

# The embargo against Burundi before the African Commission on Human and Peoples' Rights (Note on Communication 157/96, *Association for the Preservation of Peace in Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*)

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## 1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) should be lauded for placing the 1981 African Charter on Human and Peoples' Rights (African Charter) firmly on the road to effectiveness, departing from what had initially been considered the organised ineffectiveness of 1981,<sup>1</sup> with a quantitatively respectable<sup>2</sup> and qualitatively ever richer jurisprudence.<sup>3</sup> Nevertheless, one cannot fail to express the opinion that much remains to be refined in the Commission's interpretative procedures, particularly when it gives a

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<sup>1</sup> See AD Olinga 'L'effectivité de la Charte africaine des droits de l'homme et des peuples/The effectiveness of the African Charter on Human and Peoples' Rights' (2000) *Afrique* 1996.

<sup>2</sup> See Institut pour les Droits Humains et le Développement/Institute for Human Rights and Development, 'Compilations des décisions sur les communications de la Commission Africaine des Droits de l'Homme et des Peuples/Compilations of the decisions on the communications of the African Commission on Human and Peoples' Rights' Dakar, April 2002 463.

<sup>3</sup> See F Ougergouz 'Les mécanismes continentaux de protection de la personne humaine en Afrique — Gros plan sur la Charte Africaine des Droits de l'Homme et des Peuples/Continental protection mechanisms for the human person in Africa — A close-up of the African Charter on Human and Peoples' Rights' (2001) 10 *L'Observatoire des Nations Unies* 103-139.

ruling on a contentious issue. The ideology of constructive dialogue, which it operates under, and its twin tasks of promoting and protecting human rights seem to influence the quality of its jurisprudence. The balancing act, often rather difficult to follow, between the political procedure of promotion and the more technical procedure of protection, results in atypical jurisdictional interpretations. Such, in my opinion, is the case of the decision of the African Commission on the legality in terms of the African Charter of the embargo passed in 1996 against Burundi by its neighbours. This decision was taken in May 2003 on a communication introduced in September 1996.<sup>4</sup> At the time of the decision, the political context had completely changed, the embargo had been lifted and there was no evidence that its initial effects were still being felt. The decision thus appears to be pointless, 'moot', according to the English expression, or simply declaratory; a political rather than a legal decision, the appropriateness of which is doubtful. Below a detailed account of the facts of the case is given.

On 25 July 1996, Major Pierre Buyoya overthrew elected Burundian President Sylvestre Ntombantanga in a *coup d'état*. On 31 July 1996, during a summit held at Arusha in Tanzania, the states of the region decided to impose an embargo on Burundi, with the intention of denouncing the *coup d'état* and ensuring the promotion of democracy, justice and the rule of law. The Security Council of the United Nations (UN), in its Resolution 1072 (1996), and the Organisation of African Unity (OAU) subsequently approved this embargo decided on at the sub-regional level. This embargo was denounced by a non-governmental organisation (NGO), the Association for the Preservation of Peace in Burundi (ASP-Burundi), before the Commission. Indeed, on 18 September 1996, ASP-Burundi submitted a communication to the Commission pointing out that the embargo violated three documents, namely the African Charter itself, the OAU Charter and Resolution 2625 (XXIV) of 24 October 1970 of the UN General Assembly. More specifically, it was alleged that it violated article 4 of the Charter (the embargo prevented the importation of essential goods such as fuel required for the purification of water and for the preservation of drugs; and the embargo prevented the exportation of tea and coffee, the country's only sources of revenue), article 17 (the embargo prevented the importation of school materials), article 22 (the embargo denied Burundians access to means of sea and air transport), article 23(2)(b) (Tanzania, Zaire and Kenya were alleged to shelter and give their support to terrorist militia) and, finally, it violated articles 3(1), (2) and (3) of the OAU Charter (interference in the internal affairs of Burundi). The communication therefore

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<sup>4</sup> The communication is included in the Commission's 17th Annual Activity Report, as *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*. The text of this report is not yet available on the Commission's website ([www.achpr.org](http://www.achpr.org)).

mentions violations both of human and peoples' rights, as well as 'rights of the state'. Coming from an NGO, this seems *a priori* curious.

