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May 5, 2008

VIA E-MAIL AND FACSIMILE +221 860 4283

EXECUTIVE DIRECTOR

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African Commission on Human and Peoples' Rights

**Re: Communication 290/04 Open Society Justice Initiative/Republic of
Cameroon—Additional Submissions on Admissibility and Request for
Hearing**

Dear Madame Secretary,

The following is an additional submission on the admissibility of the above referenced Communication. This submission is meant to supplement our original Communication of June 21, 2004, and focuses on the question of exhaustion of domestic remedies. This submission is organized as follows: (1) a chronology of the proceedings in this case; (2) a brief background section on Cameroon's broadcasting laws; (3) a summary of the admissibility requirements of the African Charter on Human and Peoples' Rights ("African Charter") concerning exhaustion of domestic remedies; and (4) our specific submissions on exhaustion. In view of the potentially complex admissibility questions raised by this Communication, we respectfully request an opportunity to address these issues at **an oral hearing** at the Commission's upcoming 43rd Ordinary Session.

The Open Society Justice Initiative is a joint initiative of Open Society Institute, New York and Open Society Institute, Budapest.

400 West 59th Street, New York, New York 10019, USA ■ Tel: 1 (212) 548-0600 ■ Fax: 1 (212) 548-4662

Oktober 6. u. 12, H-1051 Budapest, Hungary ■ Tel: (+36-1) 327-3100 ■ Fax: (+36-1) 327-3103

No. 32/Plot 1266, Amazon Street, Off Alvan Ikoku Way, Maitama, P.O. Box 11363, Garki GPO, Abuja, Nigeria ■ Tel: (+234-9) 413-3771 ■ Fax: (+234-9) 413-3772

I. CHRONOLOGY OF PROCEEDINGS

- October 29, 2002 The Douala-based Groupe Le Messenger filed an application with Cameroon's Minister of Communication (MinCom) for a broadcasting license for Radio Freedom FM.
- April 29, 2003 The Minister failed to take any action on the application within the six-month statutory deadline.
- May 23, 2003 Army and police forces took over Freedom FM's building and sealed off its studios and transmission rooms pursuant to an order of the MinCom, even though Freedom FM had never gone on air. The radio remains off the air to this date.
- November 11, 2003 MinCom filed criminal charges against Groupe Le Messenger and its director, Mr. Pius Njawe Noumeni, for having allegedly "created and operated" an unlicensed broadcasting company.
- June 21, 2004 The Open Society Justice Initiative ("Justice Initiative"), acting on behalf of Pius Njawe Noumeni and Groupe Le Messenger, filed Communication 290/04 against Cameroon for violations of Articles 2, 9 and 14 of the African Charter. The Justice Initiative also filed a request for provisional measures.
- July 15, 2004 The Chairperson of the Commission sent an urgent request to the President of Cameroon to adopt provisional measures to ensure that no irreparable damage would be done to the equipment of Radio Freedom FM. Cameroon never formally complied with the Chairperson's request.
- December 2004 The Commission, during its 36th Ordinary Session, decided to be **seized of Communication 290/04** and to consider its admissibility at the next session.
- May 2005 The Commission, during its 37th Ordinary Session, decided to defer a decision on admissibility following an indication by the

head of the Cameroonian delegation that his government was prepared to negotiate an amicable settlement of the case.

June 24, 2005

Radio Freedom FM and the Government of Cameroon signed a settlement agreement, whereby the State agreed to drop the pending criminal charges against Mr. Njawe, release Freedom FM's equipment, and – most importantly – promptly grant the radio a provisional broadcasting authorization, pending consideration of its application for a full license. The government negotiators initially declined all discussion of damages.

July 2005

Radio Freedom FM's equipment was returned, but it had been so damaged while in the State's custody as to be unusable. Accordingly Freedom FM demanded further negotiations on damages or other arrangements that would enable it to procure new equipment.

April 27, 2006

The Justice Initiative asked the Commission to **register the settlement agreement** between the parties and discontinue consideration of the Communication, following what seemed at the time to have been good progress in negotiations between the parties on the prompt granting of the provisional authorization and compensation arrangements.

December 18, 2006

The Justice Initiative wrote to the Cameroonian MinCom to protest the State's failure to comply fully with the settlement agreement, demanding in particular that Freedom FM be immediately granted a provisional authorization to broadcast.

April 20, 2007

The Justice Initiative **wrote the Commission formally withdrawing its acceptance of the settlement** in light of the State's failure to comply, and asked the Commission to re-open consideration of Communication 290/04.

