21-29 July 2008
Communication No. 300/2005

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Fifth Extraordinary Session
21-29 July 2008

SOCIO ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT
v.
NIGERIA

DECISION

SUMMARY OF FACTS

1. The Communication (herein referred to as the Communication or Complaint) is submitted by the Socio-Economic Rights and Accountability Project (SERAP, the Complainant) against the Government of Nigeria (the Respondent State). Nigeria is a State Party to the African Charter on Human and Peoples' Rights, (the African Charter) which it ratified on 22nd July 1983.

2. In the Complaint, SERAP states that the President of the Republic, Olusegun Obasanjo in a television broadcast of 22 March 2005, alleged that members of the Nigerian Senate and the House of Representatives took bribes from the Federal Minister of Education in order to increase the budget for education. That, according to the President, the Minister of Education invited his acting Permanent Secretary and some Directors to collect money from votes under their control to bribe some members of the National Assembly so that the budget for the Ministry could be increased.

3. The Directors then allegedly took from the votes under their control 35 million naira, while an additional loan of 20 million naira was taken from the National Universities Commission (NUC) to pay a bribe totalling 55 million naira to named members of the National Assembly and a member of the Federal House of Representatives.

4. The Petitioner contends that the above is an illustration of the grand corruption by high-level officials and that it is routine for federal ministries to offer bribes to National Assembly members to have their budget estimates inflated. According to the Complainant, large-scale corruption such as the one described above has contributed to serious and massive violations of the right to education, among other rights, in Nigeria. It further avers that in effect, Nigeria's human rights legal obligations under the African Charter to achieve the minimum core contents of the right to education has been honoured more in breach than in observance, resulting in:

a. Failure of government to train the required number of teachers;

b. Gross under-funding of the nation's educational institutions;

c. Lack of motivation of teachers;

d. Non-available class room seats and pupils sitting on bare floor;

e. Non-availability of books and other teaching materials;

f. Poor curricula;

g. Poor and uninviting learning environments; h. Overcrowding;

h. Persistent strikes by teachers and staff who have not been paid; j. Inability of supervising agencies to set and/or enforce standards;

k. Absence of infrastructure facilities.

5. The Complainant further submits that, the Nigerian Government has deliberately failed to investigate all allegations of corruption and this has contributed in impeding its ability to utilize Nigeria's natural resources for the benefit of its peoples.

6. To demonstrate the gravity of the situation, the Complainant quotes the Concluding Observations of the Committee on Economic, Social and Cultural Rights, where the Committee held that millions of children hold odd jobs and some who go to school are crammed in dilapidated classrooms. The poor quality of education is attributed to the fact that teachers are not devoted to work since their salaries do not meet their expectations. Furthermore, that, in 1997, fees were increased in the universities which caused a brain drain in academia because of long periods of closures, strikes etc.

THE COMPLAINT

7. The Complainant alleges violation of Articles 1, 2, 3, 17, 21, and 22 of the African Charter on Human and Peoples' Rights.

PROCEDURE

8. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the Communication by letter of 29 March 2005. The Commission decided to be seized of the Communication at its 37th Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005.

9. On 18 May 2005 the Respondent State was informed of the seizure and it was requested to submit its arguments on admissibility.

10. The Complainant was also informed of the seizure and requested to submit its arguments on admissibility.

11. By a letter of 4 August 2005, the Secretariat received the Complainant's arguments on admissibility, to which receipt of acknowledgement was sent on 25 August 2005.

12. The arguments on admissibility were also sent to the Respondent State on 25 August 2005.

13. On 14 November 2005, a letter was sent to the Respondent State party urging it to submit its arguments on admissibility.

14. The Respondent State submitted its written observations on the admissibility of the Communication during the 38th Ordinary Session.

15. At its 38th Ordinary Session held from the 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered this Communication and deferred its decision on admissibility to the 39th Ordinary Session.

