

**Communication 290/2004 - Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v. the Republic of Cameroon**

**Summary of the Complaint**

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a complaint on 28 June 2004 from Open Society Justice Initiative (the Complainant) on behalf of Pius Njawe Noumeni (the Victim), journalist and head of *Groupe Le Messenger*.<sup>1</sup>
2. The Complaint is submitted against the Republic of Cameroon (the Respondent State), State Party to the African Charter on Human and Peoples' Rights (the African Charter or the Charter).<sup>2</sup>
3. The Complainant submits that the Victim is: a prominent activist for media freedom; he established *Le Messenger* Newspaper which is outspoken and independent; he has been arrested thirty times since 1990, forced into exile and imprisoned three times for weeks or months; and *Le Messenger* and its satirical sister, *Le Messenger Popoli* have been banned and seized, and their staff have been arrested and prosecuted, on numerous occasions.
4. The Complainant submits that the Respondent State had a state monopoly on radio and television broadcasting until 1990, when it enacted Law No. 90/052 on Freedom of Social Communication of 19 December 1990 (Law 1990) which had the stated aim of liberalising broadcasting. The Complainant submits that the Government finally issued the implementing Decree for Law 1990 on 3 April 2000, by adopting Decree No. 2000/158 Establishing the Conditions and Modalities for the Creation and Operation of Private Audiovisual Communication Enterprises (Decree 2000). The Complainant adds that radio stations had begun to appear in Yaounde under conditions of a regulatory vacuum, despite threats by authorities that no one could operate until the government issued a decree to implement Law 1990.
5. The Complainant avers that, during the regulatory vacuum, in November 1999 *Le Messenger*, started operating a radio station in Douala, Radio Sawa, on the 20<sup>th</sup> anniversary of *Le Messenger*. Radio Sawa operated from November 1999 to April 2000.

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<sup>1</sup> Following the sudden death of the Victim on 12 July 2010, the Complainant submitted a signed statement by Ms Amanda Njawe, the Victim's oldest child and next of kin, requesting the continuation of the full consideration of the Communication and the totality of the claims submitted therein.

<sup>2</sup> The Republic of Cameroon ratified the African Charter on 20 June 1989.

6. The Complainant submits that when the State finally issued Decree 2000, *Groupe Le Messenger* suspended broadcasting in order to obtain better equipment. The Complainant avers that on 29 October 2002, after raising sufficient funds to purchase the equipment, *Le Messenger* submitted a formal application for a radio licence with the Minister of Communication.
7. The Complainant states that pending review of the application, *Le Messenger* started purchasing equipment and building studios for the radio. On 31 January 2003, it informed the Minister of Communication of its decision to change the name of the radio station to Freedom FM, and also requested that it be allocated a different frequency, as its former frequency was attributed to another radio station.
8. The Complainant avers that on 7 February 2003, a group of technicians from the Ministry of Communication visited the premises of the radio station and inspected the equipment for four hours.
9. The Complainant submits that on 15 May 2003, *Le Messenger* announced in print media that it will begin broadcasting on Freedom FM on 24 May 2003. The Complainant adds that after the mandatory time-limit of six (6) months, on 21 May 2003, the Minister of Communication did not respond favourably to the request arguing that the application was still being considered.
10. The Complainant submits that on 23 May 2003, even before Freedom FM began broadcasting, dozens of army, police and gendarmerie forces took over the Freedom FM building and sealed off the studios and transmission rooms. The Complainant further submits that they claimed to act pursuant to an order of the Minister of Communication banning Freedom FM.
11. The Complainant alleges that the value of the radio equipment is about 60 million CFA francs (110, 000 US dollars), and that because the insulation and air-conditioning of the sealed rooms were unfinished, the equipment is exposed to rainy and humid weather which would cause serious damage.
12. The Complainant avers that upon the proposal of the Minister of Communication to change the name and programming nature of the radio, on 3 June 2003, *Le Messenger* filed amendments to the initial application for a broadcasting licence.
13. The Complainant avers that in the following weeks the Minister of Communication informed *Le Messenger* that the Douala radio market is saturated and that City FM would have to transmit from a location outside Doula. The

Complainant states that the Victim proposed two new sites 60 km west of Douala, but the Minister failed to respond. The Complainant adds that *Le Messenger* has not received any formal notification from the Minister regarding the outcome of its licence application, and that it has been denied access to its seized equipment.

14. The Complainant further submits that the Minister of Communication is in the habit of processing applications for operational licences in an arbitrary, illegal and discriminatory manner and had on several occasions refused to grant statutory licences to operators of radio stations. The Complainant cites the case of Radio Veritas, a Douala-based radio of the Catholic Church, which never received a response to its licence application of 2001 until November 2003, amid speculations that Cardinal Christian Tumi of Douala, an outspoken critic of the government, might run against President Paul Biya in the upcoming elections. The Complainant states that the Minister of Communication authorised the radio to operate only after the Cardinal publicly declared that he had no intention of running.
15. The Complainant submits that the Minister simply allocates frequencies to broadcasters that it generally deems to be politically innocuous to the current government. The Complainant states that on 27 May 2003, the Minister of Communication passed Decision No. 012 allocating frequencies to fourteen (14) radios in the capital Yaounde and ten radios in Douala without granting them a proper licence. The Complainant states that this has not provided any legal cover to the operators of radio stations but only placed them in a situation of uncertainty since the informal authorisation could at any given time be withdrawn.
16. The Complainant alleges that on 4 September 2003, *Le Messenger* filed an action for emergency relief against the Douala Representative for National Security, requesting the release of the equipment. The Complainant further alleges that the Douala Court of First Instance postponed the hearing 19 times in almost five months because of the Respondent State's failure to appear before the Court.
17. The Complainant submits that following the Minister of Communication's intervention as an interested party regarding the jurisdiction of the Court of First Instance, on 26 January 2004, the Court ruled that it was not competent to decide on the case. The Complainant adds that the Court only notified *Le Messenger* of the written judgment in mid-May 2004, after which *Le Messenger* appealed the ruling to the Douala Court of Appeal. While the Court of Appeal was to consider this

appeal, some equipment worth \$110,000 continued to depreciate as a result of poor storage conditions.

18. The Complainant submits that on 11 November 2003, while the civil case was pending, the Minister of Communication brought a criminal action against the Victim and *Le Messenger* for having “created and operated” an unlicensed broadcasting company.

#### **Articles alleged to have been violated**

19. The Complainant alleges violation of Articles 1, 2, 9, and 14 of the African Charter.

#### **Prayers**

20. The Complainant requests the African Commission on Human and Peoples’ Rights (the Commission) to:
  - a) hold that Cameroon’s laws and practices on licensing of private broadcasters, as well as its silent refusal to grant *Le Messenger* a radio licence, violate Article 9 and Article 1 of the Charter;
  - b) hold that Cameroon has violated the Victim’s right to property under Article 14 of the Charter;
  - c) hold that Cameroon has violated the Victim’s right under Article 2 of the Charter to enjoy freedom of expression without being subjected to politically-motivated discrimination;
  - d) request that Cameroon bring its broadcasting laws and practices in conformity with Article 9 of the Charter and the Commission’s Declaration of Principles on Freedom of Expression in Africa; and
  - e) request the State to pay appropriate compensation to the Victim for the multiple violations of his Charter rights and freedoms.

#### **Procedure**

21. The Secretariat received the Complaint on 28 June 2004 and acknowledged receipt on 5 July 2004. Accompanying the Complaint was a request for Provisional Measures in accordance with Rule 111 of the 1995 Rules of Procedure of the Commission.

22. By letter dated 15 July 2004, the Commission transmitted a request for provisional measures to the Respondent State in accordance with the Rules of Procedure, to ensure that no irreparable damage is done to the equipment of *Le Messenger*.
23. By letter dated 16 November 2004, the Complainant informed the Commission that the request for provisional measures had not been complied with and that the Victim had received death threats over the matter.
24. During its 36<sup>th</sup> Ordinary Session, held from 29 November to 7 December 2004, the Commission considered the Communication and decided to be seized of it. During the Session, the Complainant made an oral submission on the failure of the Respondent State to comply with the request for provisional measures. The Respondent State's delegates at the Session indicated that they had not been made aware of the request and the head of delegation, Minister Joseph Dion Ngute, offered his good offices with a view to facilitating an amicable solution to the matter.
25. On 22 December 2004, the Secretariat informed the parties that the Commission had been seized of the Communication and requested them to submit arguments on admissibility within three months from the date of notification. The Secretariat reminded the Complainant to forward its submissions by letter dated 22 February 2005.
26. On 22 March 2005, the Complainant submitted its arguments on admissibility, which were transmitted to the Respondent State on 29 March 2005.
27. At its 37<sup>th</sup> Ordinary Session, which was held from 27 April to 11 May 2005, the Commission considered the Communication and heard oral submissions from the parties. The Commission subsequently deferred its decision on admissibility pending receipt of further arguments from the Respondent State.
28. By Note Verbale dated 8 September 2005, the Respondent State informed the Secretariat that an amicable settlement was underway on the matter.
29. By letter dated 4 October 2005, the Secretariat informed the Complainant of the developments and transmitted the documents forwarded by the Respondent State to support its claim. The Complainant was requested to forward its observations.
30. At its 38<sup>th</sup> Ordinary Session held from 21 November to 5 December 2005, the Commission deferred its decision pending receipt of the Complainant's formal response on the outcome of the said amicable settlement.