On 6 April 1997, the states that had instituted the embargo had relaxed it somewhat by excluding from its field of application school materials, foodstuffs, construction material, medical supplies, agricultural produce and inputs. However, at its 24th session, the Commission decided to address a communication to the serving President of the OAU, requesting that the states concerned find means to reduce the effects of the embargo, while specifying that this should not in any way prejudice the in-depth examination of the case. The meaning of this procedure is not clear. Was it a provisional measure? In this case the Commission should have been more specific in its demands and specified the effects to be reduced. Does a request to reduce the effects of the embargo not imply that the effects of the said embargo violate, as such, the provisions of the Charter? Whatever the Commission may say, this is a question of pre-judgment in which the roles of promotion and protection are confused. How could the Commission request states to reduce the effects of an embargo ratified by a resolution of the Security Council, without at the same time prompting a finding that they are in violation of their international obligations? Should the obligations in accordance with the African Charter take precedence over those in accordance with the UN Charter? The tabled communication requested that the states concerned be ordered, among other things, to pay damages. The examination of the case by the Commission, at the admissibility stage and at the in-depth analysis stage, brought to light, beyond the final assessment of non-violation of the Charter, two elements on which it would be advisable to dwell: the question of the *locus standi* of ASP-Burundi before the Commission, a question resolved in a most unsatisfactory manner, and the weakness of the Commission's arguments regarding the substance of the matter.

## **2 Unsatisfactory handling of the question of the *locus standi* of ASP-Burundi before the Commission**

For a proper understanding of the importance of this question, it should be recalled that communications based on the African Charter may be from member states in accordance with articles 47 to 54, or from individuals or NGOs in accordance with articles 55 to 59. Even if, when a state acts by virtue of article 49 of the Charter, principles of procedure are similar to those for communications from a state and 'other' communications, there are two distinct procedures, clearly and separately codified by the Rules of Procedure of the Commission. It follows that a communication from a state cannot be transformed into a communication from an individual. Conversely, a communica-

tion from an individual cannot conceal a communication from a state. On the other hand, the rights that the African Commission guarantees are both human rights and peoples' rights. If it is understandable that a state, an individual or an NGO may apply to the Commission to safeguard the rights of an individual, is it conceivable that a state, an individual or an NGO may apply to the Commission to guarantee the rights of the 'people of any other state' (article 23(2)(b) of the Charter)? *A priori*, one cannot perceive in the system of the Charter any impediment prohibiting this possibility. To think otherwise would be to deprive the peoples' rights in the Charter of their potential effectiveness. And yet, to admit this hypothesis would be to politicise considerably the Pan-African system for the protection of rights. What is at stake is the fate of the peoples' rights contained in the Charter, from the point of view of effectiveness. This was the embarrassing situation that confronted the Commission when it examined the admissibility of the communication in question. Was it a communication from a state or from an individual? The Commission dealt with this question in paragraphs 63 to 66 of its decision. In paragraph 63, the Commission states that it had

[t]o resolve the matter of the *locus standi* of the author of the communication. It would appear that the authors of the communication were in all respects representing the interests of the military regime of Burundi. The question that was raised was whether this communication should not rather be considered as a communication from a state and be examined under the provisions of articles 47-54 of the African Charter. Given that it has been the practice of the Commission to receive communications from non-governmental organisations, it was resolved to consider this as a class action. In the interests of the advancement of human rights, this matter was not rigorously pursued, especially as the respondent states did not take exception by challenging the *locus standi* of the author of the communication. In the circumstances the matter was examined under article 56.

This standpoint is not satisfactory. If the Commission firmly concluded that ASP-Burundi, although formally an NGO, 'represented' in all respects 'the interests of the military regime of Burundi', then the logical conclusion ought to have been that it was Burundi directly that was the party instituting proceedings and not an undercover-NGO. If the legal link of representation was established, then the legal conclusion should have been implacable, namely, articles 47 to 54 of the Charter should have been applied. The applicability of these articles was all the more logical since, on the one hand, states can 'have themselves represented before the Commission' (article 51(2) of the Charter) and, on the other hand, communications from states are in no way against the interest of the promotion of human rights. Even if it has been the practice of the Commission to receive communications from NGOs, it has never received any communications from an NGO representing, 'in all respects', the interests of a given government. The question of the nature of a communication (from an individual or from a state) is an essential preliminary question, and even one of a public nature for the

Commission. This may not be treated in a lenient manner, for it would allow a situation in which NGOs accredited by the Commission could, in fact, be 'screens' for governments, risking the discrediting of civil society in Africa, in spite of NGO dynamism in the area of human rights, particularly in Africa. This was also probably the first time that an NGO was in collusion with a government in such an obvious way.

The notion of a 'class action' evoked by the Commission to describe the procedure of ASP-Burundi is intriguing in more ways than one. Is this a new category in the system of the Charter and, if so, what could be its legal basis, beyond an 'interest in the promotion of human rights'? Whatever the case may be, it must be said that the system of the Charter has developed procedures for communications from states and from individuals. It would be problematic to do away with these without valid justification, allowing NGOs to become involved, in the name of governments, in procedures directed against other states, making use of the platform provided by the African Commission. Every type of communication has its own set of requirements, and the Commission cannot create a situation in which communications that are in principle from individuals, but in practice from states, escape from the requirements governing the admissibility of communications from states. This will encourage contempt for the Charter.