16. By a Note Verbale of 15 December 2005, the Secretariat notified the Respondent State of this decision to defer decision on admissibility to its 39th Ordinary Session.

17. By a letter of 15 December 2005, the complainant has likewise notified.

18. At its 39th Ordinary Session held from 11th to 25th May 2006 in Banjul, The Gambia, the African Commission considered the Communication and deferred consideration of the same to its 40th Ordinary Session. The Commission indicated that the Complainant's allegation of "serious and massive" human rights violation by the Respondent State merits a hearing before the African Commission as per the latter's established practice.

19. At its 40th Ordinary Session, the African Commission considered the Communication and deferred its decision on admissibility to the 41st Ordinary Session.

20. During the same Session, the Secretariat received the additional written submissions of the Respondent State's admissibility.

21. At its 42nd Ordinary Session held in Brazzaville, Republic of Congo from 15-28 November 2007, the Commission considered the Communication and deferred its consideration of the same to its 43rd Ordinary Session to allow the Secretariat to draft a decision on admissibility.

22. During the same Session, the Secretariat received additional written submissions of the Respondent State's admissibility which was forwarded to the Complainant.

THE LAW

ADMISSIBILITY

SUBMISSIONS BY THE COMPLAINANT

23. The Complainant submits that the Communication raises prima facie violation of the Charter and meets the conditions of admissibility in terms of Article 56 of the Charter.

24. However, on the requirement of the exhaustion of local remedies in accordance with Article 56(5), the Complainant is requesting the Commission to invoke the exception rule. While admitting that local remedies have not been attempted, the Complainant explains that such a course would have been futile for three reasons.

25. Firstly, that there is no local recourse readily available to SERAP because of the strict interpretation of the principle of locus standi in Nigeria, and that exhaustion of local remedies is inapplicable where it is impractical to seize the domestic courts due to the large number of potential plaintiffs (Nigerian students amounting over 5 millions at the primary, secondary and university levels) and potentially over burden the courts resulting in unduly prolonged process.

26. Secondly, that there is no adequate or effective domestic remedies to address the violations alleged in this Complaint since Nigerian courts do not generally regard economic and social rights as legally enforceable human rights. Furthermore, that there is no equivalent of the provisions of Articles 17 and 21 of the African Charter relating to the right to education and the right of people not to be disposed of their wealth and natural resources under Nigeria's Constitution or legislation. For this reason therefore, Nigerian courts will not be easily disposed to hear the matter.

27. Thirdly, that the Nigerian judiciary process is weak and cases are unduly prolonged, making recourse to them ineffective.

SUBMISSIONS BY THE RESPONDENT STATE

28. On its part, the Respondent state submits that in Nigeria, social and economic rights are not justiciable under the Constitution as they fall under what may be termed the preamble of the Constitution, mapping objectives rather than enforcing and sanctioning compliance thereof. Hence there is no legal right that can give rise to rights of action.

29. The Respondent State further argues that, this notwithstanding, the courts in Nigeria have creatively made socio-economic rights justiciable where it can be shown that a denial of these principles are likely to result in a denial of fundamental human rights guaranteed under the Constitution. The State added that, the domestication of the African Charter by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Chapter 10, Laws of the Federation of Nigeria 1990) empowers the Nigerian courts to enforce or give remedies under the provision of the African Charter. Furthermore, that the Constitution of Nigeria contains provisions on socio-economic rights which, even though non-justiciable, States can be held accountable by the courts if they disregard them.

30. The State also argues that even though socio-economic rights are not justiciable, the government has enunciated some policies and created some institutions to address the issue, including the National Economic Empowerment and Development Strategy (NEEDS) and the State Economic Empowerment and Development Strategy (SEEDS). The institutions and programmes include the National Directorate of Employment (NDE), the National Poverty Eradication Programme (NAPEP) as well as the Small and Medium Enterprises Development Agency (SMEDAN) respectively. It further avers that these measures are all geared towards enhancing the peoples' economic and social welfare generally.