31. On 28 April 2006, the Secretariat received correspondence from the Complainant stating that Radio Freedom FM and the Government of Cameroon signed a settlement agreement on 24 June 2005, and pursuant to the agreement:
  - i. The Respondent State had dropped the criminal charges against the Director of Freedom FM and released the equipment of the radio station;
  - ii. The Respondent State has committed itself to grant Freedom FM a provisional authorization to broadcast, and process its application for a full licence in a fair and equitable manner;
  - iii. Freedom FM, for its part, has agreed to discontinue the Communication before the Commission, and settle the case amicably;
  - iv. The ongoing negotiations between the parties on the compensation issue has produced a mutually acceptable compromise, with the Respondent State agreeing to re-open discussions with Freedom FM in relation to the compensation of the damages suffered by the radio station, with a view to reaching a fair, comprehensive and final settlement of the case; and
  - v. The Respondent State has reiterated its commitment to grant Freedom FM a provisional authorization as soon as consideration of the current Communication is discontinued - as well as process the Radio's application for a broadcasting licence in a fair, transparent, and expeditious manner.
32. In light of the above, the Complainant, acting on behalf of the Victim requested the Commission to discontinue the consideration of Communication 290/04 against the Republic of Cameroon and that the amicable settlement be registered.
33. At its 39<sup>th</sup> Ordinary Session held from 11 to 25 May 2006 in Banjul, The Gambia, the Commission, acting on the Complainant's request, decided to close its consideration of the Communication, requesting that the terms of the amicable settlement upon which the Complainant's request for discontinuance was based be filed with the Commission.
34. By Note Verbale dated 23 November 2006, the Respondent State forwarded a report of a joint meeting that took place on 24 June 2005 between the Ministry of Communication and the Victim, which report sets out the terms agreed on by the parties.
35. On 18 December 2006, the Complainant copied the Chairperson of the Commission in a letter addressed to the Minister of Communication of the

Respondent State, enquiring about the Respondent State's failure to comply with the terms of the amicable settlement.

36. On 20 April 2007, the Secretariat received a correspondence from the Complainant requesting the Commission to:
  - i. Reopen the Communication procedure and resume the normal consideration of the Communication, by virtue of the Respondent State's failure to grant Radio Freedom FM a broadcasting authorization in material breach of the 24 June 2005 amicable settlement which, the Complainant alleges, is no longer effective and, in any event, would no longer constitute an amicable solution on the issue based on the respect of human rights and fundamental freedoms, as recognized by the Charter.
  - ii. Adopt provisional measures requiring the Cameroonian authorities to grant Radio Freedom FM a provisional authorization to broadcast pending the Commission's consideration of the case. The Complainant further avers that the Commission's urgent intervention is needed to preserve the Victim's freedom of expression by requesting that Radio Freedom FM be immediately granted a provisional authorization to broadcast, which would not require Cameroon to do anything more than what it agreed to do under the terms of the June 2005 settlement.
  - iii. Grant audience to the Complainant at the 41<sup>st</sup> Ordinary Session.
37. At its 41<sup>st</sup> Ordinary Session, held from 16 to 30 May 2007, the Commission granted the Complainant audience during which the latter argued for the matter to be continued and for the Commission to issue provisional measures.
38. By letter dated 8 July 2007, the Secretariat informed the Complainant of the Commission's decision to reopen the matter, and decline the request for provisional measures.
39. By Note Verbale dated 8 July 2007, the Respondent State was requested to indicate the measures it had taken to implement the terms of the amicable agreement. A reminder was sent to the Respondent State on 11 September 2007.
40. By Note Verbale and letter dated 20 March 2008, the parties were requested to submit their observations on admissibility.
41. The Secretariat received the Complainant's submissions on admissibility on 10 May 2008, and forwarded the same to the Respondent State and invited it to respond by Note Verbale dated 4 July 2008.

42. After several reminders from the Secretariat, by Note Verbale dated 16 February 2010, the Respondent State requested to be allowed more time to make its submission on admissibility.
43. By Note Verbale dated 18 March 2010, the Respondent State forwarded its submissions on admissibility.
44. By letter dated 6 May 2010, the Complainant urged the Commission to resume active consideration of the Communication due to the adverse effects of the delayed resolution.
45. By Note Verbale dated 4 October 2010, the Secretariat acknowledged receipt of the Respondent State's submissions on admissibility and forwarded the same to the Complainant by letter dated 4 October 2010.
46. On 10 November 2010, the Complainant acknowledged receipt of the Respondent State's submissions on admissibility, and informed the Commission that Pius Njawe Noumeni (the Victim), died in a traffic accident on 12 July 2010. The Complainant submitted a signed statement by Ms Amanda Njawe, the Victim's oldest child and next of kin, requesting the Commission to continue with the full consideration of the Communication and the totality of the claims submitted therein.
47. During its 11<sup>th</sup> Extra-Ordinary Session held from 21 February to 1 March 2012, the Commission considered the Communication and declared it admissible. The Parties were informed and the Complainant was requested to forward its submissions on the merits by 25 August 2012.
48. On 21 August 2012, a reminder was sent to the Complainant to submit on the merits within one month of the notification, failing which the Communication will be struck out.
49. On 13 November 2012, the Secretariat received a Note Verbale from the Respondent State transmitting the State's submissions on the merits. The submissions were transmitted to the Complainant by letter dated 20 November 2012.
50. At the 13<sup>th</sup> Extra-Ordinary Session held from 19 to 25 February 2013, the Commission decided to strike out the Communication for lack of diligent prosecution. The Parties were informed by correspondence dated 28 February 2013, respectively.

51. By letter dated 9 April 2013, the Complainant informed the Secretariat that it had not received any notification regarding the admissibility decision taken, and requested the Commission to re-instate the Communication.
52. At its 54<sup>th</sup> Ordinary Session held from 22 October to 5 November 2013, the Commission having found acceptable the reasons presented by the Complainant, re-listed the Communication. The Parties were informed by correspondence dated 15 November 2013, and the Complainant was invited to submit on the merits within sixty days.
53. The Complainant transmitted its submissions on the merits by letter dated 14 January 2014, which was forwarded to the Respondent State on 3 February 2014.
54. By Note Verbale dated 30 April 2014, the Respondent State forwarded its submissions on the merits to the Commission.
55. The Respondent State's delegation attending the 55<sup>th</sup> Ordinary Session of the Commission, held in Luanda, Angola, from 28 April to 12 May 2014, informed the Secretariat that the Complainants' Submissions on the Merits were never received by the Government of the Republic of Cameroon. The Submissions were therefore re-transmitted by Note Verbale dated 28 May 2014.

### **The Law on Admissibility**

#### **Complainant's Submission on Admissibility**

56. The Complainant submits that domestic remedies are in part non-existent and therefore unavailable to the Complainant, and in part have been proven ineffective and unduly prolonged. While Decree 2000 gives the Minister a six-month deadline to decide on a licence application, neither Law 1990, nor the Decree 2000 specifies what remedies, if any, a licence applicant has against the Minister's failure to act on an application. In addition, both instruments fail to specify whether the Minister's silence should be legally considered as either acceptance or rejection of the application.
57. Under Cameroon law and practice, the applicant would be able to challenge, before the administrative chamber of the Supreme Court, only the explicit rejection of a licence application by a Government entity, unless otherwise provided by law.
58. The Complainant submits that the failure of the broadcasting laws to define the legal effects of administrative silence and/or to provide explicitly for a remedy

against administrative silence means that Radio Freedom FM was left without a domestic remedy to challenge the Minister of Communication's (now five-year-long) failure to act on its application. In view of this, the Complainant concludes that they were not required to exhaust remedies that were unavailable. The Complainant contrasts this situation with the relevant Cameroonian legislation on licensing of drinking establishments which stipulates that administrative silence on a licensing application past the three-month deadline shall amount to a grant of the licence.

59. The Complainant contends that the Minister of Communication has developed an entrenched and illegal practice of granting temporary or informal authorization that gives broadcasters no legal recognition or certainty. In this regard, they argue that victims of such entrenched and widely-tolerated administrative practices are not required to exhaust ostensible, "paper" remedies if judicial or administrative challenges to those practices are likely to be ineffective or to subject the victims to even greater abuse and harassment. The Victim in this case is essentially in the same position because of Cameroon's policy - inconsistent with its own laws - of not granting licenses to private broadcasters, as well as the great likelihood that any challenges to that policy would result in further retaliation by the Government.
60. The Complainant further submits that the excessive degree of discretion granted to the Minister of Communication by Cameroon's broadcasting laws would render any theoretical form of judicial review ineffective and illusory.
61. The Complainant further contends that even if the Minister's licensing decision could be subject to some form of judicial review, the legal framework provides no standards, and therefore gives applicants no basis to challenge those decisions on the merits. Under these circumstances, the Complainant holds that only a domestic constitutional challenge to the licensing laws could provide an effective remedy to the Complainants. In that regard, the Complainant states that the Constitution of Cameroon grants the Constitutional Council the power to review unconstitutional legislation. However, competence to bring actions before this court is limited to senior executive and elected officials and the Complainant thus has no opportunity to challenge the constitutionality of the licensing laws.
62. Regarding the attempts made to seek local remedies in respect of the sealing off of Freedom FM, the Complainant submits that while Radio Freedom FM was not able to challenge the Minister of Communication's silence directly, it sought to

do so indirectly by filing a civil action following the sealing of its premises and equipment.

63. In that regard, on 4 September 2003, *Le Messenger* filed an expedited action for emergency relief against the Douala Representative for National Security (an agent of the central Government), requesting for the removal of the seals and release of the equipment, which had been under seal continuously since 23 May 2003.
64. The lawsuit argued that the sealing was without any legal basis, that Radio Freedom FM had never started broadcasting, and that the Minister of Communication had failed to comply with the statutory six-month deadline to process its licence application.
65. The supposedly expedited proceedings, assigned to a judge of the Douala Court of First Instance, were postponed nineteen times in the next four and a half months because of the Government representatives' repeated failure to appear. Initially the judge set a 20 September 2003 deadline for the final decision, but then decided on that date to re-open the debate and request the opinion of the public prosecutor; a highly unusual measure in a private case like this.
66. In the meantime, the Minister of Communication sought, and was granted, leave to intervene in the case as an interested party, arguing that with regard to the Minister of Communication's order to ban Radio Freedom FM's operations, the sealing of the equipment was "a material act necessary to enforce a unilateral administrative act". The Minister of Communication also argued that the Court of First Instance had no jurisdiction over the case, which should be tried by an administrative tribunal.
67. The Complainant submits that in one of the final hearings, the national police headquarters in Yaoundé sent a representative to testify that the police had suspicions that *Le Messenger* was conspiring to use Freedom FM to overthrow the Government. The only effort by the police representative to substantiate these outlandish allegations was a statement that the radio's "sophisticated equipment" could be programmed to enable radio Communication among a selected group of people (i.e. like "walkie-talkie" Communication).
68. On 26 January 2004, heeding the Minister of Communication's suggestion, and after months of debate on the merits, the court ruled that it was not competent to decide the case. The Douala Court of First Instance notified and prepared a

certified copy of the written judgment, which *Le Messenger* needed to be able to appeal pursuant to the relevant procedural laws by mid-May 2004 only.