November 2007 The Commission, at its 42nd Ordinary Session, decided to **re-open its consideration of Communication 290/04** and defer consideration of its admissibility to the Commission’s forthcoming (43rd) Ordinary Session.

II. BACKGROUND ON CAMEROON’S BROADCASTING LAWS

1. Cameroon had a state monopoly on radio and television broadcasting until 1990, when it passed a law with the stated aim of liberalizing broadcasting.¹ Title III of the law provides that “audiovisual communication is free,” subject to the granting of a license. The law authorized the Executive to adopt regulations on “the conditions and modalities of the allocation and use of licenses,” in consultation with the National Communication Council (NCC) (art. 36.3).
2. The Government of President Paul Biya took ten years to adopt the licensing regulations, effectively putting enforcement of the 1990 Law on hold and extending the state monopoly throughout the 1990s. In April 2000 the government issued a decree setting forth the conditions and procedures for the establishment of private broadcasters.²
3. The Decree provides for renewable five-year licenses for radio and ten-year licenses for television. The licenses are to be issued “by a decision of the Minister in charge of communication, after a reasoned opinion of the National Communication Council” (arts. 8-9). The license applications are to be first reviewed by a “technical committee” chaired by the Minister of Communications and consisting of representatives of some thirteen ministries and regulatory agencies (art. 13). The conclusions of the technical committee are forwarded to the National Communication Council (NCC), which should then send its opinion to the Minister.
4. The Minister of Communications has a maximum of six months to review a license application and notify the applicant of the decision (art. 15.3). Neither the 1990 Law nor the 2000 Decree establishes any substantive criteria to guide the Minister’s

¹ Law (no. 90/052) on Freedom of Social Communication (hereinafter 1990 Law).

² Decree 2000/158 of Apr. 3, 2000 (hereinafter 2000 Decree).

decisions concerning whether to grant a license. If the Minister's decision is favorable, the Minister and the applicant negotiate the specific terms of the license and the Minister issues "an authorization of installation." The installed equipment is then subjected to a technical check, after which—if successfully completed—the Minister issues the license (art. 18.3).

III. ARTICLE 56 REQUIREMENTS

5. Article 56 of the African Charter requires authors of communications to exhaust any available local remedies that are not "unduly prolonged." This Commission has held that the requirement does not apply where there are no remedies to be exhausted. Thus, in *Civil Liberties Organization v. Nigeria*, which involved a number of detentions carried out under a special decree that specifically barred any court challenges, the Commission held that the decree precluded access to any possible remedies under national law and rendered the exhaustion requirement inapplicable.³ Similarly, complainants are not required to exhaust discretionary or extraordinary remedies. In particular, the Commission has held that "where the remedy is at the complete discretion of the executive, the existence of local remedies is futile and to exhaust them would be ineffective."⁴ The Commission has also found the exhaustion requirement satisfied where the complainants had formal access to the courts but judicial proceedings were a sham, ineffective or excessively protracted. Thus, in an earlier communication against Cameroon involving allegations of false imprisonment and miscarriage of justice, the Commission considered an appeal procedure that had been pending for twelve years to have been "unduly prolonged."⁵ Similarly, in *Modise v. Botswana*, the complainant's attempts over 16 years to obtain judicial recognition of his citizenship had been repeatedly interrupted due to his multiple and

³ Communication 67/91 (1993).

⁴ Communication 78/92 *Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi* (1994), para. 2. See also Communication 60/91 *Constitutional Rights Project v. Nigeria* (1994) (involving a nonjudicial appeal to the state governor).

⁵ Communication 59/91 *Louis Emgba Mekongo v. Cameroon* (1994).

summary deportations from that country. The Commission held that the “national legal procedures were willfully obstructed,” denying Modise any effective remedies.⁶

6. We submit that, as we shall demonstrate in this submission, in this case domestic remedies are in part non-existent within Cameroon, and therefore unavailable to the Complainants, and in part have been proven ineffective and/or “unduly prolonged.”

IV. SUBMISSIONS ON EXHAUSTION OF DOMESTIC REMEDIES

7. As indicated above, our original Communication of June 21, 2004 addressed in comprehensive fashion both the admissibility and merits of this case. The current submission focuses therefore on the question of exhaustion of domestic remedies, summarizing and complementing the original arguments. In addition, the following arguments go primarily to Cameroon’s failure to act on the Complainants’ application for a broadcasting license. This is closely related to exhaustion in relation to the sequestration of Freedom FM’s equipment, which was also discussed in the June 2004 submission. While the government has now returned the equipment to Freedom FM, such equipment had suffered very considerable damage as a direct result of poor conditions of storage and lack of maintenance during the time that the equipment was effectively in State custody. The State has failed to compensate Freedom FM for those damages, hence the Complainants will maintain their claims and submissions related to the equipment in the “Merits” stage.
8. The following are our submissions, under three separate lines of argument, on the question of exhaustion of domestic remedies.

