submit the communication directly to the Chairman of the Commission without first notifying them and the Secretary General of the OAU, is procedurally wrong and therefore fatal to the admissibility of the case.

55. Article 47 requires the complainant state to draw, by written communication, the attention of the violating state to the matter and the communication should also be addressed to the Secretary-General of the OAU and the Chairman of the Commission. The state to which the communication is addressed is to give written explanation or statement elucidating the matter within three months of the receipt of the communication.

56. By the provisions of article 48 of the Charter, if within three months from the date on which the original communication is received by the state to which it is addressed, the issue is not settled to the satisfaction of the two states involved through bilateral negotiation or by any other peaceful procedure, either state shall have the right to submit the matter to the Commission through the Chairman and to notify the other states involved.

57. The provisions of articles 47 and 48 read in conjunction with rules 88 to 92 of the Rules of Procedure of the Commission are geared towards the achievement of one of the essential objectives and fundamental principles of the Charter: conciliation.

58. The Commission is of the view that the procedure outlined in article 47 of the Charter is permissive and not mandatory. This is borne out by the use of the word 'may'. Witness the first sentence of this provision:

If a state party to the present Charter has good reasons to believe that another state party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that state to the matter.

59. Moreover, where the dispute is not settled amicably, article 48 of the Charter requires either state to submit the matter to the Commission through the Chairman and to notify the other states involved. It does not, however, provide for its submission to the Secretary General of the OAU. Nevertheless, based on the decision of the Commission at its 25th ordinary session, requesting it to forward a copy of its complaint to the Secretary General of the OAU (see paragraph 14 above), the complainant state had done so.

60. Furthermore, it appears that the main reason why the Charter makes provision for the respondent state to be informed of such violations or notified of the submission of such a communication to the Commission, is to avoid a situation of springing surprises on the states involved. This procedure enables the respondent states to decide whether to settle the complaint amicably or not. The Commission is of the view that even if the complainant state had not abided by the said provision of the Charter, such omission is not fatal to the communication since after being seized of the case, a copy of the communication, as is the practice of the Commission, was forwarded to the respondent states for their observations (see paragraph 15 above).

61. Article 49 on the other hand, provides for a procedure where the complainant state directly seizes the Commission without passing through the conciliation phase. Accordingly, the complainant state may refer the matter directly to the Commission by addressing a communication to the Chairman, the Secretary General of the OAU and the state concerned. Such a process allows the requesting state to avoid making contacts with the respondent state in cases where such contacts will not be diplomatically either effective or desirable. In the Commission's considered opinion that seems to be the case here. Indeed, the situation of undeclared war prevailing between the Democratic Republic of Congo and its neighbours to the east did not favour the type of diplomatic contact that would have facilitated the application of the provisions of articles 47 and 48 of the Charter. It was also for this reason that the Commission took the view that article 52 did not apply to this communication.

62. The Commission is mindful of the requirement that it can consider or deal with a matter brought before it if the provisions of article 50 of the Charter and rule 97(c) of the Rules of Procedure are met, that is if all local remedies, if they exist, have been exhausted, unless such would be unduly prolonged.

63. The Commission takes note that the violations complained of are allegedly being perpetrated by the respondent states in the territory of the complainant state. In the circumstances, the Commission finds that local remedies do not exist, and the question of their exhaustion does not, therefore, arise.

64. The effect of the alleged activities of the rebels and armed forces of the respondent states parties to the Charter, which also back the rebels, fall not only within the province of humanitarian law, but also within the mandate of the Commission. The combined effect of articles 60 and 61 of the Charter compels this conclusion; and it is also buttressed by article 23 of the African Charter.

65. There is also authority, which does not exclude violations committed during armed conflict from the jurisdiction of the Commission. In communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995) para 21], the Commission held that the African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even ... war ... cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

(See also communication 159/96, *Union Interafricaine des Droits de l'Homme and Others v Angola* [(2000) AHRLR 18 (ACHPR 1997)]). From the foregoing, the Commission declares the communication admissible.

The merits

66. The use of armed force by the respondent states, which the Democratic Republic of Congo complains of contravenes the well-established principle of international law that states shall settle their disputes by peaceful means in such a manner that international peace, security and justice are not endangered. Indeed, there cannot be both national and international peace and

security guaranteed by the African Charter under the conditions created by the respondent states in the eastern provinces of the complainant state.