Having decided that the communication will be handled as an individual communication, the Commission states that the provisions of articles 56(5) and (6)<sup>5</sup>

are hardly applicable in this matter inasmuch as the national courts of Burundi have no jurisdiction over the state respondents herein. This is yet another indication that this communication appropriately falls under Communications from States (articles 47-54).

This statement adds to the confusion. Would there be situations which, by nature, are not subject to the rule of exhausting internal channels of appeal? The end of this statement could lead one to believe that communications from states are not compelled to adhere to the rule of exhausting internal channels of appeal. The Commission has not, it would seem, had the courage to follow this idea to its logical conclusion, by inquiring whether complaints about violations of the rights of people-states could reasonably be submitted to the condition of exhausting domestic remedies. The Commission will not be able to avoid this question for much longer.

The Commission's conclusion on the issue of admissibility is disconcerting. Normally, according to the Commission, the communication ought to be treated as a communication from a state, and that<sup>6</sup>

[d]rawing from general international law and taking into account its man-

<sup>5</sup> Para 65 of the Decision.

<sup>6</sup> Para 66 of the Decision.

date for the protection of human rights as stipulated in article 45(2), the Commission takes the view that the communication deserves its attention and declares it admissible.

Because nothing indicates that an examination of the communication on the basis of a complaint from a state would have precluded admissibility, the wording of the communication is in itself detrimental to the Charter system. Nobody knows from what general international law the Commission drew its inspiration here. For a system that is still finding its way, it is imperative not to depend on such generalities. Is the Commission's protective mandate a sufficient reason, when the intention was to conduct this aspect of its mandate in accordance with rules contained in the Charter? The mandate cannot authorise ignorance of the precise procedures to aid its achievement. The Commission, in my opinion, bypassed the system prescribing the admissibility of communications from individuals. To say that a request 'deserves attention' means nothing in particular. Does it follow that communications declared inadmissible are those posing problems that do not deserve the Commission's attention? In short, the exercise of the protective mandate has procedural constraints that the Commission must include at all the stages of deliberation. 'Class action' cannot become a category of appeal exempt from the admissibility requirements of other communications. The Commission's desire to take cognisance of the situation at all costs does not appear to be at all justified by the in-depth analysis. This is on the whole rather disappointing.

### 3 A superficial analysis of the substance of the matter

Before considering the analysis of the Commission regarding the substance of the matter, it must be stressed that, although ASP-Burundi specified alleged violations, the Commission did not reply to them in any detail. The complainant claimed, with supporting arguments, that the embargo violated articles 4, 17(1), 22 and 23(2)(b) of the African Charter. Since the Commission had decided that the request deserved its attention, one would have expected a detailed study of these allegations. However, this did not happen. An introductory note, in which the Commission could have resolved the question of the legal sources cited by the complainant, notably the OAU Charter, the UN Charter and Resolution 2625 of 24 October 1970, could also have been interesting. Was the Commission competent to examine the allegations in any way directly?<sup>7</sup> This question should have been settled, preventing the Commission from dealing with problems that do not concern it. The Com-

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<sup>7</sup> As for the OAU Charter, one can reason *a contrario* that if art 56 of the Charter demands that communications be 'compatible', among other things, with the provisions of the said Charter, this is because it is a document that can be applied by the Commission, as well as being a standard of reference for the control exercised by the Commission, at least in the admissibility stage. For the other texts, the situation is problematic.

mission then proceeded to deal with the question as to the legality of the embargo, the question of the proportionality of the effects of the embargo and the question of interference in the affairs of Burundi. The first and third questions are closely linked, because it is by alleging interference in the domestic affairs of Burundi that the very principle of the embargo, and thus its legality, is questioned.

The Commission considered the embargo against Burundi to be legitimate, as it was based on the provisions of the UN and OAU Charters, it had respected the procedures appropriate to the case, and its objective was legitimate. The embargo, according to the Commission, 'is based' on the provisions of chapters VII and VIII of the UN Charter regarding 'Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' and 'Regional Agreements', 'in the sense that the military *coup d'état*, which deposed the democratically elected government, constituted a threat to, indeed a breach of, the peace in Burundi and the region' (paragraph 70). In 1996, at the time of the events under consideration, Africa had not yet started to express condemnation of governments that came into power by unconstitutional means, as became the case from 1999 and with the adoption of the African Union (AU)'s Constitutive Act. This is probably why the Commission failed to consider the embargo legitimate based on the principle of democratic interference, but rather on motivations of collective security. The Commission, however, did not demonstrate sufficiently in what way the *coup d'état* of Major Buyoya constituted a 'threat' to or a 'breach' of the peace in the region, unless one accepts in this regard the statement in paragraph 77 according to which

[i]t is self-evident that Burundians were in dispute among themselves and the neighbouring states, under the supervision of the OAU and the UN, had a legitimate interest in a peaceful and speedy resolution of the dispute.