69. *Le Messenger* appealed the ruling to the Douala Court of Appeal, arguing that the case belongs to the civil jurisdiction. For some eighteen months, the Court of Appeal took no action whatsoever on the appeal, failing even to set a date for a single hearing on the case until July 2005, when *Le Messenger* withdrew the case pursuant to the terms of its amicable settlement agreement with the Government.
70. The Complainant argues that the judicial procedures pursued by the Victim to indirectly challenge the Minister of Communication's failure to take a decision on the application, as well as its order to ban Radio Freedom FM's operations indefinitely and seize its equipment, were rendered patently ineffective and unduly prolonged by the actions, omissions and inadequacies of the domestic courts. This conclusion is supported by the Commission's own jurisprudence, including in *Mekongo v. Cameroon* and *Modise v. Botswana*.<sup>3</sup>
71. The Complainant argues that while the delays in this case may not be as prolonged, in absolute terms, as those identified by this Commission in other cases, they are significant insofar as they occurred in the context of proceedings that were supposed to be urgent and expedited; and were characterized by repeated and blatant procedural omissions of the most basic nature by both the Court of First Instance and the Court of Appeal.
72. Ultimately, the deliberate failure of the Douala Court of First Instance to provide a written judgment, coupled with the failure of the Court of Appeal to hold a single hearing on *Le Messenger's* appeal – both over extended periods of time – amount to a clear case of denial of justice. Such judicial behaviour casts serious doubt on the ability or willingness of the Douala courts to preside over a fair trial in this matter.
73. On Article 56 (7), the Complainant submits that the case has not been submitted to or settled by any other international human rights mechanism.

### **Respondent State's Submission on Admissibility**

74. The Respondent State submits that considering the facts, clarifications provided, and the amicable and definitive settlement that is underway with Mr Pius Njawe,

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<sup>3</sup> Communication 59/91 - *Embga Mekongo Louis v. Cameroon* (1995) ACHPR and Communication 97/93\_14AR *John K. Modise v. Botswana* (2000) ACHPR.

the Victim; it would appreciate if the Commission would suspend the proceedings before it and declare the Communication inadmissible.

### **Analysis of the Commission**

75. The Admissibility of Communications submitted to the Commission in accordance with Article 55 of the African Charter is governed by the conditions stipulated under Article 56 of the Charter. Article 56 outlines seven (7) conditions which must generally be met by the Complainant for the Communication to be considered admissible.
76. In the present Communication, the Complainant submits that the seven conditions have been met, while the Respondent State holds that the matter has been settled by means of an amicable settlement and requests the Commission to declare the Communication inadmissible.
77. None of the parties have submitted arguments on the compliance of the Communication under Article 56 (1), (2), (3), (4) and (6). The Commission considers that these provisions raise no contentious issues and accordingly considers the requirements to have been complied with.
78. Regarding Article 56 (5), the Complainants submissions as outlined above<sup>4</sup> are to the effect that local remedies are in part inexistent and therefore unavailable, and in part, have proven ineffective and unduly prolonged.
79. The Commission has already stated its position on the importance of the exhaustion of local remedies, by maintaining that "the rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matters through its own local system."<sup>5</sup>
80. The Commission notes that the legal framework for broadcasting in Cameroon does not provide any remedy or avenue of recourse against the decision of the Minister of Communication if he fails to grant a broadcasting license within the statutory six months' period. The law also does not indicate any remedies for the Minister's inaction and whether or not the Minister's silence should be legally considered as either acceptance or rejection. The law grants an unfettered

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<sup>4</sup> See paragraphs 56-72 above.

<sup>5</sup> Communication Nos. 147/95, 149/96 - *Sir Dawda K. Jawara vs. Gambia* (2000) ACHPR para. 31.

discretion to the Minister to the extent that the latter is not obliged to justify his decision.

81. The Commission also notes that under Cameroonian law and practice, the applicant would only be able to challenge before the Administrative Bench of the Supreme Court, the explicit rejection of a license by a Government entity, unless provided by law.
82. The Complainant has also made it clear that given the nature of the law, only a domestic constitutional challenge to the law could provide an effective remedy. However, the Complainant has no competence to bring a case before the Constitutional Council of Cameroon given that only senior executives and elected officials have standing before this jurisdiction.
83. In spite of the above, *Le Messenger* took reasonable steps to challenge the Minister's action in a civil suit following the sealing of its premises by instituting civil proceedings in the Douala Court of First Instance, which after months of debate on the merits of the case, declared that it was incompetent to hear the matter. The Court also failed to provide *Le Messenger* with a copy of the Judgment which would have enabled it file an appeal pursuant to the relevant domestic procedural laws. Even though *Le Messenger* subsequently succeeded to appeal the decision of the Court of First Instance, the case was stalled at the level of the Court of Appeal because, for 18 months, no single hearing was set for the case and *Le Messenger* was compelled to discontinue the matter following the amicable settlement with the Government of Cameroon.
84. The Commission notes that the Respondent State has not challenged the Complainant's submissions on Article 56 (5) and in accordance with its established practice, the Commission considers that the facts as submitted by the Complainant are proved.
85. In the above circumstances, the Commission is inclined to agree with the Complainant's argument that local remedies were inexistent in its circumstances. The Commission also agrees with the Complainant that the remedies attempted proved ineffective. This is in tandem with the decision of the Commission in Communication 155/96 - *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (SERAC Case)*,<sup>6</sup> wherein it was held that "if a right is not well provided for, there cannot be effective remedies or any

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<sup>6</sup> Communication 155/96 -*Social and Economic Rights Action Center, Center for Economic and Social Rights v Nigeria* (2001) ACHPR para 37.

remedies at all”<sup>7</sup>. Similarly, in Communication 147/95 – *Jawara v. The Gambia*, the Commission held that “a remedy is considered available if the petitioner can pursue it without impediment”<sup>8</sup> and that “a remedy is considered available only if the applicant can make use of it in the circumstance of his case”.<sup>9</sup>

86. Based on the foregoing, the Commission considers that it would be unreasonable to require the Complainant to exhaust inexistent local remedies or remedies that have proved to be ineffective and consequently holds that Article 56 (5) has been complied with.
87. On Article 56 (7), the Complainant submits that the present Communication has not been submitted to, or settled by any other international human rights mechanism. The Respondent State on the other hand submits that the amicable settlement concluded between the parties renders the case settled.
88. The Commission notes that it discontinued consideration of the present Communication at its 39<sup>th</sup> Ordinary Session at the request of the Complainant on the understanding that an amicable settlement had been reached between the parties. The Commission further notes that the requirement for the Complainant to discontinue proceedings before the Commission was one of the terms of the amicable settlement reached between the parties.
89. However, because the Respondent State failed to respect its own part of the bargain, the Complainant requested that the Commission should continue with the consideration of the matter. Despite repeated requests from the Commission for the Respondent State to furnish it with information on the steps it had taken to meet the terms of the amicable settlement, no response has been received to date. In the present circumstances, the Commission considers that the Respondent State did indeed fail to respect the terms of the amicable settlement.
90. The question that therefore needs to be answered is whether a failed amicable settlement between parties to a Communication before the Commission can constitute a settled matter in terms of Article 56 (7) of the African Charter?
91. This Commission has held in Communication 260/02 – *Bakweri Lands Claims v. Cameroon* that “the principle behind the requirement under this provision of the African Charter is to desist from faulting member states twice for the same alleged violations of human rights. This is called the *ne bis in idem* rule (also

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<sup>7</sup> Ibid.

<sup>8</sup> *Jawara v. The Gambia* (n 5 above), para 32.

<sup>9</sup> As above, para 33.

known as the principle or prohibition of double jeopardy, deriving from criminal law) and ensures that, in this context, no state may be sued or condemned more than once for the same alleged violation of human rights.”<sup>10</sup>

92. The Commission notes that in this case, the Commission is the international human rights mechanism before which the matter was brought, and that it had not taken any decision on the admissibility or merits of the case before the request for discontinuance was made. Its decision noting the will of the parties to settle their dispute amicably cannot be confused with a decision on the admissibility or merits of the case and cannot as such be considered to have been settled in terms of Article 56 (7), especially in a situation where one of the parties has failed to respect the terms of the settlement.
93. The Commission considers that the Respondent State’s argument that the matter has been settled in terms of Article 56 (7) is not tenable, because the State failed to respect the terms of the settlement on the basis of which the Commission had discontinued consideration of the Communication. For an amicable settlement agreed upon between the parties to be conclusive and in accordance with Article 56 (7), and as such constitute a case which has been settled, the parties must comply with the terms of the amicable settlement. The Respondent State has not given any justification for its silence or inaction for over six years concerning the granting of a broadcasting licence to Radio Freedom FM, and this cannot be fulfilment of its part of the amicable settlement.
94. The Commission therefore concludes that the prolonged silence and inaction of the Respondent State in granting Radio Freedom FM a broadcasting licence, which was one of the main terms of the amicable settlement, is a refusal by the Respondent State to honour its commitments and a violation of the amicable settlement concluded between the parties. This amounts to the non-implementation of the amicable settlement which qualifies the case as one which has not been settled by the parties.
95. In view of the foregoing, the Commission declares the Communication admissible.

## **Merits**

### **Complainant’s Submission on the Merits**

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<sup>10</sup> Communication 260/02 - *Bakweri Lands Claims vs. Cameroon* (2004) ACHPR para 52.