A. MinCom’s failure to act on the license application is not subject to judicial or other independent review

9. More than five and a half years after the filing of the original Freedom FM application for a broadcasting license, the MinCom has yet to respond in any way or take any formal decision on that application. While the 2000 Decree gives the Minister a six-month deadline to decide on a license application, neither the 1990 Law nor the 2000 Decree specifies what remedies, if any, a license applicant has

⁶ Communication 97/93 *John Modise v. Botswana* (1997), para. 20.

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. 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 license application by a government entity, unless otherwise provided by law. For example, the relevant Cameroonian legislation on licensing of drinking establishments stipulates that administrative silence on a licensing application past the three-month deadline shall amount to a grant of the license. In contrast, 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 Freedom FM was left without a domestic remedy to challenge the MinCom's (now five-year-long) failure to act on its application.

10. While Freedom FM was not able to challenge MinCom's silence directly, it sought to do so indirectly by filing a civil action following the sealing of its premises and equipment. On September 4, 2003, Groupe Le Messager filed an expedited action for emergency relief (*refere d'heure a heure*) against the Douala Representative for National Security (an agent of the central government), requesting the removal of the seals and release of the equipment, which had been under seal continuously since May 23, 2003. The lawsuit argued that the sealing was without any legal basis, that Freedom FM had never started broadcasting, and that the MinCom had failed to comply with the statutory six-month deadline to process its license application.
11. 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 side's repeated failures to appear. Initially the judge set a September 20, 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. In the meantime, the MinCom sought, and was granted, leave to intervene in the case as an interested party, arguing that the sealing of the equipment was "a material act necessary to enforce a unilateral administrative

act [the MinCom's order to ban Freedom FM's operations]."⁷ MinCom also argued that the Court of First Instance had no jurisdiction over the case, which should be tried by an administrative tribunal.

12. 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).
13. On January 26, 2004, heeding the MinCom's suggestion, and after months of debate on the merits, the court ruled that it was not competent to decide the case. To this date, and despite repeated requests since, the Douala Court of First Instance has failed to provide Le Messenger with a certified copy of the written judgment, which Le Messenger needed to be able to appeal pursuant to the relevant procedural laws. Le Messenger appealed the ruling nevertheless 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 through July 2005, when Le Messenger withdrew the case pursuant to the terms of its amicable settlement agreement with the government.
14. In view of the above, we submit that Cameroonian law and practice provided the Complainants with no effective remedies to challenge MinCom's administrative silence regarding their license application. The judicial procedures pursued by the Complainants to challenge indirectly MinCom's failure to take a decision on the application, as well as its order to ban 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

⁷ See Communication 290/04, dated June 21, 2004, para. 19.

supported by the Commission's own jurisprudence, including in *Mekongo v. Cameroon* and *Modise v. Botswana*.⁸

15. 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 (1) they occurred in the context of proceedings that were supposed to be urgent and expedited; and (2) were characterized by repeated and blatant procedural omissions of the most basic nature by both the first instance and appeal courts. Ultimately, the deliberate failure of the Douala Court of First Instance to provide the Complainants with a written judgment, coupled with the failure of the Court of Appeals 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 behavior casts serious doubt on the ability or willingness of the Douala courts to preside over a fair trial in this matter.

B. MinCom has created an entrenched, unlawful and tolerated practice of not awarding any broadcasting licenses in the past eighteen years.

14. Under international human rights law, victims of entrenched and widely-tolerated administrative practices are not required to exhaust on-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. For instance, the European Commission of Human Rights has found the exhaustion requirement to be satisfied in cases where its strict application would subject the victims to further violations of their rights, such as mistreatment in prison.⁹ We submit, under this heading, that the Government of Cameroon has developed an entrenched administrative practice of not granting any broadcast licenses, in complete disregard of its own licensing laws.
15. Eighteen years after the passage of the 'liberalizing' 1990 Law, not a single private broadcaster in the country has received a proper license by the MinCom. The government has also failed to set up a functioning National Communication

⁸ See paragraph 5 above and accompanying notes.