67. Rwanda and Uganda, in their oral arguments before the Commission at its 27th ordinary session held in Algeria had argued that the decision of the complainant state to submit the communication directly to the Chairman of the Commission without first notifying them and the Secretary-General of the OAU, is procedurally wrong and therefore fatal to the admissibility of the case. But the African Commission found otherwise.

68. The Commission finds the conduct of the respondent states inconsistent with the standard expected of them under the UN Declaration on Friendly Relations, which is implicitly affirmed by the Charters of the UN and OAU, and which the Commission is mandated by article 23 of the African Charter on Human and Peoples' Rights to uphold. Any doubt that this provision has been violated by the respondent states is resolved by recalling an injunction in the UN Declaration on Friendly Relations:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other states. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law ... Also no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state or interfere in civil strife in another state.

The substance of the complaint of the Democratic Republic of Congo against the respondents is covered by the foregoing prohibition. The respondent states have therefore violated article 23 of the African Charter. The conduct of the respondent states also constitutes a flagrant violation of the right to the unquestionable and inalienable right of the peoples of the Democratic Republic of Congo to self-determination provided for by article 20 of the African Charter, especially clause 1 of this provision.

69. The complainant state alleges grave and massive violations of human and peoples' rights

committed by the armed forces of the respondent states in its eastern provinces. It details series of massacres, rapes, mutilations, mass transfers of populations and looting of the peoples' possessions, as some of those violations. As noted earlier on, the series of violations alleged to have been committed by the armed forces of the respondent states fall within the province of humanitarian law, and therefore rightly covered by the four Geneva Conventions and the Protocols additional to them. And the Commission having found the alleged occupation of parts of the provinces of the complainant state by the respondents to be in violation of the Charter cannot turn a blind eye to the series of human rights violations attendants upon such occupation.

70. The combined effect of articles 60 and 61 of the African Charter enables the Commission to draw inspiration from international law on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity and also to take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules recognized by member states of the Organization of African Unity, general principles recognized by African states as well as legal precedents and doctrine. By virtue of articles 60 and 61 the Commission holds that the four Geneva Conventions and the two Additional Protocols covering armed conflicts constitute part of the general principles of law recognized by African states, and take same into consideration in the determination of this case.

71. It is noted that article 75(2) of the First Protocol of the Geneva Conventions of 1949, prohibits the following acts at any time and in all places whatsoever, whether committed by civilian or by military agents:

(a) violence to life, health, or physical or mental well-being of persons, in particular: i) murder; ii) torture of all kinds, whether physical or mental; iii) corporal punishment and iv) mutilation

(b) outrages upon personal dignity, in particular, humiliating and degrading treatment; enforced prostitution and any form of indecent assault.

72. The complainant state alleges the occupation of the eastern provinces of the country by the respondent states' armed forces. It alleges also that most parts of the affected provinces have been under the control of the rebels since 2 August 1998, with the assistance and support of the respondent states. In support of its claim, it states that the Ugandan and Rwandan governments have acknowledged the presence of their respective armed forces in the eastern provinces of the country under what it calls the 'fallacious pretext' of 'safeguarding their interests'. The

Commission takes note that this claim is corroborated by the statements of the representatives of the respondent states during the 27th ordinary session held in Algeria.

73. Article 23 of the Charter guarantees to all peoples the right to national and international peace and security. It provides further that '[t]he principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between states.' The principles of solidarity and friendly relations contained in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (resolution 2625 (XXV)), adopted by the UN General Assembly on 24 October 1970, prohibits threat or use of force by states in settling disputes. Principle 1 provides:

Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

74. In the same vein, article 33 of the United Nations Charter states that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Chapter VII of the same Charter outrightly prohibits threats to the peace, breaches of the peace and acts of aggression. Article 3 of the OAU Charter states:

The member states, in pursuit of the purposes stated in article 2, solemnly affirm and declare their adherence to the following principles: ... 2. Non-interference in the internal affairs of states; 3. Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence; 4. Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.