31. The Respondent State further submits that the Communication should be declared inadmissible because:

i. the Complaint does not disclose a breach of any municipal law within the Federal Republic of Nigeria or the breach of any international treaties or conventions to which Nigeria is a party;

ii. the factual basis for the Communication is an allegation of criminal conduct which is currently the subject of an on-going criminal trial before the Federal High Court in Abuja;

iii. the conduct of a few officials does not, in law and in fact, amount to the abdication by Nigeria of her sovereign obligations to her citizens properly covered by any municipal law or international conventions or treaties to which Nigeria is a signatory;

iv. all the officers named by the Complainant were forced to resign from their positions in the National Assembly and have since been defending the prosecution case filed against them;

v. the sum of fifty-five million Naira involved in the illegal transaction has been recovered;

vi. adequate local remedies exist in Nigeria and have been employed by the State, and the Complainant has failed to exhaust these local remedies;

vii. the facts alleged by the Complaint are purely criminal in nature and do not amount to an official policy by the government to deny the people of Nigeria the "right to productive use of their resources" or their "right to education" as alleged;

viii. the Complaint has been filed before the African Commission on the basis of generalised statements and information obtained from unverified sources and that there are no statistical or other information supplied in support of these general statements; and

ix. the government has been carrying out various initiatives, including negotiating for debt relief with the Paris Club of Creditors, to significantly impact on the level of poverty in the country.

32. The Respondent State in its additional submission on admissibility reiterates the fact that this Communication offends the fifth ground of admissibility set out under Article 56 of the African Charter. Furthermore, that Chapter 2(Sections 13 to 24) of the Nigerian Constitution of 1999 shows the State's commitment to promotion and protection of the socio-economic rights of its citizens.

DECISION OF THE AFRICAN COMMISSION ON ADMISSIBILITY

33. The admissibility of Communications before the African Commission is governed by the requirements of Article 56 of the African Charter which provides seven requirements that must be met before the African Commission can declare a Communication admissible. If one of these requirements is not met, the African Commission will declare the Communication inadmissible, unless the Complainant provides justifications why any of the requirements could not be met.

34. In the present Communication, the Complainants submit that they have complied with all the requirements under Article 56 of the Charter, except Article 56(5) due to the absence of local remedies. The State however argues that the Communication does not satisfy Article 56(5) of the Charter, as well as Article 56(2) of the Charter. The African Commission will thus deal with the above provisions.

35. As indicated earlier, for a Communication to be declared admissible, it must meet all the requirements under Article 56. Thus, if a party contends that another party has not complied with any of the requirements, the Commission must pronounce itself on the contentious issues between the parties. However, the Commission shall also examine other requirements of Article 56 which are not contested by the parties.

36. Article 56(1) of the African Charter provides that Communications will be admitted if the authors indicate their identity, even if they request anonymity. In the present case the author of this Communication is SERAP, which is an NGO based in Lagos. The author of the Communication is thus clearly identified.

37. Article 56(2) of the African Charter provides that a Communication must be compatible with the Charter of the OAU or with the African Charter on Human and Peoples' Rights. In the present Communication, the Respondent State argues that the Communication does not comply with this requirement. The State asserts in this regard that, the Complaint does not disclose a breach of any municipal law within Nigeria or the breach of any international treaties or conventions to which

Nigeria is a party.

38. For a Complaint to be compatible with the Charter or the Constitutive Act, it must prove a prima facie violation of the Charter. Compatibility according to the Black's Law Dictionary denotes, ‘in compliance with ‘and ‘in conformity with' or ‘not contrary to' or ‘against'. In this Communication, the Complainant alleges violations of the right to education, health and enjoyment of natural resources occasioned by the actions of the Respondent State. These allegations do raise a prima facie violation of human rights guaranteed in the Charter. Based on the above, the African Commission is satisfied that Article 56(2) of the African Charter in the present Communication has been sufficiently complied with.