⁹ *Reed v. United Kingdom*, 19 D.R. 113 (1979); *Hilton v. United Kingdom*, 4 D.R. 177 (1976).

Council.¹⁰ Using NCC's state of dysfunction as an excuse – even though the NCC has a merely advisory role in the licensing scheme – the MinCom has developed, without any legal basis, a practice of granting provisional authorizations or simply allocating frequencies to broadcasters that it generally deems to be politically innocuous to the current government. For example, a May 27, 2003 decision of the Minister of Communication allocated frequencies to fourteen radios in the capital Yaoundé and to ten radios in Douala without granting any of them a proper license.¹¹ Being outside the law, these informal authorizations do not grant broadcasters any of the rights, guarantees or legal certainties to which they are entitled under the 1990 Law. They can be revoked at any time.

16. In many other cases, however, the MinCom has routinely chosen to ignore license applications altogether. A prominent example of the government's treatment of independent broadcasters is the case of Radio Veritas, the Douala-based radio of the Catholic Church. The Church applied for a license in early 2001 but did not receive a response within the statutory deadline. Given the silence of the authorities, it started broadcasting but was banned, and had its equipment seized, by the MinCom in November 2003 amid speculations that Cardinal Christian Tumi of Douala, an outspoken critic of the government, might run against President Biya in the upcoming presidential elections. Only after Cardinal Tumi publicly declared that he had no intention of running did the MinCom grant Radio Veritas an authorization to operate.
17. The tenuous legal status of the provisional authorizations became painfully obvious in the aftermath of the recent unrest in Cameroon, as the authorities suspended – without any due process whatsoever – the operations of two leading radio stations and one television network that had covered the debates on the constitutional amendments proposed by President Biya to remove limits on presidential terms. Between February 26 and 28, 2008, the police, acting without warrant, shut down and removed the equipment of the Douala-based Equinoxe Television and its sister station Radio

¹⁰ The Council, first appointed some 17 years ago, is virtually defunct. Its members are supposed to serve three-year terms, but the membership has never been renewed since its original constitution.

¹¹ Decision no. 012.

Equinoxe, as well as the Yaoundé-based Magic FM 94 radio station.¹² The three broadcasters remain off the air. These closures, which mirror the shutdown of Freedom FM in May 2003, reveal the true rationale of what the Cameroonian authorities call “administrative tolerance:” the unlawful provisional authorizations regime was developed to keep the broadcasters operating at the whim of the Executive, without any legal protection, and under the constant threat that their coverage may provoke the wrath of the government. This is a system designed to permanently muzzle, not promote freedom of, the media.

18. We submit that the local authorities have consistently refused to grant licenses to private radio broadcasters in accordance with the 1990 Law, developing instead an entrenched and unlawful practice of issuing temporary or informal authorizations that give broadcasters no legal recognition or certainty. We have maintained, in our submissions on the merits of the case, that this administrative practice is *per se* inconsistent with Article 9 of the Charter. The Complainants, however, were at the relevant time, and continue to be, not in a position to challenge MinCom’s practice because they have never been granted any form of authorization to broadcast, despite the State’s commitment in amicable settlement to grant them a provisional authorization.
19. Even if they were to acquire standing to challenge the practice, however, any such challenge would most likely lead to the permanent revocation of any such authorization, considering MinCom’s history of exercising complete discretion and arbitrariness in this area. It is revealing that no holder of an informal authorization in Cameroon has chosen to take this matter to the courts.
20. As indicated, 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 Complainants in this case are essentially in the same position because of Cameroon’s policy – inconsistent with its

¹² Reuters, *Cameroon government accused of muzzling media over riots*, Feb. 29, 2008; see also Committee to Protect Journalists, *Cameroon: Third Broadcaster Closed Within a Week Over Coverage*, Feb. 29, 2008.

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.

C. The excessive discretion granted to MinCom by law makes judicial review ineffective.

14. In addition, and in the alternative, we submit that the excessive degree of discretion granted to MinCom by Cameroon’s broadcasting laws would render any theoretical form of judicial review ineffective and illusory. International human rights tribunals have long held that theoretical judicial remedies may be ineffective where flawed laws grant executive agencies unfettered discretion to decide matters directly affecting fundamental rights. Under the jurisprudence of the European Court of Human Rights, for example, formal remedies that do not allow for consideration of the central merits of a complaint by the domestic courts cannot be considered “effective.”¹³ Thus, in *Hasan and Chaush v. Bulgaria*, the Grand Chamber of the European Court held that it was not sufficient for the local courts to apply the doctrine of “full discretion” when reviewing executive action, as this rendered the supposed remedy inadequate.¹⁴

15. Cameroonian legislation grants the Minister of Communications unfettered discretion, and no substantive guidance whatsoever, in making licensing decisions: the legal framework provides no standards, and therefore gives applicants and domestic courts no basis on which to challenge those decisions on their merits. For this and other reasons, we have argued in our June 21, 2004 submission, under “Merits,” that the Cameroonian licensing legislation is *per se* in violation of Article 9 of the Charter.

