

June 21, 2004

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## **URGENT**

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African Commission on Human and Peoples' Rights  
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### **Re: Request for Provisional Measures – Rule of Procedure 111**

Dear Madame Chair:

The Open Society Justice Initiative requests that the Commission consider this request for provisional measures, which is submitted in conjunction with our communication on behalf of Pius Njawè Noumeni and Groupe Le Messenger for multiple violations of their Charter rights by the Republic of Cameroon. In particular, the serious, persistent and irreparable violations of the Complainants' rights to freedom of expression and to property require the Commission's immediate attention.

A summary of the facts, as well as the Charter violations claimed in the communication, is provided below for the Commission's convenience. This is followed by the requests for provisional measures.

### **SUMMARY OF FACTS**

In November 1999, the multimedia Groupe Le Messenger, based in Douala, Cameroon and headed by Mr. Pius Njawè, started operating a radio station in Douala, under conditions of an effective but unlawful ban on private broadcasting. Following the formal liberalization of the broadcasting sector in April 2000, Le Messenger applied for a radio license with the Ministry of Communication on October 29, 2002. The Minister of Communication failed to act on the application within the 6-month deadline provided by law, claiming that the application was still under consideration.

The Cameroonian Ministry of Information (MinCom) has a history of arbitrary, unlawful and discriminatory handling of license applications. In particular, the MinCom has consistently refused to grant broadcast operators proper licenses in accordance with the law, developing instead an abusive practice of providing temporary or informal authorizations to broadcast at certain frequencies. These authorizations or allocations give broadcasters no legal recognition or certainty, and can be revoked at any time. In addition, the MinCom routinely refuses to act on license applications or provide grounds for their denial, and tends to ban existing operators in arbitrary, discriminatory and politically-motivated ways.

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Given the MinCom failure's to comply with the legal deadline, and its history of arbitrary denial of licenses, in mid-May 2003, Le Messenger announced that it would start the broadcasts of Radio Freedom FM on May 24. On May 23, however, before Freedom FM ever started broadcasting, the MinCom issued a banning order, and the police and military sealed off the premises containing the radio's equipment and studios. To date, the radio remains off the air and the equipment sealed. Nineteen months after the filing of the initial license application, the MinCom has yet to notify Le Messenger of its decision. There is little doubt that the Minister's refusal to license Freedom FM is politically motivated (see Communication, paras. 50 and 73).

In early September Le Messenger filed an action for emergency relief (*refere d'heure a heure*) requesting the removal of the seals and release of the equipment. After almost five months of repeated postponements, the Douala Court of First Instance ruled, at the end of January, that the case belonged to the administrative, rather than civil, jurisdiction. The court took another three months to provide Le Messenger with a written judgment that would allow it to appeal. The first instance court has thus made a mockery of the urgent relief procedure. The appeal is currently pending before the Douala Court of Appeals. In the meantime, the radio equipment of U.S.\$110,000 value continues to deteriorate on a daily basis under inadequate climate conditions with no opportunity for Complainants to monitor and maintain it.

While the civil case was still pending, the MinCom filed criminal charges against Complainants Njawè and Le Messenger for having "created and operated" an unlicensed broadcasting company. This case is currently pending before Douala's First Division Magistrate Court and was recently reassigned to a new judge without explanation.

## **SUMMARY OF CHARTER VIOLATIONS**

The Communication filed by the Justice Initiative under separate cover respectfully requests the Commission to find that Cameroon:

1. by virtue of its laws and practices on licensing of private broadcasters, as well as its silent refusal to grant Le Messenger a radio license, has violated Article 9 and Article 1 of the Charter;
2. by virtue of its seizure of Le Messenger's radio equipment and premises, has violated the Complainants' right to property under Article 14 of the Charter;
3. has violated the Complainants' right under Article 2 of the Charter to enjoy freedom of expression without being subjected to politically-motivated discrimination;
4. should pay appropriate compensation to the Complainants for the multiple violations of their Charter rights and freedoms.