The Commission noted further that the actions of the authors of the embargo, dictated by the principles of the UN and the OAU, were initiated during a summit of the states of the Great Lakes Region; and that the resolution to impose the embargo was subsequently ratified by the competent authorities of the two organisations. Its conclusion was therefore implacable, and legally correct in my view, that<sup>8</sup>

[n]o breach attaches to the procedure adopted by the states concerned. . . . The endorsement of the embargo by resolution of the Security Council and of the summit of Heads of State and Government of the OAU does not merit a further enquiry as to how the action was initiated.

As a result, any allegation of abusive interference in the affairs of Burundi falls away (paragraph 78).

Since the legality of the embargo was recognised, the fundamental question that remained and that could have affected the legitimacy of

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<sup>8</sup> Para 72 of the Decision.

the action, was whether the sanctions were excessive and disproportionate, whether they were indiscriminate and went beyond their legitimate purpose. In this regard, the Commission expressed a position of principle which should serve as a future guide:<sup>9</sup>

Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of.

To put it plainly, the embargo should be 'selective' and not penalise the most vulnerable. After establishing this principle, the analysis of the Commission is less pertinent. Evading the concrete grievances set out in the claim, it notes<sup>10</sup>

that the sanctions imposed against Burundi were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and the situation was monitored regularly.

If one sets aside the targeting of specific goods and monitoring the effects of the sanctions mentioned above, the Commission's decision does not result from a detailed analysis of the case. The communication evoked the violation of articles 4, 17, 22 and 23 of the Charter. Were the social needs of the most vulnerable populations compromised so that a violation of the Charter could be decided? Did the sanctions target the main perpetrators of the *coup d'état*? This analysis was not done. The communication claimed that the tempering of the embargo remained theoretical and was not followed by concrete results. Was the Commission satisfied with an abstract examination? In my opinion, this is a grave oversight. Incidentally, a quotation from the report of the Secretary-General of the OAU submitted in June 1998 at the 68th session of the Council of Ministers is rather damning of the Commission:<sup>11</sup>

... besides their political, economic and psychological impact, they (the sanctions) continue to have a harsh impact on the people. The paradox is that they enrich the rich and impoverish the poor, without effectively producing the desired results . . . It would, perhaps, be appropriate to review the question of the sanctions, in such a way as to minimise the suffering of the people, maximise and make effective the pressures on the intended target.

Certainly, in May 2003, on the occasion of the decision, 'the matters complained of here have now been largely resolved. The embargo has been lifted . . .' However, does the lifting of the embargo at an unspe-

<sup>9</sup> Para 75 of the Decision.

<sup>10</sup> Para 76 of the Decision.

<sup>11</sup> The report established therefore that the sanctions were more harmful to the most vulnerable levels of the population than to those who were the intended target, the political group that had perpetrated the *coup d'état*. This group was enriching themselves from the embargo, whereas the poor were getting progressively poorer. By the yardstick of the criteria released by the Commission itself, the legitimacy of the embargo was being called into question. CM/2034 (LXVIII), 68th ordinary session of the Council of Ministers, Ouagadougou, 1-6 June 1998.



cified date erase its consequences, including those that would have constituted a violation of the Charter?

As the accusation applies to article 23(2)(b) of the Charter, which compels member states to prohibit 'their territories from being used as a base for subversive or terrorist activities directed against the people of another state, a signatory of the present Charter', a factual examination was imperative for the Commission to ensure respect for the Charter. This was not done.

Finally, the Commission finds that 'the respondent states are not guilty of a violation of the African Charter on Human and Peoples' Rights'. It notes the entry into force of the Arusha Agreement for Peace and Reconciliation in Burundi, and the efforts of the respondent states in the communication aimed at restoring a lasting peace and, more strangely, welcomes the entry into force of the AU's Constitutive Act, particularly in so far as it censures states that come to power by unconstitutional means. This terminology is typical of the political resolutions adopted by the Commission<sup>12</sup> and is out of place in a decision on a contentious issue. An in-depth legal analysis was stifled and reinforced the impression that it would have been better to strike this interpretation off the roll, rather than to arrive at a pointless decision. The length of time before a finding was made, showing little concern for the right of the parties to have their case examined within a reasonable time, and the inadequate interpretation does not contribute to the coherence and pertinence of the final findings of the Commission.

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<sup>12</sup> See AD Olinga 'Les resolutions de la Commission Africaine des Droits de l'Homme et des Peuples. Une tentative de systématisation/The Resolutions of the African Commission on Human and Peoples' Rights. An attempt at systematisation' (2002) 1 *Afrique Juridique et Politique*, Revue du CERDIP.