75. It also contravenes the well-established principle of international law that states shall settle their disputes by peaceful means in such a manner that international peace and security and justice are not endangered. As noted in paragraph 66 above, there cannot be both national and international peace and security guaranteed by the Charter with the conduct of the respondent states in the eastern provinces of the complainant state.

76. The Commission therefore disapproves of the occupation of the complainant's territory by the armed forces of the respondent forces and finds it impermissible, even in the face of their argument of being in the complainant's territory in order to safeguard their national interests and therefore in contravention of article 23 of the Charter. The Commission is of the strong belief that such interests would better be protected within the confines of the territories of the respondent states.

77. It bears repeating that the Commission finds the conduct of the respondent states in occupying territories of the complainant state to be a flagrant violation of the rights of the peoples of the Democratic Republic of Congo to their unquestionable and inalienable right to self-determination provided for by article 20 of the African Charter.

78. As previously stated, the Commission is entitled, by virtue of articles 60 and 61 of the African Charter to

draw inspiration from international law on human and peoples' rights, ... the Charter of the United Nations, the Charter of the Organization of African Unity ... also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules recognised by member states of the Organization of African Unity ... general principles recognised by African states, as well as legal precedents and doctrine.

Invoking these provisions, the Commission holds that the four Geneva Conventions and the two Additional Protocols covering armed conflicts, fall on all fours with the category of special international conventions, laying down rules recognised by member states of the Organization of African Unity and also constitute part of the general principles recognised by African states, and to take same into consideration in the determination of this case.

79. The Commission finds the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the respondent states' armed forces were still in effective occupation of the eastern provinces of the complainant state reprehensible and also inconsistent with their obligations under part III of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol I to the Geneva Conventions.

80. They also constitute flagrant violations of article 2 of the African Charter, such acts being directed against the victims by virtue of their national origin; and article 4, which guarantees respect for life and the integrity of one's person and prohibits the arbitrary deprivation of rights.

81. The allegation of mass transfer of persons from the eastern provinces of the complainant state to camps in Rwanda, as alleged by the complainant and not refuted by the respondent, is inconsistent with article 18(1) of the African Charter, which recognises the family as the natural unit and basis of society and guarantees it appropriate protection. It is also a breach of the right to freedom of movement, and the right to leave and to return to one's country guaranteed under article 12(1) and (2) of the African Charter respectively.

82. Article 56 of the First Protocol Additional to the Geneva Conventions of 1949 provides:

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. ...

2. The special protection against attack provided by paragraph 1 shall cease: (a) for a dam or dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support ...

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of precautionary measures provided for in article 57.

83. As noted previously, taking article 56, quoted above into account, and by virtue of articles 60 and 61 of the African Charter, the Commission concludes that, in besieging the hydroelectric dam in Lower Congo province, the respondent states have violated the Charter.

84. The siege of the hydroelectric dam may also be brought within the prohibition contained in The Hague Convention (II) with Respect to the Laws and Customs of War on Land which provides in article 23 that '[b]esides the prohibitions provided by special conventions, it is especially prohibited ... to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'. By parity of reason, and bearing in mind articles 60 and 61 of the Charter, the respondent states are in violation of the Charter with regard to the just noted article 23.

85. The case of Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (the Celebici judgment, International Criminal Tribunal for the former Yugoslavia, 16 November 1998 at paragraph 587) is supportive of the Commission's stance. It states, inter alia, that

international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party. The basic norms in this respect, which form part of customary international law ... [include] the fundamental principle ... that private property must be respected and cannot be confiscated ... [p]illage is formally forbidden.

86. The raping of women and girls, as alleged and not refuted by the respondent states, is prohibited under article 76 of the first Protocol Additional to the Geneva Conventions of 1949, which provides that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other forms of indecent assault'. It also offends against both the African Charter and the Convention on the Elimination of All Forms of Discrimination Against Women; and on the basis of articles 60 and 61 of the African Charter find the respondent states in violation of the Charter.

87. The Commission condemns the indiscriminate dumping of, and / or mass burial of victims of the series of massacres and killings perpetrated against the peoples of the eastern province of the complainant state while the armed forces of the respondent states were in actual fact occupying the said provinces. The Commission further finds these acts barbaric and in reckless violation of Congolese peoples' rights to cultural development guaranteed by article 22 of the African Charter, and an affront on the noble virtues of the African historical tradition and values enunciated in the Preamble to the African Charter. Such acts are also forbidden under article 34 of the first Protocol Additional to the Geneva Conventions of 1949, which provides for respect for the remains of such peoples and their gravesites. In disregarding the last provision, the respondent states have violated the African Charter on the basis of articles 60 and 61 of this instrument.