## **REQUESTED PROVISIONAL MEASURES**

In view of the specific circumstances of this communication, we also request that the Commission, pursuant to Rule 111 of its Rules of Procedure, require Cameroon to adopt the following provisional measures in order to avoid further irreparable damage being caused to the Complainants' rights:

**Provisional Measure No. 1: Immediately lift the ban on Freedom FM and grant it a frequency to broadcast freely pending this Commission's decision.**

The MinCom's denial of Le Messenger's license application constitutes a persistent and serious violation of the Complainants' freedom of expression, amounting to prior censorship. The Complainants' ability to exercise their freedom of access to broadcasting is irreversibly denied with every day that passes.

While Le Messenger was not automatically entitled to a license, Cameroon's effective denial of its application has arbitrarily precluded the group's access to broadcasting. Indeed, the MinCom's statements, actions and inactions are equivalent to a clear government policy that, because of its history of critical journalism, Le Messenger will never be granted a radio license. By banning Freedom FM and sealing its equipment, Cameroon has prevented them from participating in the formation of public opinion through the airwaves.

Such arbitrary denial of access to broadcasting violates international human rights law. As the Inter-American Court of Human Rights has noted, "freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."<sup>1</sup> National and international tribunals have guaranteed access to all media of mass communication, including in the broadcast sector. Lord Hoffmann of the British House of Lords, for example, reasoned in a recent case that the European Convention on Human Rights guarantees a "right not to have one's access to [broadcast] media denied on discriminatory, arbitrary or unreasonable grounds."<sup>2</sup> The Privy Council, in a case from Antigua and Barbuda very similar to the Freedom FM case, held that the denial of license and seizure of equipment of an aspiring broadcaster "without any stated or apparent grounds" violated its right to freedom of expression.<sup>3</sup>

The harm to the Complainants' rights, like any form of prior restraint, is particularly severe and irreparable. Prior censorship is universally considered to be the most insidious form of government interference with freedom of expression. In the words of the United States Supreme Court, "prior restraint, ... by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it."<sup>4</sup> It is for these reasons that national and international courts, including the European Court of Human Rights, the Inter-American Court of Human Rights and the U.S. Supreme Court, have repeatedly ruled that prior restraint is immediately suspect and can be sustained only in the most exceptional circumstances.<sup>5</sup> The ECHR has specifically recognized that the unjustified denial of registration to the media amounts to prior restraint.<sup>6</sup>

Under international law, a government should not be able to arbitrarily deny the citizenry access to the airwaves any more than it can "freeze" expression in print or other traditional forms of communication. Arbitrary licensing is to freedom of broadcasting what blue-penciled censoring is to freedom of the press.

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<sup>1</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No.5 (1985), para. 34.

<sup>2</sup> *R. v British Broadcasting Corporation, ex parte Prolife Alliance* [2003] 2 WLR 1403 (HL), para. 58.

<sup>3</sup> *Observer Publications Ltd. v. Matthew* [2001] UKPC 11. The Council ordered that the applicant be granted a broadcasting license, have the seized equipment returned and be allowed to claim damages from the government.

<sup>4</sup> *Nebraska Press Association v. Stuart*, 427 U.S. 539, at 559 (1976).

<sup>5</sup> See, respectively, *Observer and Guardian v United Kingdom*, 14 E.H.R.R. 84 (1991); *Olmedo Bustos et al. v. Chile* ("The Last Temptation of Christ" Case), 5 February 2001, Series C No. 73; *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>6</sup> *Gaweda v. Poland*, Judgment of March 14, 2002, Application No. 26229/95.

Cameroon's prior censoring of Le Messenger is arbitrary and hence a most serious and persistent violation of Article 9.

Indeed, the particularly serious nature of the infringement of free expression in this case requires urgent action by the Commission. As the U.S. Supreme Court famously noted in the *Pentagon Papers* case, "any system of prior restraints of expression [bears] a heavy presumption against its constitutional validity"; the government has to meet the "heavy burden of showing justification for the imposition of such a restraint."<sup>7</sup> Pending the government's satisfying this heavy burden – a most difficult threshold to overcome given the facts of this case – the Commission's urgent intervention is required to preserve Complainants' freedom to broadcast without unlawful prior censorship.