16. The 2000 Decree, an executive regulation, grants the Minister unfettered discretion to make licensing decisions. Under the 1990 Law and the 2000 Decree, the Minister is to be advised in making licensing decisions by the National Communication Council

¹³ Under Article 60 of the African Charter, and this Commission’s longstanding practice, “[t]he Commission shall draw inspiration from international law on human and peoples’ rights,” including the jurisprudence of other international human rights tribunals.

¹⁴ Judgment of Oct. 26, 2000, para. 100.

and a group of technical experts.¹⁵ The advisory role of the NCC, however, has been unavailable to the Minister for years due to that body's state of paralysis. The technical committee, on the other hand, is made up entirely of representatives of executive agencies who serve in their official capacities. In any event, the power to grant licenses rests ultimately with the Minister, and the Minister alone. Neither the 1990 Law nor the 2000 Decree sets forth any substantive criteria by which to guide and constrain the Minister's total discretion in making licensing decisions.

17. In contrast, most democratic countries leave licensing decisions in the hands of an independent authority that must follow statutory guidelines in making those decisions – thus minimizing the risk that the government of the day may abuse the power to award licenses and “mold” the broadcasting sector according to its own partisan interests. In South Africa, for example, licenses are awarded by an independent regulatory authority, whose members are appointed by the President, on the advice of the National Assembly.¹⁶ The 1999 Broadcasting Act includes a set of at least eight substantive criteria that must govern the Authority's licensing proceedings; these are supplemented by more detailed secondary legislation.¹⁷

18. This Commission's own Declaration of Principles on Freedom of Broadcasting in Africa provides that “an independent regulatory body shall be responsible for issuing broadcasting licences” and that “licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting.”¹⁸ The international mandates on freedom of expression, including the relevant special rapporteurs of the United Nations and the Organization of American States, have similarly maintained that

¹⁵ Under the 2000 Decree, the group of experts should include one representative of each of the following institutions: the President's Office; the Prime Minister's Office; the ministries responsible for finances, urban planning, telecommunications, civil aviation, territorial administration, justice, defense and labor; the General Representative for National Security; an inter-ministerial group overseeing telecommunications; and the Telecommunications Regulatory Agency. 2000 Decree, art. 13.1.

¹⁶ Independent Communications Authority of South Africa Act (No. 13 of 2000), section 5(1); available at www.icasa.org.za.

¹⁷ Broadcasting Act (No. 4) of Apr. 23, 1999, sec. 30.

¹⁸ Adopted by the African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17 to 23 October 2002, Principle V.

“[b]roadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference.”¹⁹

19. In Germany, the Constitutional Court struck down a law granting a (sub-federal) state government unlimited discretion in allocating broadcast licenses as incompatible with freedom of expression under the German Basic Law. The doctrine of broadcasting *Staatsfreiheit* (freedom from state control), held the German Court, required that licenses be awarded by an autonomous entity that must follow detailed statutory guidelines on the vetting of license applications.²⁰

20. In the 1998 case of *Media Rights Agenda v. Nigeria*, this Commission reviewed the legality under the African Charter of a registration and licensing regime for the print media. Finding a violation of Article 9, the Commission noted with concern

the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they chose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9(1).²¹

21. Returning to the immediate question of remedial effectiveness, we submit that, under international human rights law, theoretical judicial remedies become ineffective where flawed laws grant executive agencies unfettered discretion to decide matters affecting fundamental rights and freedoms. In the same vein as the European Court of Human Rights,²² the Inter-American Court of Human Rights has held that when “the general conditions of the country or even the particular circumstances of a case” render remedies illusory, these cannot be considered effective:

This may occur, for example, when their uselessness has been shown in practice, because the jurisdictional body lacks the necessary independence to decide

¹⁹ International Mechanisms for Promoting Freedom of Expression, “Joint Declaration on Challenges to Freedom of Expression in the New Century,” November 20, 2001.