39. Article 56(3) of the Charter provides that a Communication will be admitted if it is not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity (African Union). In the present case, the Communication does not, in the view of this Commission, contain any disparaging or insulting language, and thus fulfils the requirement of Article 56(3).

40. Article 56(4) of the Charter provides that the Communication must not be based exclusively on news disseminated through the mass media. This Communication was submitted based on the testimonies given before the Nigerian National Assembly, text statements, reports by human rights organisations and first hand information from the Nigerian students themselves, ‘'who have been directly affected by the theft of Nigeria's natural resources." Thus the requirement under Article 56(4) has been fully complied with.

41. Article 56(5) provides that Communications to be considered by the African Commission must be sent after local remedies have been exhausted. The Respondent State contends that the Complainant has not complied with this requirement. The State argues that the complainant has not sought the sufficient and effective local remedies available to them in the State, before bringing the present Communication before the Commission. On the other hand, the Complainant states that they could not comply with the requirements under this article due to reasons that will be outlined below.

42. Article 56(6) provides that, Communications must be submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter. From the wording of this Article, time-limit commences from the date when all local remedies are supposed to have been exhausted, and the phrase "or from the date the Commission is seized with the matter," does not apply to the case before the Commission because a Communication is only seized after the Complainant must have submitted the same, and this Communication has already been seized by the Commission. In addition, the African Charter does not expressly lay down a clear-cut time-limit for the Complainant to submit a Complaint. In this regard, ‘reasonableness' of the time limit can rightfully be assessed by this Commission bearing in mind the circumstances of the case. The Commission is therefore of the opinion that, the Complaint was submitted within a reasonable time period because according to the facts herein, the Complainant submitted when it thought it practicable to do so. Based on the above, and the fact that this Article is not in contention with the Respondent State, the Commission holds that Article 56(6) has been satisfied by the Complainant.

43. Lastly, Article 56(7) provides that the Communication must not deal with cases which have been settled by states, in accordance with the principles of the United Nations, or the Charter of the OAU or the African Charter. This Communication has not been settled by any of these international bodies and thus, the requirement of Article 56(7) has been fulfilled by the Complainant.

44. The rationale for the exhaustion of local remedies is to ensure that before proceedings are brought

before an international body, the State concerned must have the opportunity to remedy the matter through its own local system. This prevents the international tribunal from acting as a court of first instance rather than as a body of last resort. [FN23]

[FN23] See Communications 25/84, 74/92 & 83/92.
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45. Three major criteria could be deduced from the practice of the Commission in determining compliance with this requirement, that is: the local remedy must be available, effective and sufficient.

46. These three major criteria are clearly expressed by the Commission in Sir Dawda K. Jawara v The Gambia. In this case, the Commission held that ‘the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness....'[FN24]

[FN24] See para. 32. of Communications 147/95 and 149/96
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47. The Complainant in the present Communication submit that it could not exhaust local remedies because there are no provisions in the national laws of Nigeria allowing them to seek remedies for the violations alleged.

48. It further avers that there was no local recourse readily available to them, ‘'due to the strict interpretation of locus standi in Nigeria." Furthermore, that locus standi is not available in domestic courts due to the large number of students involved.

49. It also submits that, Nigerian courts will not easily be disposed to hear the matter because they do not enforce socio-economic rights. In addition, there is no equivalent of Articles 17 and 21 of the African Charter relating to the right to education and ‘the right of people not to be disposed of their wealth and natural resources under Nigeria's Constitution or legislation.'

50. Lastly, the Complainant avers that the Nigerian judiciary process is weak and cases are unduly prolonged, making recourse to them ineffective.

51. The Respondent State on its part, submits that even though the rights alleged to have been violated are not justiciable under the Nigerian Constitution of 1999, the domestication of the African Charter by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Chapter 10, Laws of the Federation of Nigeria 1990) empowers the Nigerian courts to enforce or give remedies under the provision of the African Charter. Furthermore, that Chapter 2(Sections 13 to 24) of the Nigerian Constitution of 1999 portrays the State's commitment to promotion and protection of the socio-economic rights of its citizens, and that the government has enunciated some policies and institutions that are aimed at protecting socio-economic rights of its citizens.