## **Alleged violation of Article 9 in conjunction with Article 1**

96. The Complainant alleges a violation of Article 9 of the Charter, in conjunction with Article 1. The Complainant submits that the Respondent State's monopoly on broadcasting, the lack of an independent licensing authority and fair procedures, as well as the arbitrary denial of access to radio broadcasting violate Article 9 and Article 1 of the Charter.
97. The Complainant submits that the effective State monopoly on broadcasting which ended, at least in law, through the adoption of Decree 2000 was in violation of Article 9 of the African Charter. The Complainant avers that the Government deliberately failed to adopt the enabling regulations to Law 1990 on private broadcasting. The Complainant further alleges that in an attempt to enforce the ban on private broadcasting, the Government made threats of prosecution and of confiscation of the equipment while Radio Sawa was broadcasting from November 1999 to April 2000.
98. The Complainant submits that the Minister of Communication cannot be deemed an "independent regulatory body,"<sup>11</sup> "adequately protected against interference... of a political nature"<sup>12</sup> as provided for in the Commission's Declaration of Principles on Freedom of Expression in Africa (the Declaration on Freedom of Expression). The Complainant highlights that the Minister of Communication is a member of the Government appointed by the President. The Minister is further advised in making licensing decisions by a group of technical experts. The Complainant submits that the technical experts group, being composed only of representatives of executive agencies serving in their official capacity, cannot be deemed to be independent from the Government. The Complaint further submits that the National Communication Council (*Conseil National de la Communication*) was only properly established in 2013.
99. According to the Complainant, the total control by the Government results in arbitrary and politically motivated licensing decisions. In support of this allegation, the Complainant again alludes to a past encounter where the Minister hinted to the Victim's political and professional background as a reason for refusing to license Freedom FM, a general current affairs radio. The Minister is alleged to have described Freedom FM with Mr Njawe at its helm as a "Molotov cocktail".

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<sup>11</sup> Principle V of the Declaration of Principles on Freedom of Expression in Africa.

<sup>12</sup> Principle VII of the Declaration of Principles on Freedom of Expression in Africa.

100. The Complainant submits that the rules governing the licensing process are not established by law. The Complainant avers that the 1990 law delegated to the executive the entire regulation of the “conditions and modalities of allocation and exploitation of licences” (Article 36(3)), while the 2000 Decree regulates only the procedural aspects of the licensing regime, without providing any limitations on the Minister’s discretion.
101. The Complainant submits that this goes against the principle of international human rights law, that restrictions on fundamental rights and freedoms, including freedom of expression must be set by law. The Complainant highlights the Minister of Communication’s informal practice of issuing simple authorisations to broadcast at designated frequencies, rather than full-fledged licences, which the Complainant finds has no basis in Cameroonian law and cannot therefore be considered a restriction that is “prescribed by law”.
102. The Complainant submits that the licensing procedures in the Respondent State are neither fair nor transparent and fail to ensure diversity in broadcasting. A number of reasons are advanced to back this argument: the legal framework fails to determine the criteria for making licensing decisions; the Minister of Communication systematically fails to act on license application within the legal deadline or provide any reasons for refusal to grant licenses; there are strong indicators that licensing decisions are politically motivated; and refusals or silent refusals are not subject to judicial review or any other form of public scrutiny.
103. The Complainant alleges that the discretionary power granted to the Minister to make the final decision on the granting of licences gives the Cameroonian Government the power to control the information that reaches the public through the airwaves, thus violating the principle of pluralism in broadcasting.
104. The Complainant submits that the Government’s denial of a broadcasting license to Freedom FM is arbitrary, as no good reason has been provided for the denial.
105. The Complainant submits that the denial of the licence and the seizure of the equipment equates to a prior restraint of legitimate Communication in violation of Article 9.
106. The Complainant avers that the current situation in Cameroon where the State has failed to adopt adequate ‘legislative or other measures’ to give effect to the rights guaranteed in Article 9 is in violation of Article 1 of the Charter.

## **Alleged violation of Article 2**

107. The Complainant alleges discrimination based on political grounds. The Complainant contests the Respondent State's claim that the refusal to grant the license was due to failure from *Le Messenger* to submit the necessary papers, which the Complainant avers is incorrect.
108. The Complainant avers that the rejection of the license was on the specific basis that the Victim would not be allowed to operate a current affairs radio that comments on the general socio-political developments in the country. In support of this argument, the Complainant points to the Minister of Communication allegedly hinting to the Victim that his political and professional background was the reason for the refusal of a radio-license.<sup>13</sup>
109. The Complainant further avers that the Minister ultimately refused to grant a license even for a radio that would primarily cover urban development issues. According to the Complainant, this creates a strong presumption of political bias and it is incumbent on the Cameroonian authorities to prove that their decisions were not politically motivated.

#### **Alleged violation of Article 14**

110. The Complainant alleges that the sealing off of the radio equipment deprived *Le Messenger* of its right to have access to, maintain and dispose of its property, and that it constituted an unreasonable and disproportionate encroachment on the right to property.
111. The Complainant further alleges that the equipment, which was particularly sensitive to the humidity and general climate of Douala, suffered persistent and irreparable deterioration due to the Victims' inability to maintain it in appropriate conditions. The Complainant submits that *Le Messenger* continued to pay rent on the sealed premises where the equipment was located until the premises were unsealed in July 2005.
112. The Complainant alleges that the encroachment was done without any due process of law and under no appropriate laws.
113. The Complainant avers that the authorities had no reason to seize the equipment as Freedom FM had not started broadcasting and had expressed its intention not to do so until the issue of the licence was resolved. The Complainant adds that the equipment was held in defiance of the urgent request by the Commission on

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<sup>13</sup> The Complainant refers to a meeting that took place between the Minister of Communication and the Victim on 26 May 2003. Footnote 39 of the Complainant's submissions on the merits.

15 July 2004, requesting that “provisional measures be taken to ensure that no irreparable damage is done to the equipment of Radio Freedom FM”.

114. The Complainant submits that the pecuniary damage alone includes:
- i. The value of the seized radio equipment, amounting to 110,000USD at 2003 exchange rates, which was damaged beyond repair;
  - ii. Continued rent paid for the premises where the seized equipment was located between April 2003 and July 2005;
  - iii. Payments to radio technicians or the installation of the equipment;
  - iv. Lawyer’s fees and other legal costs incurred in relation to the court’s proceedings brought to recover possession of the seized equipment and obtain a broadcasting license;
  - v. Loss of earnings from their investment since May 2003.

#### **Respondent State’s Submission on the Merits**

##### **Alleged violation of Articles 1, 2 and 9**

115. In its submission, the Respondent State argues that none of the rights covered under Articles 1, 2, 9 and 14 of the Charter have been violated by Cameroon.
116. The Respondent State submits that the author has not characterized the discrimination suffered by indicating the companies which have submitted demands under the same conditions as the Victim and whose demands have been accepted.
117. In response to the Complainant’s argument on the violation of Article 9, the State refers to Article 12 of the 2000 Decree which sets out the modalities of creation and exploitation of audio-visual enterprises. The State contends that in the case of Radio Freedom, the licence was refused due to an incomplete application. The State maintains that the Complainant was invited to complete the application through letters dated 15 June 2006, 04 May 2007 and 21 August 2008, but that the Complainant did not follow-up on the matter.

##### **Alleged violation of Article 14**

118. In response to the Complainant’s argument on the violation of Article 14, the State submits that the sealing off of the radio equipment followed the illegal

exploitation of an audio-visual enterprise in violation of Article 36 (2) of Law 1990, which provides that “the establishment and operation of a private radio or television broadcasting enterprise shall be subject to obtaining a licence”. The State affirms that the sealing off of the equipment cannot be interpreted as a violation of the right to property.

### **Respondent State’s Submission on Amicable Settlement**

119. The Respondent State submits that since the signature of the amicable settlement of 24 June 2005, the State has striven to implement its commitments under the agreement. It adds that it particularly: put an end to all legal proceedings against Pius Njawe in the Court of First Instance of Douala-Bonanjo; removed the seals placed on the premises of Freedom FM Radio Station; and was disposed to examine the application for the said radio station as shown by the various letters addressed to the developer to complete the application file.
120. The Respondent avers that “although the process of implementing the terms of the agreement was fraught with misunderstandings, the Government constantly showed its readiness to have the matter settled amicably.”

### **Analysis of the Commission on the Merits**

121. Before analysing the Merits of the Complaint, the Commission would first like to examine the issue of amicable settlement. Rule 109 of the Commission’s 2010 Rules of Procedure provides that the Commission may offer its good offices for an amicable settlement between the parties “at any stage of the examination of a Communication”.
122. In this case, an amicable settlement agreement was signed by both parties on 24 June 2005, leading the Complainant to request that consideration of the Communication be discontinued via a letter dated 27 June 2006. On 20 April 2007, unsatisfied by the progress under the amicable settlement, the Complainant asked the Commission to reopen the Communication procedure.
123. Clearly, the parties were given a reasonable opportunity to reach an amicable settlement. The Commission finds that to grant a second attempt at an amicable settlement, as requested by the Respondent, would simply result in further delays in the examination of this Communication which was first submitted in 2004.

124. The Commission also notes that the Complainant has expressly stated that amicable settlement “is no longer effective and... would no longer constitute an amicable solution on the issue based on the respect of human rights and fundamental freedoms, as recognized by the Charter.”<sup>14</sup>
125. For these reasons, the Commission considers that an invitation to reach an amicable settlement would not be appropriate in this case. The Commission will therefore proceed to examine the merits of the present Communication.

### **Alleged violation of Article 9**

126. Article 9 of the Charter guarantees the right of every individual “to receive information” and to “express and disseminate his opinions within the law”. The Declaration on Freedom of Expression adopted by the Commission in 2002 to supplement Article 9 of the African Charter, affirms that freedom of expression and information, including the right to seek, receive and impart information and ideas, through any form of communication is a fundamental and inalienable human right and an indispensable component of democracy.<sup>15</sup>
127. The Complainant avers the violation of Article 9 of the Charter due to: the State monopoly on broadcasting; lack of an independent licensing authority and lack of fair procedures; and the arbitrary denial of access to radio broadcasting.