²⁰ 73 BVerfGE 118 (1986) (*Fourth Television Case*), at 182-184.

²¹ *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, October 31, 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para. 57.

²² See paragraph 14 above and accompanying notes.

impartially or because the means to execute its decisions are lacking; or owing to any other situation that establishes a situation of denial of justice, as happens when there is unjustified delay in the decision.²³

By a similar token, the lack of any substantive standards or criteria in Cameroon's broadcast licensing laws – and the resulting absolute discretion granted to the Minister of Communications in making licensing decisions – means that the domestic courts lack the means to “decide impartially” and for themselves whether the Minister violated the substance of the applicants' rights under the African Charter. For example, there is nothing in the law to keep the Minister – or empower the courts to prevent the Minister – from making unjustified and unreasoned licensing decisions on the basis of the applicants' political background or previous editorial orientation.

22. In another recent, and even more to-the-point, case against Bulgaria, the European Court examined a complaint by a broadcasting aspirant that the state authorities had arbitrarily denied its request for a radio license, including by virtue of the licensing authority's failure to provide any reasons for the denial.²⁴ The applicant alleged, among other points, that the national supreme court had violated its Convention right to a remedy by failing to properly review the decision of the broadcasting authority. After finding a violation of Article 10 (freedom of expression) of the European Convention, the Court went on to rule that Article 13 (right to a remedy) had also been infringed as a result of the Bulgarian court's failure to “scrutinise the manner in which [the licensing authority] had assessed the compliance of [the applicant's] programme documents with the relevant [statutory] criteria.”²⁵ The domestic court's failure to review the administrative denial of the license application “on substantive grounds” – because of its deference to the domestic doctrine of “absolute executive

²³ *Baena Ricardo et al. v. Panama*, Judgment of Nov. 28, 2003 (Jurisdiction), para. 77; see also *Case of Nineteen Merchants v. Colombia*, Judgment of July 5, 2004, para. 192.

²⁴ *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, Judgment of Oct. 11, 2007.

²⁵ *Id.*, para. 68.

discretion” on such matters – had rendered the judicial remedy ineffective, the European Court concluded.²⁶

23. Similarly, in the current case, the Cameroonian courts – even if prepared to substantively review MinCom’s licensing decisions – would find no criteria or other substantive yardstick in their broadcasting laws to assess MinCom’s exercise of discretion and the merits of the Complainants’ claims under the Charter. The law grants MinCom virtually absolute discretion to make licensing decisions that impinge upon the core of the applicants’ freedom of expression, rendering any theoretical judicial remedies against such restrictions ineffective in practice.
24. **Burden of proof.** It is generally accepted in international human rights law that the State carries the burden of proving that an effective and sufficient remedy existed, in practice, and at the relevant time, which was not exhausted by the complainant.²⁷ To date, we have not been notified of any submissions by Cameroon to this effect, even though the State has had ample time and opportunity – and we understand was properly invited by the Commission – to do so in the four years since the filing of this Communication. We submit therefore that the State has relinquished its right to raise any admissibility objections. That notwithstanding, were the State to raise any such objections at this late stage of the proceedings, and were those objections to be entertained by the Commission, we would respectfully request an opportunity to address the merits of such objections before the Commission reaches a decision on the matter.

CONCLUSION

25. In conclusion, it is our submission that there were at the relevant time, and there are still, no remedies available to the Complainants to challenge effectively the Minister’s

²⁶ The European Court reached this decision in its consideration of the merits. However, the preliminary question of whether potentially ineffective domestic remedies need to be exhausted is very closely connected to the substantive issue of whether the state party complied with its obligation to provide an effective remedy for the protection of Convention rights. For the purposes of the current discussion, they pose, and answer, essentially the same question: if the remedy is found to be ineffective, it need not be exhausted.

²⁷ See, inter alia, *Kelly v. United Kingdom*, European Ct. H.R., Judgment of Jan. 13, 1993 (Admissibility); and *Godinez-Cruz v. Honduras*, Inter-American Ct. H.R., Judgment of June 26, 1987 (Preliminary Objections), paras. 95-96.

now five-year-long inaction on their license application. The judicial remedies of which the Complainants availed themselves to challenge indirectly the Minister's silent denial of their application have proved to be ineffective and unduly prolonged. In addition, and in any event, given the prevailing practice in the country and the lack of substantive standards on licensing, any challenges to the Minister's licensing decisions are doomed to be ineffective.

Respectfully submitted,



Robert O. Varenik
Acting Executive Director



Darian K. Pavli
Legal Officer