88. The looting, killing, mass and indiscriminate transfers of civilian population, the siege and damage of the hydro-dam, stopping of essential services in the hospital, leading to deaths of patients and the general disruption of life and state of war that took place while the forces of the respondent states were occupying and in control of the eastern provinces of the complainant state are in violation of article 14 guaranteeing the right to property, articles 16 and 17 (all of the African Charter), which provide for the rights to the best attainable state of physical and mental health and education, respectively.

89. Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, particularly in article 27, provides for the humane treatment of protected persons at all times and for protection against all acts of violence or threats and against insults and public curiosity. Further, it provides for the protection of women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Article 4 of the Convention defines a protected person as those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.

90. The complainant state alleges that between October and December 1998, the gold produced by the Okimo firm and by local diggers yielded US\$ 100 000 000 to Rwanda. By its calculation, the coffee produced in the region and in North Kivu yielded about US\$ 70 000 000 to Uganda in the same period. Furthermore, Rwanda and Uganda took over control of the fiscal and customs revenue collected respectively by the Directorate General of Taxes. The plunder of the riches of the eastern provinces of Congo is also affecting endangered animal species such as okapis, mountain gorillas, rhinoceros, and elephants.

91. Indeed, the respondent states, especially Uganda, has refuted these allegations, pretending for example that its troops never stepped in some of the regions [in which] they are accused of [having perpetrated] human rights violations and looting of the natural resources of the complainant state. However, the African Commission has evidence that some of these facts did take place and are imputable to the armies and agents of the respondent states. In fact, the United Nations have acknowledged that during the period when the armies of the respondent states were in effective control over parts of the territory of the complainant state, there were lootings of the natural resources of the complainant state. The United Nations set up a Panel of Experts to investigate this matter. 3

92. The report of the Panel of Experts, submitted to the Security Council of the United Nations

in April 2001 (under reference S/2001/357) identified all the respondent states among others actors, as involved in the conflict in the Democratic Republic of Congo. 4 The report profusely provides evidence of the involvement of the respondent states in the illegal exploitation of the natural resources of the complainant state. It is stated in paragraph 5 of the summary of the report: 5

Mass-scale looting. During this first phase stockpiles of minerals, coffee, wood, livestock and money that were available in territories conquered by the armies of Burundi, Rwanda and Uganda were taken, and either transferred to those countries or exported to international markets by their forces and nationals.

93. Paragraph 25 of the reports further states:

The illegal exploitation of resources by Burundi, Rwanda and Uganda took different forms, including confiscation, extraction, forced monopoly and price-fixing. Of these, the first two reached proportions that made the war in the Democratic Republic of the Congo a very lucrative business.

94. The Commission therefore finds the illegal exploitation/looting of the natural resources of the complainant state in contravention of article 21 of the African Charter, which provides:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. ...

4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

95. The deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation - their right to their economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the right to development, guaranteed under

article 22 of the African Charter.

96. For refusing to participate in any of the proceedings although duly informed and invited to respond to the allegations, Burundi admits the allegations made against it.

97. Equally, by refusing to take part in the proceedings beyond admissibility stage, Rwanda admits the allegations against it.

98. As in the case of Rwanda, Uganda is also found liable of the allegations made against it.

For the above reasons, the Commission:

- Finds the respondent states in violation of articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter on Human and Peoples' Rights.

- Urges the respondent states to abide by their obligations under the Charters of the United Nations, the Organization of African Unity, the African Charter on Human and Peoples' Rights, the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States and other applicable international principles of law and withdraw its troops immediately from the complainant's territory.

- Takes note with satisfaction, of the positive developments that occurred in this matter, namely the withdrawal of the respondent states armed forces from the territory of the complainant state.

- Recommends that adequate reparations be paid, according to the appropriate ways to the complainant state for and on behalf of the victims of the human rights by the armed forces of the respondent states while the armed forces of the respondent states were in effective control of the provinces of the complainant state, which suffered these violations.