### **State monopoly on broadcasting**

128. The Complainant avers that at least until April 2000, when it adopted Decree 2000/158, the Respondent State had in place an effective State monopoly on broadcasting that violated Article 9 of the Charter. The Complainant adds that the Respondent State maintained a policy banning all private broadcasting during that period.
129. The Complainant submits that Principle V of the Declaration on Freedom of Expression provides that “state monopoly over broadcasting is not compatible with the right to freedom of expression”. The Complainant further cites legal

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<sup>14</sup> Correspondence from the Complainant dated 20 April 2007.

<sup>15</sup> Principle I (1) of the Declaration of Principles on Freedom of Expression in Africa. This Declaration was adopted by the Commission pursuant to Article 45 (1) (b) of the African Charter which mandates the Commission “to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation”; and Article 45 (3) which mandates the Commission to interpret all the provisions of the African Charter.

provisions and case law to support its assertion that state monopoly over broadcasting is not compatible with the right to freedom of expression.<sup>16</sup>

130. Although the Respondent State does not engage on this issue in its submissions, the Commission notes that at the time of submission of this Communication by the Complainant in 2004, the State monopoly was no longer in force as the secondary legislation required to implement the liberalised regime of Law 1990 – Decree 2000, had already been promulgated.
131. In the instant case, therefore, the Commission declines to pronounce itself on the Complainant’s allegations of state monopoly in the Respondent State, since the complained-of situation had ceased to exist at the time when this Communication was filed. The Commission however wishes to reiterate Principle V of the Declaration on Freedom of Expression which encourages diverse and independent private broadcasting and discourages monopoly over broadcasting due to its incompatibility with the right to freedom of expression.

#### **Lack of an independent licensing authority and lack of fair procedures**

##### *Lack of an independent licensing authority*

132. The Complainant submits that the licensing authority (the Minister of Communication) is not independent and impartial, and that the licensing decision is arbitrary and politically motivated. The Respondent State does not address the allegations regarding the independence and impartiality of the Minister of Communication.
133. The Declaration on Freedom of Expression states that “an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions.”<sup>17</sup> Principle VII of the Declaration further states that “[a]ny public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.” General Comment No. 34 on the freedoms of opinion and expression by the Human Rights Committee (General Comment No. 34) further recommends

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<sup>16</sup> The Complainant refers to the following case law: *Informationsverein Lentia and Others v Austria* (1997) ECHR (Application No.17207/90); *Fourth Television Case* 73 BVerfGE 118 (1986); *Capital Radio (Pvt) Ltd. V. Minister of Information* (2000) ZLR 243 (S); and *Retrofit (Pvt) Ltd. V. Minister of Information* (1996) 4 LRC 512.

<sup>17</sup> Principle V (2) of the Declaration of Principles on Freedom of Expression in Africa.

that States “establish an independent and public broadcasting licensing authority.”<sup>18</sup>

134. In the instant Communication, pursuant to Law 1990 and Decree 2000, the Minister of Communication has the authority to grant broadcasting licenses, upon the advice of the *Conseil National de la Communication* and a technical committee comprised of representatives of executive bodies acting in their official capacity. The final decision however rests with the Minister who is not required by law to follow the opinion of either the technical committee or the *Conseil National de la Communication*. The Minister is appointed by the President and is a member of the Executive.
135. In light of the above, the Commission is of the view that the Minister of Communication cannot be deemed “an independent regulatory body” in accordance with Principle V (2) of the Declaration, nor is the Minister “adequately protected against interference, particularly of a *political...* nature” in line with Principle VII (1).

*Rules and procedures are not established by law*

136. The Complainant submits that the rules and practices governing the licensing process are not established by law, in contravention of the international human rights principle that restrictions on fundamental laws and freedoms must be set by law. The Respondent State submits that licence application files are subject to rules, in particular Article 12 of Decree 2000 which relates to the content of the file that needs to be submitted to the Minister of Communication in order to obtain a licence.
137. The Commission takes note of Article 27 (2) of the Charter which establishes certain restrictions in the exercise of the rights and freedoms enshrined in the Charter. Further, Article 9 of the Charter guarantees freedom of expression “within the law”, and Principle II (2) of the Declaration on Freedom of Expression provides that any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society. The Commission recalls that in *Nigeria Constitutional Rights Project v Nigeria*, it stated that the justification of limitations must be strictly proportionate

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<sup>18</sup> Human Rights Committee, General Comment No.34. Article 19: Freedom of Opinion and Expression, (2011) para 39.

with and absolutely necessary for the advantages which follow, and that limitations may not erode a right such that the right itself becomes illusory.<sup>19</sup>

138. The Commission deems it necessary to first identify whether the licensing process is a restriction on fundamental freedoms, and if so, whether the restriction is provided by law, serves a legitimate interest and is necessary in a democratic society. In making this determination, the Commission refers to the jurisprudence of the European Court of Human Rights (ECHR) in line with Articles 60 and 61 of the African Charter which establish the importance of international and regional human rights instruments and standards, as benchmarks for the application and interpretation of the African Charter.
139. In determining whether the licensing process is a restriction on fundamental freedoms, the Commission recalls the vast jurisprudence of the ECHR holding that refusal to grant a broadcasting licence interferes with freedom of expression, namely the right to impart information and ideas.<sup>20</sup> The Commission therefore finds that refusal to grant a broadcasting licence constitutes a restriction/interference on the exercise of the right to freedom of expression.
140. On whether the interference is provided by law, serves a legitimate interest and is necessary in a democratic society, the Commission refers to *Meltex v. Armenia*, where the ECHR held that, first, in order to determine whether a denial of a broadcasting licence was “prescribed by law”, the interference must have some basis in domestic law and the law should be... formulated with sufficient precision... to foresee, to a degree that is reasonable... the consequences which a given action may entail.<sup>21</sup> Second, the domestic law must afford a measure of legal protection against arbitrary interferences by public authorities. The ECHR stated that it would be contrary to the basic principles of a democratic society for legal discretion to be granted to the executive... in terms of an unfettered power.<sup>22</sup> The law should therefore indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with

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<sup>19</sup> Communications 140/94-141/94-145/95- *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (1999) paras 41, 42.

<sup>20</sup> *Informationsverein Lentia and Others v Austria* (1997) ECHR (Application No.17207/90) para 27; *Radio ABC v. Austria* (1997) ECHR (Application No. 19736/92) para 27; *Demuth v. Switzerland* (2002) ECHR (Application No. 38743/97) para 30 and *Glas Nadezhda EOOD and Anatoliy Elenkov v Bulgaria* (2007) ECHR (Application No. 14134/02) para 42.

<sup>21</sup> *Meltex Ltd and Mesrop Moosesyan v. Armenia* (2008) ECHR (Application No. 32283/04) para 80. See also, *Maestri v. Italy* (2004) ECHR (Application No.39748/98) para 30.

<sup>22</sup> *Meltex v. Armenia* above, para 81.

sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.<sup>23</sup>

141. The ECHR further held that as regards licensing procedures, the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence.<sup>24</sup>
142. In light of the above, in the instant Communication, to determine whether the interference is provided by law, the Commission will first examine if the interference has a basis in domestic law and if it is formulated with sufficient precision to foresee the consequences which a given action may entail. The Commission will also examine if the domestic law affords legal protection against arbitrary interferences by the licensing authority, including the proper reasoning of decisions to deny a broadcasting licence.
143. Beyond indicating that licence application files are subject to Article 12 of Decree 2000 which relates to the composition of the licensing dossier, the Respondent State does not engage with the issue of whether the licensing rules and procedures are “provided by law, serve a legitimate interest and are necessary in a democratic society”.
144. The Commission finds that Article 12 of Decree 2000 only lists the procedural requirements for the composition of the licensing dossier, and is silent on the substantive criteria for the allocation of a licence. There is no further indication in the law as to the requirements applied by the Minister of Communication, the *Conseil National de la Communication* or the Technical Committee to accept or reject an application following the receipt of the dossier.<sup>25</sup>
145. The Commission also finds that the law places no restriction on the discretion of the Minister, as there is no indication that the Minister must follow the opinion of either the Technical Committee or the *Conseil National de la Communication*. The Minister has the ultimate power to decide on applications for a licence. Further,

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<sup>23</sup> As above.

<sup>24</sup> As above.

<sup>25</sup> Article 5 of the 1991 Windhoek Declaration states that “[l]icensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.” (The Windhoek Declaration was issued at a conference organized by UNESCO held from 29 April to 3 May 1991 on promoting an independent and pluralistic African press). General comment No. 34 on Freedoms of Opinion and Expression provides that a fair and transparent licensing process should be objective, clear and non-discriminatory. See General Comment No.34 (n 18 above) para 39.

the Minister needs not justify any decision taken contrary to the opinion of those two bodies, and is not required to provide any reasoning on a decision to grant or deny a broadcasting licence.

146. The Commission agrees with the Complainant that the practice of issuing simple authorisations to broadcast, rather than licences, is not provided by law. Decree 2000 provides that the consequence of an application for a licence entails the acceptance or rejection thereof, and not the grant of a simple authorisation to broadcast. The Respondent State does not address this issue. The Commission finds that simple authorisations have no basis in domestic law and do not allow applicants for a licence to foresee, to a degree that is reasonable, the consequences of their applications.
147. In the present Communication, as a result of the shortcomings in Decree 2000 and the Minister's practice of issuing simple authorisations, the Commission finds that the interference on the Victim's freedom of expression is not provided under domestic law with sufficient precision to foresee to a degree that is reasonable the consequences of the Victim's actions, nor does the interference afford the Victim sufficient protection against arbitrary interference by the Minister. The Victim had no protection from the arbitrary processing of his broadcasting licence application, and had no recourse to challenge what could be described as the *de facto* denial of his application. The interference is therefore not provided by law.
148. Having determined above that the interference is not provided by law, the Commission now examines whether it serves a legitimate interest and is necessary in a democratic society. In this regard, the Commission again refers to *Meltex v. Armenia*, in which the ECHR held that:

"a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression... [T]he interferences with the [applicant's] freedom to impart information and ideas, namely the [multiple] denials of a broadcasting licence, did not meet the Convention requirement of lawfulness. That being so, it is not required to determine whether these interferences pursued a legitimate aim and, if so, whether they were proportionate to the aim pursued."<sup>26</sup>

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<sup>26</sup> *Meltex Ltd and Mesrop Movsesyan v. Armenia* (n 21 above) paras 83 – 84.