52. Considering the arguments brought by the Complainant before this Commission, the latter is of the view that, the Complainant has failed to prove that local remedies are not available. It is simply casting doubts about the effectiveness and availability of the domestic remedies.

However, it is also the Commission's view that the Policies and Institutions which have been enunciated by the government are administrative remedies and not legal remedies. Moreover, the

Respondent has not shown the potential effectiveness of the local remedies that are alleged to exist for the benefit of the applicants.

53. The Complainant contends that it could not exhaust local remedies due to the strict interpretation of the principle of locus standi in Nigeria, especially when it involves a large number of plaintiffs. The Commission notes that, notwithstanding the strict interpretation of this rule, Nigerian courts allow class/representative actions where numerous persons have the same interest, right and a common grievance, and the judgement obtained is binding on all the persons represented.

54. Section 6(6)(b) of the 1979 Constitution in Nigeria, which is the same as Section 6(6)(b) in the 1999 Constitution provides that;

"The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between governments or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.'

55. On the basis of the above, Justice Belo of the Supreme Court of Nigeria in the case of Abraham Adesanya v President of the Federal Republic of Nigeria, held that;

"Section 6(6) (b) can be interpreted to mean that, standing can only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or affected by the act complained of."[FN25]

[FN25] (1981) 2 NCLR 358
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56. The decision became a binding precedent for most class action litigations in Nigeria, even though there were dissenting opinions on the fact of considering Section 6(6) (b) as a test for locus standi. It was held in NNPC v Fawehinmo for instance that;

"This section is not attended to be a catch-all, all purpose provision to be pressed into service for determining questions ranging from locus standi to the most uncontroversial questions of jurisdiction."[FN26]

[FN26] (1998) 1 NWLR(pt.559) 598 at 612
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57. Supporting Justice Belo's opinion in the Adesanya case, Justice Pats-Acholonu of the Supreme Court in Ladejobi v Oguntayo, also stated that;

"...it is dangerous to limit the opportunity for one to canvass his case by rigid adherence to the ubiquitous principle inherent in locus standi which is whether a person has standing in a case. The society is becoming highly dynamic and certain stands of yester years may no longer stand in the present state of our social and political development."[FN27]

[FN27] (2004) All FWLR(pt. 231) 1209 at 1235-1236

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58. With the above submissions, this Commission is of the view that Nigerian courts can properly employ the locus standi rule in class actions. The question should not be whether it is a public or private action, but whether the applicants sufficiently prove violation of the rights alleged and demonstrates enough interest. For this reason, the Complainant cannot rely on the argument that it could not exhaust local remedies due to the large number of plaintiffs involved and the strict interpretation of the principle of locus standi in Nigeria.

59. With respect to the Complainant's assertion that the courts in the Respondent State are weak and ineffective, the African Commission is of the opinion that, the Complainant is simply casting doubts about the effectiveness of the domestic remedies.

60. The African Commission has held in Article 19 v Eritrea, that; "it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies," adding that; " it is not enough for the Complainant to cast aspersions on the ability of the domestic remedies of the State due to isolated incidences."[FN28] In the same case, the Commission referred to the Human Rights Committee's (the Committee) decision in A v Australia, in which the Committee held that; "mere doubts about the effectiveness of local remedies or prospect of financial costs involved did not absolve the author from pursuing such remedies."[FN29]

[FN28] See Communication 275/2003, Article 19 v Eritrea, para 67
[FN29] Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993(1997)
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61. Furthermore, the Commission held in Mr. Obert Chinhamo v Zimbabwe that, "Complainants are required to set out in their submissions the steps taken to exhaust domestic remedies. They must provide some prima facie evidence of an attempt to exhaust local remedies."[FN30] Thus, the Commission is of the opinion that, by not attempting local remedies or substantiating the weaknesses or ineffectiveness, the Complainant cannot rely on this argument as reasons for their non exhaustion of local remedies.