**Provisional Measure No. 2: Immediately remove the seals from Freedom FM's studios and equipment and allow Le Messenger to use them freely, as well as to restore and maintain them in good condition, pending the decision of this Commission.**

Apart from preventing Le Messenger to operate the radio, the sealing of the Freedom FM equipment has deprived the Complainants of their right to have access to, maintain and dispose of their property. In the meantime the radio equipment, which is sensitive to humidity and other climate conditions, has most likely suffered persistent deterioration due to the Complainants' inability to maintain it appropriately. In addition, Le Messenger continues to pay rent on the sealed premises where the equipment is located.

As this Commission noted in *Media Rights Agenda v. Nigeria*, 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."<sup>8</sup> The sealing of Le Messenger's premises and equipment, like the sealing of the premises of the Nigerian publications in *Media Rights Agenda*, was done in accordance with no "appropriate laws" and without any due process of law. As the Privy Council ruled in *Observer Publications*, the unlawful denial of the license renders any measures aimed at enforcing the broadcasting ban equally unlawful.

Under the circumstances of this case, the seizure of the radio equipment is a separate violation of Article 9 above and beyond the silent refusal to grant a broadcasting license. In view of the persistent deterioration of the equipment and the failure of the Cameroonian courts to resolve the matter promptly, the continued seizure of the equipment and premises amounts also to an unreasonable and disproportionate encroachment upon the Complainants' right to property. The failure of the domestic courts to grant Le Messenger a prompt and effective remedy for the preservation of its perishable equipment is another reason for the immediate intervention of the Commission.

**Provisional Measure No. 3: Undertake a prompt review of its legal framework and administrative practices on licensing of broadcasters to ensure their consistency with Article 9 of the Charter and the 2002 Declaration of Principles.**

Cameroon's current licensing regime is, in many essential respects, in violation of the freedom of expression of all current and aspiring private broadcasters in the country. The Communication of the

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<sup>7</sup> *New York Times Co. v. United States*, 403 U.S. at 714.

<sup>8</sup> *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para. 77.

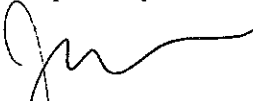
Justice Initiative submits in detail that Cameroon's licensing laws and practices fail to ensure respect for the principles of independence and pluralism of broadcasting.<sup>9</sup> In particular:

- the rules governing the licensing process are not established by the legislature through a law, but are imposed by executive decree;
- the entity responsible for issuing licenses, the Minister of Communication, is not an independent regulatory body and is not adequately protected against interference of a political nature. In practice, as the Freedom FM and other cases indicate, the Minister's decisions are politically motivated. The government has direct control over access to the airwaves and routinely abuses its licensing powers.
- the licensing process is neither fair nor transparent, and fails to ensure diversity in broadcasting. The legal framework fails to determine the criteria for making licensing decisions; the MinCom systematically fails to act on license applications within the legal deadline or provide any reasons for its refusals to grant licenses; and ultimately, refusals or silent refusals to grant licenses are not subject to judicial review.

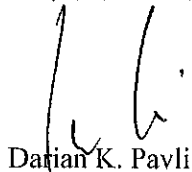
In view of these structural inconsistencies with the system of broadcasting freedom guaranteed by Article 9 of the Charter and international law, it is imperative that the Commission require Cameroon to open up the airwaves to the widest possible range of freely expressed views. The country's laws and practices are suffocating not just the freedoms of broadcasters, but, first and foremost, the right of 15 million Cameroonians to receive information through the airwaves, free of government filtering.

We respectfully submit that the Commission should urgently invoke its Article 111 authority to request that Cameroon adopt these provisional measures in order to stop the irreparable damage being caused to the Complainants and their Charter rights.

Respectfully submitted,



James A. Goldston  
Executive Director



Darian K. Pavli  
Legal Officer

cc: Commissioner Andrew Chigovera, Focal Person on Freedom of Expression  
Mr. Germain Baricako, Secretary to the Commission

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<sup>9</sup> These principles, inherent in Article 9 of the Charter, have been elaborated by this Commission, consistent with international standards on freedom of expression, in its 2002 Declaration of Principles on Freedom of Expression in Africa.