149. In the same vein, the Commission, in the instant Communication, finds that the interferences with the Victim's freedom of expression do not meet the requirement of lawfulness under Article 9 (2) of the African Charter and Principle II (2) of the Declaration on Freedom of Expression. The Commission therefore need not examine whether these interferences pursued a legitimate aim and were necessary in a democratic society.

*Licensing processes are not fair nor transparent*

150. The Complainant alleges that the licensing process in the Respondent State is neither fair nor transparent and fails to ensure diversity in broadcasting. The Complainant refers to gaps in the legal framework for making licensing decisions, the failure of the licensing authority to grant licenses within the legal deadline or provide reasons for granting or refusing licenses, the inability to subject refusal or silent denials to judicial review, and indicates that decisions are politically motivated. The Respondent State does not address these allegations.
151. The Commission has already analysed Decree 2000 and found that the interferences therein do not meet the requirement of lawfulness. It has also found that one of the short-comings of Decree 2000 is the unlimited discretion granted to the licensing authority, including the lack of reasoning for the authority's decision to grant or deny a licence.
152. Concerning the failure of the Minister of Communication to revert to the Victim within the six (6) months deadline on his licence application, the Commission is of the view that the purpose of a deadline in the grant of licenses is to allow for speedy decisions and afford prospective broadcasters certainty over the outcome of their applications. Deadlines prevent protracted decision-making and help ensure that the licensing process provides an effective rather than theoretical access to the airwaves. The licensing process must not be used as a stalling mechanism against diversity in broadcasting.
153. With regards to the inability of prospective applicants to have recourse to a judicial review, the Commission reiterates that in a democratic society, any legal discretion granted to the executive cannot be an unfettered power.<sup>27</sup> The law must indicate with sufficient clarity the scope of the discretion and the manner of

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<sup>27</sup> This is supported by Principle VII (3) of the *Declaration of Principles on Freedom of Expression in Africa* which provides that “[a]ny public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body”.

its exercise. The law must also provide adequate and effective safeguards against abuse, which may include the judicial review of decisions.

154. As stated under paragraph 80 of this Communication, the legal framework for broadcasting in the Respondent State does not provide recourse against the decision of the Minister of Communication if he fails to grant a broadcasting license within the statutory six months' period. The law also does not indicate any remedies for the Minister's inaction and whether or not the Minister's silence should be legally considered as either acceptance or rejection. The law grants an unfettered discretion to the Minister to the extent that the latter is not obliged to justify his decision.<sup>28</sup>
155. The Commission finds that in the present case the failure of the Minister of Communication to act within the legal deadline, and the inability to subject refusal or silent denial of licences to judicial review indicate that the licensing process is indeed not fair nor transparent. It also does not promote diversity in broadcasting.<sup>29</sup> These amount to a violation of Article 9 of the Charter.

#### **Access to radio broadcasting arbitrarily denied**

##### *Licence application arbitrarily denied*

156. The Complainant alleges the arbitrary denial of a broadcasting licence to Radio FM.
157. The facts, which have not been contested by the Respondent State, indicate that *Le Messenger* first applied for a broadcasting licence on 29 October 2002, and that on 21 May 2003, almost seven months after filing the application, it received a written response that "the actual state of the review of your [license application] does not allow us to authorise you to start broadcasting." On 23 May 2003, Radio

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<sup>28</sup> See also paragraph 83 of this Communication which notes the steps taken by *Le Messenger* to challenge the Minister's action on the sealing of its premises by instituting civil proceedings in the Douala Court of First Instance and later the Court of Appeal, but to no avail.

<sup>29</sup> Principle III of the *Declaration of Principles on Freedom of Expression in Africa* provides that "[f]reedom of expression imposes an obligation on the authorities to take positive measures to promote diversity [including pluralistic access to the media]". In *Stefano v. Italy*, the European Court of Human Rights observed "that to ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed." See *S.R.L. and Di Stefano v. Italy* (2012) ECHR (Application no. 38433/09) para 130.

FM's equipment and premises were sealed by the army and police, on the order of the Minister of Communication. Upon the suggestion of the Minister, *Le Messenger* filed amendments to the initial application on 3 June 2003, changing the name and programming nature of the radio. *Le Messenger* was informed that it would have to identify another location outside Douala, as the radio market in Douala was saturated. Two new sites 60 km west of Douala were proposed. *Le Messenger* never received formal notification from the Minister afterwards.

158. The Respondent State does not refute the above-stated facts in its submissions, all of which occurred before the attempt at amicable settlement on 24 June 2005. It however denies the arbitrary treatment of application files, noting that licence applications are subject to rules, particularly Article 12 of Decree 2000 relating to the content of licence application files. It adds that the Decree lays down the terms and conditions for the establishment and operation of audio-visual communication enterprises.
159. The Respondent State submits that the June 2006 report of the *Conseil National de la Communication* indicates that Freedom FM Radio was not granted a licence because its application file was incomplete.
160. According to information provided by both Parties, in the process of amicable settlement, the Victim was informed of missing documents in his dossier and was invited by a letter dated 15 June 2006 to complete his dossier by providing the same.<sup>30</sup> However, the submissions as to what happened next differs. The Complainant claims that the required documents were submitted and provides the Commission with a cover letter dated 30 June 2006 attesting the same. The document provided to the Commission however does not contain the requested documents in annex but is stamped by the Minister of Communication as having been received on 18 July 2006. The Respondent State on the other hand submits that the requested documents were not provided by the Victim and that the request was reiterated in correspondences dated 4 May 2007 and 21 August 2008. The Respondent State however does not provide copies of the said follow-up correspondences.
161. The Commission observes that the Minister did not communicate his decision on the Victim's initial licence application within the statutory time-limit, nor did the

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<sup>30</sup> The Respondent State avers that the Victim was requested to submit: les statuts notariés de la radio; l'attestation d'ouverture d'un compte bancaire au nom de la radio; et un acte de désignation de son Directeur de publication (the notarized articles of association of the radio station, the attestation of opening a bank account in the name of the radio station, and the instrument of appointment of its publisher). See page 3 of the Respondent State's Submissions on the Merits.

Minister officially communicate his decision on the licence after the Victim filed amendments to the initial application changing the programming and name of the radio station, as well as proposing a new location, pursuant to the Minister's recommendation. These allegations are not contested by the Respondent State and are indeed included in the Respondent's submissions as facts before commencement of the amicable settlement process in June 2005. The Commission further notes that the Respondent State has not provided proof of the above-stated letters following up on the missing documents required to grant the Victim a licence in accordance with the amicable settlement agreement. The Commission notes that the Complainant produced a cover letter dated 30 June 2006 transmitting the requested documents, which was stamped by the Minister of Communication as having been received on 18 July 2006. The Commission therefore finds the allegations of the Respondent State regarding the failure of the Victim to provide the missing documentation unsubstantiated.

162. With due consideration to the facts of this Communication, particularly relating to the delays, lack of response, and the numerous demands imposed by the Minister of Communication on the Victim, which have not been contested by the Respondent State, the Commission is of the view that the Victim would not have received an unbiased response to his licence application. Further, as elaborated above, the Respondent State was not able to substantiate its argument that the Minister denied *Le Messenger's* application for a licence because the Victim did not provide the necessary documents, nor did it present other justifications for the denial. For these reasons, the Commission finds that the decision to deny the licence application by *Le Messenger* was arbitrary. This amounts to a violation of Article 9 of the Charter.

*Denial amounts to prior censorship*

163. The Complainant avers that the denial of the broadcasting licence in a discriminatory and arbitrary manner amounted to prior restraint of legitimate communication. The Respondent State does not engage on this issue.
164. Prior restraint is an interference "by censorship or injunction before the words are spoken or printed."<sup>31</sup> Further, "[i]n contrast to a system of subsequent punishment, which permits the communication but imposes a subsequent

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<sup>31</sup> Douglas Blount Maggs, *Selected Essays on Constitutional Law* (1938), 1030.

penalty for its publication, prior restraints prevent communication from occurring in the first place.”<sup>32</sup>

165. The Commission again draws inspiration from other regional and international standards further to Articles 60 and 61 of the African Charter, and refers to the American Convention on Human Rights which bans prior restraint, by specifically stating that freedom of thought and expression shall not be subjected to prior censorship.<sup>33</sup> The Convention adds that “[t]he right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.” In the same vein, the Inter-American Commission on Human Rights (IACHR)’s Declaration of Principles on Freedom of Expression holds in Principle 5 that, “[p]rior censorship (...) exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic Communication must be prohibited by law”.
166. The Complainant refers to a number of cases where prior restraint was deemed an affront to freedom of expression, including the ECHR cases of *Observer and Guardian v. United Kingdom* and *Gaweda v Poland*, as well as the United States Supreme Court cases of *Nebraska Press Association v Stuart* and the *New York Times v United States*. These cases however dealt with print media and other publications.
167. While noting the above-stated provisions and case law, the Commission finds it appropriate to examine whether the standards of prior restraint in publications can be applied wholly in the context of radio broadcasting. The Commission refers to General Comment No. 34 which states that “[r]egulatory systems should take into account the differences between the print and broadcast sectors... while also noting the manner in which various media converge.”<sup>34</sup>
168. The Commission notes that there is a fundamental difference between print media and radio broadcasting. First, there are limitations in the frequencies

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<sup>32</sup> Council of Europe “‘Prior Restraints’ and Freedom of Expression: The Necessity of Embedding Procedural Safeguards in Domestic Systems” *Thematic factsheet 1* (May 2018) p. 1, available at <https://rm.coe.int/factsheet-prior-restraints-rev25may2018/16808ae88c>.

<sup>33</sup> It provides an exception on public entertainments [within the law] for the moral protection of childhood and adolescence. See Article 13 (2) and (3) of the American Convention on Human Rights.