[FN30] Communication 307/2005, para 84
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62. Regardless of the fact that there is no legislation in Nigeria domesticating the International Covenant on Economic, Social and Cultural Rights (the ESR Covenant), the 1999 Constitution of Nigeria has certain provisions which embody most of the rights enumerated in the ESR Covenant. These provisions are contained in Chapter II (Sections 13-24) of the Constitution and couched as Fundamental Objectives and Directive Principles of State Policy.

63. Even though it can be argued that, these are not rights, but mere Political, Economic, Social, Educational, Environmental, Cultural and Foreign Policy Directives and that these provisions are non justiciable by virtue of Section 6 (6) (c) of the Constitution, the African Commission is of the view that this Chapter provides a foundation upon which economic and social rights could be enjoyed, and its provisions indicate that the courts are not excluded from entertaining cases relating to socio-economic rights.

64. Section 16(2) (d) for instance, requires the state to direct its policy towards ensuring that "suitable

and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care, pension, unemployment, sick benefits and welfare of the disabled are provided for the citizens." Section 20 and 21 on the other hand, require the state to protect the environment and preserve and promote Nigerian cultures.

65. Furthermore, Nigeria is a State Party to the African Charter and has domesticated the same. By reason of this domestication as required by Section 12 of the 1999 Constitution, the African Charter has become part of Nigerian Law. The African Charter therefore constitutes a normative base for socio-economic rights claims which allow any claim brought under the Charter to be litigated before the national courts.

66. This was substantiated in Abacha v Fawehinmi, where the Supreme Court of Nigeria recognised the African Charter as part of Nigerian Law and that its provisions were justiciable. In that case, the Supreme Court stated that;

"The African Charter which is incorporated into our municipal law becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. Thus, if the individual rights contained in the African Charter are justiciable in Nigerian courts and the African Charter does not recognise any generational dichotomy of rights, the articles conferring socio-economic rights are equally justiciable in the Nigerian courts."[FN31]

[FN31] (2000) 6 NWLR (Pt 600) 228
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67. This decision was also reflected in Ogugu v The State, where the Supreme Court held that:

"By reason of its domestication, the African Charter has become part of Nigeria's domestic laws and the enforcement of its provisions…falls within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto since the African Charter is part of Nigeria's domestic laws. Furthermore, that human and people's rights of the African Charter are enforceable by several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court."[FN32]

[FN32] (1994) 9 NWLR (pt 336) 1, 26-27
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68. In Oronto Douglas v Shell Petroleum Development Company Limited, for instance, the Federal Government together with other oil companies, including Shell Petroleum Development Company as the Operator, decided to set up Nigeria's Liquefied Natural Gas Project at Bonny. This was in a bid to harness Nigeria's huge gas resources. However, the environmental impact assessment which is obligatory was not carried out until after the project was underway, and a private citizen's suit, challenging this was initially thrown out for lack of locus standi. The case was appealed and the Court of Appeal in Nigeria upheld the justiciability of an action brought on the basis of Article 24 of the African Charter (Ratification and Enforcement) Act. [FN33]

[FN33] (1999) 2 NWLR(pt 591) 466
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69. All the Nigerian cases cited above are aimed at establishing the fact that socio-economic rights can be litigated in Nigerian Courts. Thus the Complainant could have made attempts to utilise the local remedies available instead of making presumptions that this Complaint would not be heard since Nigerian courts do not generally regard economic and social rights as legally enforceable human rights. The African Commission thus holds that, the Complainant has not utilised the domestic remedies available and has not demonstrated why this could not be done.

For the reasons outlined above, the African Commission declares this Communication inadmissible.

Adopted at the 5th Extraordinary Session of the African Commission on Human and Peoples' Rights, 21-29 July 2008, Banjul, The Gambia.