<sup>34</sup> General Comment No. 34 (n 18 above) para 39.

available for radio broadcasting.<sup>35</sup> This process should therefore be controlled in order to avoid overcrowding of the airwaves, and to ensure fair, equitable and diverse allocation of frequencies. States may therefore require radio broadcasters to obtain a licence, and some licence applications may be denied.<sup>36</sup>

169. Second, as held by the European Commission of Human Rights in *Betty Purcell and others v. Ireland*, “radio and television are media of considerable power and influence. Their impact is more immediate than that of the print media, and the possibilities for the broadcaster to correct, qualify, interpret or comment on any statement made on radio or television are limited in comparison with those available to journalists in the press.”<sup>37</sup> In *Stefano v. Italy*, the Court stated that audio-visual media, such as radio and television, have the power to convey messages through sound and images, and therefore have a more immediate and powerful effect than print. It added that “[t]he function of television and radio as familiar sources of entertainment in the intimacy of the listener’s or viewer’s home further reinforces their impact.”<sup>38</sup>
170. The Commission finds that in the case of radio licensing, the lawful denial of a licence may constitute an acceptable form of prior restraint on freedom of expression. However, as stated in preceding paragraphs, the licensing process must provide sufficient guarantees against arbitrariness, including the provision of a proper reasoning by the licensing authority on decisions to deny a broadcasting licence. The Commission has already found that one of the shortcomings of Decree 2000 is the unlimited discretion granted to the licensing authority, including the unavailability of a reasoned decision or the opportunity to challenge the decision.<sup>39</sup> The Commission has also held above that the licence to *Le Messenger* was arbitrarily denied. In view of the particular circumstances of the present case, the arbitrary denial of a licence to the Victim amounts to an impermissible prior restraint.

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<sup>35</sup> General Comment No. 34 recognises audiovisual terrestrial and satellite services as media with limited capacity of broadcasting, and recommends that licensing regimes should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. As above.

<sup>36</sup> See paragraph 13 of this Communication which states that the Minister of Communication informed *Le Messenger* that the Douala radio market is saturated and that City FM would have to transmit from a location outside Doula.

<sup>37</sup> *Betty Purcell and others v. Ireland* (1991) European Commission of Human Rights (Application No. 15404/89) p. 14.

<sup>38</sup> *Stefano v. Italy* (n 29 above) para 132.

<sup>39</sup> See para 151 and footnote 28.

171. In conclusion, the Commission finds that the Respondent State has violated Article 9 of the Charter because it lacks an independent licensing authority and the licensing procedures are neither fair nor transparent, and therefore fail to promote diversity in broadcasting. The Commission also holds that the broadcasting licence of *Le Messenger* was arbitrarily denied and thereby constituted an impermissible prior restraint in violation of Article 9 of the Charter.

### **Alleged violation of Article 2**

172. Article 2 of the Charter states that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

173. In the present Communication, the Complainant claims that the Victim’s application for a broadcasting licence was rejected because of his political opinion in violation of Article 2 of the Charter.

174. In its initial submissions, the Complainant indicates that: the Victim is a prominent activist for media freedom; he established *Le Messenger* Newspaper which is outspoken and independent; he has been arrested thirty times since 1990, forced into exile and imprisoned three times for weeks or months; and *Le Messenger* and its satirical sister, *Le Messenger Popoli* have been banned and seized, and their staff have been arrested and prosecuted, on numerous occasions.

175. The Complainant recounts a statement allegedly made by the Minister of Communication in a Meeting with the Victim on 26 May 2003, that “Le Messenger would not be allowed to run a general current affairs radio because of its record of critical and independent-minded journalism”, and that “Pius Njawe plus Freedom FM equals a [political] Molotov cocktail in Cameroon”. The Complainant further submits that the Victim was requested to change the name and programming nature of the radio.

176. The Complainant alleges that “the national police headquarters in Yaoundé sent a representative to testify that the police had suspicions that Le Messenger was conspiring to use Freedom FM to overthrow the government.

177. To further substantiate the allegations of political discrimination of broadcasters in the Respondent State, the Complainant submits that Radio Veritas, Equinoxe

Television, Radio Equinoxe, and Magic FM 94 Radio Station, were shut down without due process because of their political coverage.<sup>40</sup>

178. In its initial submissions, the Complainant avers that the Minister simply allocates frequencies to broadcasters that it generally deems to be politically innocuous to the current government. In this regard, the Complainant states that on 27 May 2003, the Minister of Communication passed Decision No. 012 allocating frequencies to fourteen (14) radios in the capital Yaounde and ten radios in Douala without granting them a proper licence.<sup>41</sup>
179. The Complainant submits that these facts create a strong presumption of political bias, and it is therefore incumbent upon the Cameroonian authorities to prove that their decisions were not politically motivated.
180. In its submissions, the Respondent State does not refute or address the above-stated allegations. The Respondent does not contest the presumption of political bias on the part of the licensing authority which the Complainant contends is the reason why the Victim's licence was arbitrarily denied.<sup>42</sup> Yet, as was held by the the Inter-American Court on Human Rights (IACrtHR), where there is an allegation of discrimination, it is up to the authority restricting the right to prove that the decision to restrict the right did not have discriminatory purpose or effect.<sup>43</sup>
181. The Commission has already found that the Respondent State's argument that the Victim was denied a licence because he failed to provide missing documentation is unsubstantiated. The Respondent State has failed to rebut the presumption that flows from the facts and submissions of the Communication. More specifically, the Respondent State has failed to show that the licensing authority's refusal to grant the Victim a broadcasting licence was not due to the

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<sup>40</sup> The Complainant cites the case of Radio Veritas, a Douala-based radio of the Catholic Church, which never received a response to its licence application of 2001 until November 2003, amid speculations that Cardinal Christian Tumi of Douala, an outspoken critic of the government, might run against President Paul Biya in the elections. The Complainant states that the Minister of Communication authorised the radio to operate only after the Cardinal publicly declared that he had no intention of running. (See para 14 of this Communication). The Complainant submits that the Douala-based Equinoxe Television and its sister station Radio Equinoxe, as well as the Yaounde-based Magic FM were shut down between 26 to 28 February 2008, because of their coverage of the debates on the constitutional amendments proposed by the President to remove presidential term limits. See para 17 of the Complainant's Additional Submissions on Admissibility.

<sup>41</sup> See para 15 of this Communication.

<sup>42</sup> The Respondent only contests the allegations made post the amicable settlement attempt in June 2005, regarding the documentation needed to grant a broadcasting licence to the Victim.

<sup>43</sup> *Granier et al. (Radio Caracas Television) v. Venezuela* IACrtHR (2015) para 228.

Victim's political and professional background, by presenting other justified reasons. The Commission agrees that the submissions made by the Complainant do indeed create a strong presumption of political bias.

182. In its submissions, the Respondent State argues that the Complainant has not characterised the alleged discrimination by indicating the list of audio-visual communication enterprises whose applications submitted under the same conditions as the Victims were favourably considered.
183. In *Kenneth Good v Botswana*, the Commission employed the following test to determine whether a violation of the principle of non-discrimination occurred: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed.<sup>44</sup>
184. On the first test of whether equal cases are treated in a different manner, the Commission will consider the Parties' submissions regarding the manner in which the Minister of Communication administers applications for a broadcasting licence. In addition to substantiating the arbitrary manner in which the Victim was denied a licence, the Complainant submits that the licensing process is generally politically motivated, and describes the circumstances under which certain broadcasters were allegedly shut down or denied a licence because of their political opinions.<sup>45</sup> The Complainant also states that the Minister simply allocates frequencies to broadcasters he deems to be politically harmless to the government and refers to the Minister's Decision No. 012 allocating frequencies to radio stations in Yaounde and Douala.<sup>46</sup>
185. The Respondent State has not contested the above submissions, and the Commission finds that these submissions create a presumption that equal cases are treated in a different manner.
186. With regards to the remaining two tests, on whether the difference in treatment has an objective and reasonable justification, and if there is proportionality between the aim sought and the means employed, the Commission has already determined in earlier paragraphs that the Respondent State has failed to present an objective and reasonable justification for the differential treatment of the Victim's licence application.<sup>47</sup> In *Kenneth Good v Botswana*, the Commission stated

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<sup>44</sup> Communication 313/05- *Kenneth Good v Botswana* (2010) ACHPR para 219.

<sup>45</sup> See para 177 above.

<sup>46</sup> See para 178 above.

<sup>47</sup> See para 181 above.

that “if the aim sought cannot be identified and justified... then it means that the means employed was not proportional”.<sup>48</sup> In light of these, the Commission finds that all aspects of the test to establish discrimination have been met.

187. Regarding the Respondent State’s request for the Complainant to prove the alleged discrimination by indicating the list of audio-visual communication enterprises whose applications submitted under the same conditions as the Victims’ were favourably considered, the Commission notes that the applicable principle in this regard relates to comparing the position of the complainant against that of a comparator. In this regard, the Commission recalls its jurisprudence in *Equality Now and EWLA v. Ethiopia* in which it reaffirmed the basis upon which a successful claim may be made in respect of allegations of discrimination. The Commission stated that “[t]he complainant must identify the comparator and show how the treatment complained of and that of the comparator are comparable.”<sup>49</sup> The Commission however recognises that difficulties may be encountered in the identification of comparators, and that therefore, there can be exceptions to the use of comparators.<sup>50</sup>
188. The Commission notes that the Complainant has already cited the publicly available information which it could reasonably be expected to possess, such as the names of broadcasters which were shut down on account of their political coverage, and Decision No. 012 by the Minister of Communication allocating frequencies to radios in Yaounde and Douala. Clearly, the Complainant may identify a comparator only to the extent of the information available to it.
189. The Commission notes that in claims of discrimination, the burden of proof should be shared. The Complainant is required to present sufficient facts from which it can be presumed that discrimination may have occurred, after which the burden of proof shifts to the Respondent.<sup>51</sup> In *D.H. and others V. The Czech Republic*, the ECHR noted that applicants may have difficulty in proving discriminatory treatment and that less strict evidential rules should apply.<sup>52</sup> The

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<sup>48</sup> *Kenneth Good v Botswana* (n 46 above) para 224.

<sup>49</sup> Communication 341/2007 - *Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Federal Republic of Ethiopia* (2015) ACHPR para 147.

<sup>50</sup> Kevin Kitching (ed), *Non-Discrimination in International Law: Handbook for Practitioners* (2005) pp. 116 – 118.

<sup>51</sup> European Court of Human Rights & European Union Agency for Fundamental Rights “Handbook on European Non-discrimination Law” (2010) p. 123 – 124.

<sup>52</sup> *D.H. and Others v. the Czech Republic* (2007) ECHR (Application no. 57325/00) para 186.

ECHR added that “proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.”<sup>53</sup>

190. In the present Communication, the Complainant cannot reasonably be expected to be in possession of the list of all audio-visual communication enterprises whose applications, submitted under the same conditions as the Victims’ were favourably considered. However, considering the unrebutted facts as presented by the Complainant and the failure by the Respondent State to present any justification for the differentiated treatment of the Victim, it is clear that the Complainant has identified a comparator to the extent of the information available to it. In this instance, the Commission is satisfied that the information provided by the Complainant fulfils the comparator requirement.
191. From all the foregoing, the Commission finds that it is reasonable to conclude that the Victim was indeed discriminated based on his political opinion.<sup>54</sup>
192. In light of all the above considerations, the Commission finds that the Respondent State has violated Article 2 of the African Charter.

#### **Alleged violation of Article 14**

193. The Complainant alleges that the sealing off of the Freedom FM equipment violated the right to have access to, maintain and dispose of ones’ property.
194. Article 14 of the Charter reads: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”
195. The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility and conditions of deprivation of the right to property. Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to limit the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.
196. In *Media Rights Agenda v Nigeria*, the Commission held that the sealing of the premises of several publications were done without due process and in violation of Article 14 of the Charter. The Commission stated that:

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<sup>53</sup> As above, para 178.

<sup>54</sup> See paras 174 – 179 above.

“[t]he Government did not offer any explanation for the sealing up of the premises of many publications. Those affected were not previously accused in a court of law of any wrongdoing. The right to property necessarily includes a right to have access to property of one's own and the right not for one's property to be removed. The decrees which enabled these premises to be sealed and for publications to be seized cannot be said to be 'appropriate' or in the interest of the public or the community in general.”<sup>55</sup>

197. In *Ivcher Bronstein v. Peru*, IACrtHR found Peru in violation of the Victim's right to property, reasoning that there is no evidence or argument to confirm that the restriction was based on reasons of public utility or social interest, adding that “when a procedure is conducted in violation of the law, the corresponding legal consequences should also be considered illegal.”<sup>56</sup>
198. The Commission reiterates that limitations on the use of property must be in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose. The Commission notes that Article 36 (2) of Law 1990 requires a radio broadcaster to obtain a licence before it can be deemed established and commence operation. Further, Article 49 of Decree 2000 provides that in case of non-compliance with the conditions of the Decree, the Minister of Communication may, after a formal notice has remained without effect, and without prejudice to the penalties provided by the laws and regulations in force, suspend a licence for a period not exceeding six (6) months, or issue a definitive withdrawal of the licence if the holder has not remedied the cause of suspension.
199. The Complainant's argument that Freedom FM had not yet started broadcasting and had no intention to do so until the licence issue was resolved does not hold in view of *Le Messenger's* advertisement of 15 May 2003, announcing that the radio will begin broadcasting on 24 May 2003.
200. However, the Minister's power to unilaterally ban a radio station and to request the army to seal the premises of such a station is not provided by law (Law 1990 and Decree 2000).<sup>57</sup> The Commission further recalls its finding that the restrictions placed by Decree 2000 do not meet the requirement of lawfulness, particularly due to the Minister's unlimited discretion in the licencing procedure.

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<sup>55</sup> Communications 105/93, 128/94, 130/94 and 152/96- *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria* (1998) ACHPR para 77.

<sup>56</sup> *Ivcher Bronstein v. Peru* (2001) IACrtHR para 130.

<sup>57</sup> See para 198 above.

The Commission also notes that *Media Freedom FM* was not previously accused in a court of law prior to the sealing off, nor was the sealing off court ordered.

201. In light of the above, the Commission finds that the order to seal the premises of Radio Freedom FM was unlawful and therefore in violation of Article 14. It is unnecessary for the Commission to consider whether the sealing off was in accordance with public interest.

### **Alleged violation of Article 1**

202. The Complainant alleges that the Respondent State is in violation of Article 1. Article 1 of the Charter requires States to give effect to the rights, duties and freedoms enshrined in the Charter through the adoption of “legislative or other measures”. The Complainant argues that the Respondent State has failed to adopt adequate legislative or other measures to give effect to the rights guaranteed by Article 9 of the Charter.
203. In considering the alleged violation of Article 1, the Commission notes its decision in *Jawara v The Gambia* where it held that “Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1.”<sup>58</sup>
204. The Commission also notes its decision in *Amnesty International v Sudan*, where it stated that “ratification obliges a State to diligently undertake the harmonization of its legislation to the provisions of the ratified instrument.”<sup>59</sup> The Commission further stated that “Article 1 of the Charter confirms that the Government has bound itself legally to respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them.”<sup>60</sup>
205. In light of the above, the Commission finds that by failing to take the necessary legislative and other measures to guarantee the right to freedom of expression, the right to be free from discrimination and the right to property, the Respondent State is in violation of Article 1 of the African Charter.

### **Reparations**

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<sup>58</sup> *Jawara v. The Gambia* (n 5 above), para 46.

<sup>59</sup> Communications 48/90, 50/91, 52/91, 89/93- *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* (1999) ACHPR, para 40.

<sup>60</sup> As above, para 42.

206. The Complainant requests pecuniary damages caused to the Victim, as well as compensation for moral damages (anxiety, uncertainty, humiliation etc.) suffered as a result of the violation of the Victim's rights.<sup>61</sup>
207. The Complainant requests damages for the value of the seized radio equipment, amounting to 110,000 USD at 2003 exchange rates, which deteriorated and was damaged beyond repair as the Victim was not able to access or maintain it; payment for the continued rent paid for the premises where the seized equipment was located between April 2003 and July 2005; payments to radio technicians for the installation of the equipment; lawyers' fees and other legal costs incurred in relation to the court proceedings brought to recover possession of the seized equipment and obtain a broadcasting license; and loss of earnings from their investment since May 2003.
208. In its findings on Article 14, the Commission has determined that the Victim's right to property was violated. The Commission notes that the Respondent State does not refute the Complainant's submissions on the value of the equipment and its damage beyond repair.
209. In accordance with the established jurisprudence of the Commission, the violation of rights protected by the Charter entitles victims to damages, including monetary remedy.<sup>62</sup>
210. In the instant Communication, the Victim, who is now deceased and being represented by his next of kin, has suffered substantial prejudice. As noted by the Commission in *Open Society Justice Initiative v. Côte d'Ivoire*, "the main aim of the redress is founded on the *restitutio in integrum* principle which requires that the victim is reinstated in the situation prior to the violation. Where it is impossible to reinstate him, any violation will be resolved through compensation. On the other hand, it should be ensured that the redress is fair, adequate, effective, sufficient, appropriate, victim-friendly and proportionate to the prejudice suffered."<sup>63</sup>
211. The Commission is guided by this principle in making the below determination and request.

### **Decision of the Commission on the Merits**

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<sup>61</sup> See paras 94 – 95 of the Complainant's Submissions on the Merits.

<sup>62</sup> Communication 318/06 – *Open Society Justice Initiative v. Côte d'Ivoire* (2015) ACHPR, para 198.

<sup>63</sup> As above, para 199.

212. In light of the foregoing, the African Commission on Human and Peoples' Rights:
- I. Finds the Respondent State in violation of Articles 1, 2, 9 and 14 of the African Charter;
  - II. Requests the Respondent State to take all necessary measures to ensure that *Law No. 90/052 on Freedom of Social Communication of 19 December 1990, Decree No. 2000/158 Establishing the Conditions and Modalities for the Creation and Operation of Private Audio-visual Communication Enterprises*, and all other broadcasting laws and practices are brought into conformity with Article 9 of the African Charter and the Declaration of Principles on Freedom of Expression in Africa;
  - III. In accordance with the Complainant's request under paragraph 114 of this Communication, calls on the Respondent State to pay the next of kin of the Victim adequate material compensation including the following:
    - i. The value of the seized radio equipment, amounting to 110,000 USD at 2003 exchange rates, which was damaged beyond repair;
    - ii. Continued rent paid for the premises where the seized equipment was located between April 2003 and July 2005;
    - iii. Payments made to radio technicians for installation of the equipment;
    - iv. Lawyer's fees and other legal costs incurred in relation to the court's proceedings brought to recover possession of the seized equipment and obtain a broadcasting license;
    - v. Loss of earnings from the investment since May 2003;
  - IV. Further calls on the Respondent State to pay compensation to the Victim's next of kin for the moral damages suffered by the Victim as a result of the violation;
  - V. In assessing the manner and mode of payment of compensation under paragraph 200 (III) and (IV) above, calls on the Respondent State to consult the Victim's next of kin and the legal representatives, and to be guided by international norms and practices relating to payment of compensatory damages;
  - VI. Requests the Parties to inform the Commission, within one hundred and eighty (180) days, of the measures taken to implement the present decision in

accordance with Rule 112 (2) of the Rules of Procedure of the Commission;  
and

VII. Avails its good offices to facilitate the implementation of this decision.

**Adopted during the 25<sup>th</sup> Extra-Ordinary Session of the African Commission on  
Human and Peoples' Rights, held from 19 February to 5 March 2019, in Banjul, The  
Gambia**

Commissioner Soyata Maïga, Chairperson;

Commissioner Lawrence Murugu Mute, Vice-Chairperson, Rapporteur of  
Communication;

Commissioner Yeung Kam John Yeung Sik Yuen;

Commissioner Kayitesi Zainabo Sylvie;

Commissioner Jamesina Essie L. King;

Commissioner Solomon Ayele Dersso;

Commissioner Essaïem Hatem;

Commissioner Teresa Manuela; and

Commissioner Rémy Ngoy Lumbu.