



Asociación Pro Derechos Humanos de España

March 19, 2008

The Secretary
African Commission on Human and Peoples Rights
Kairaba Avenue
P.O. Box 673
Banjul
The Gambia

**COMMUNICATION 347/07 -
ASOCIACIÓN PRO DERECHOS HUMANOS
DE ESPAÑA (APDHE)/EQUATORIAL GUINEA**

**Submission on Admissibility of the Communication
Under Article 56 of the African Charter on Human
and Peoples' Rights**

Introduction

On October 12, 2007, the *Asociación pro Derechos Humanos de España* (APDHE) filed a first submission in this case, introducing a Communication under the Article 55 Communications Procedure of the African Charter on Human and Peoples' Rights (the "Charter").

This Communication alleges violations of the right under Article 21 of the Charter of the peoples of Equatorial Guinea to "freely dispose of their wealth and natural resources." Specifically, as will be detailed in a subsequent submission, the Communication alleges that the Government of Equatorial Guinea violates the Charter in permitting the family of the President, H.E. Teodoro Obiang Nguema Mbasogo, and a small number of allied families, mostly from the President's Esangui clan or the

Mongomo region (the “Nguema/Mongomo group”¹), to divert to their own private benefit the preponderance of the value of and revenue from the Equatoguinean peoples’ natural resources, in particular, the value of the peoples’ land and hydrocarbon² resources. This misappropriation of the peoples’ resources has continued for well over two decades and represents precisely the kind of massive “spoliation” that is prohibited by Article 21. These violations entitle the people of Equatorial Guinea to “lawful recovery of its property as well as to an adequate compensation.” Moreover, this spoliation also entails additional grave violations of the “interest of the people.”

In order to accomplish these violations, the Nguema/Mongomo group has established and maintains a tightly-knit system of corruption that has subordinated to itself the machinery of the state, leaving virtually no room for participation by those outside the ruling group in either the primary economy or the political system. The Government of Equatorial Guinea has materially assisted and colluded with this corruption system by, among other things, putting the Equatoguinean judicial system at the disposal of the ruling group, to implement and ratify the massive diversion of the peoples’ wealth, thus violating the Government’s “duty to guarantee the independence of the Courts,” under Article 26 of the Charter, and the closely related duty to ensure the right of “[e]very individual [...] have his cause heard,” under Article 7(1).

The fruits of this corruption system are, in turn, the consequent violations of the right to development, right to health, right to education, and right to lawfully acquired private property, under Articles 22, 16, 17(1), and 14.

By letter of December 19, 2007, the Secretary to the African Commission on Human and Peoples’ Rights (the “Commission”) advised the authors that during its 42nd Ordinary Session, held in Brazzaville, Republic of Congo, the Commission decided to be seized of the Communication. In the December letter, the Secretary also requested the authors to file, by March 19, 2008, a second submission addressing the admissibility of the Communication, for consideration by the Commission at its 43rd Ordinary Session, to

¹ In employing this term, the authors of this Communication have no intention to suggest that the group includes only people from Mongomo, or that all or most people from Mongomo are part of the group. The Nguema/Mongomo group comprises a small minority of a small minority of the Equatoguinean population. It has, however, long been widely acknowledged that the Esangui clan and the Mongomo region have been very disproportionately represented in the political elite since independence in 1968. See, e.g., “Equatorial Guinea: Country Outlook,” ViewsWire, Economist Intelligence Unit (January 4, 2007) (“Mr. Obiang has kept a tight grip on power since 1979...principally through a network of relatives and members of his Esangui clan from Mongomo, in the east, who occupy all the top security posts in government.”), available at http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=1651791950®ion_id=&country_id=230000023&refm=vwCtry&page_title=Latest+analysis. See also United States Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices 2006 – Equatorial Guinea* (March 6, 2007), Section 5 (“near monopolization of political and economic power by the Fang ethnic group, particularly its Mongomo subclan”), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78732.htm>.

² As used in this communication, the term “hydrocarbons” refers generally to all oil and gas substances composed of hydrogen and oxygen that are produced commercially in Equatorial Guinea, including petroleum, liquefied petroleum gas, liquefied natural gas, and methanol.

be held in Swaziland from May 15-19, 2008. The present submission is made pursuant to that request.

Admissibility under Article 56

Article 56 of the Charter provides that communications submitted to the Commission “shall be considered” if they comply with seven conditions. All of these conditions are met. The conditions in subsections 1, 2, 3, 4, 6, and 7 of Article 56 are clearly satisfied, as are the conditions for applying the exception to the exhaustion of remedies rule in subsection 5. The bulk of the discussion in this submission will address the applicability of subsection 5 of Article 56, which requires a showing that the authors have “exhaust[ed] local remedies, unless it is obvious that this procedure is unduly prolonged.”

The Conditions for Admissibility under Subsections 1, 2, 3, 4, 6, and 7 of Article 56

Identity of authors (subsection 56(1)). Founded in 1976, the APDHE is a nongovernmental organization that advocates for human rights and the rule of law around the globe. Among its objectives, APDHE advocates for human rights in Equatorial Guinea through its Equatorial Guinea Working Group. It is registered in Spain and counts among its members many nationals of Equatorial Guinea resident in Spain, and views the Equatoguinean diaspora as an important constituency for its work. Estimates for the number of Equatoguineans living in Spain range from 40,000 to 100,000.³

Compatibility with the Charter (subsection 56(2)). The core of the Communication is a claim under Article 21 of the Charter, and the Communication further alleges violations of Articles 26, 7(1), 22, 16, 17(1), and 14, perpetrated by the Government of Equatorial Guinea, which ratified the Charter on April 7, 1986.⁴ All the violations alleged in this Communication occurred after this date. To the extent that any of the violations herein alleged began before this date, the authors allege that those violations have continued since then and have persisted to the present day.

Lack of disparaging or insulting language (subsection 56(3)). The authors have confidence in the strength of their legal arguments and the evidence submitted in support thereof, which are presented in decorous language respectful of the dignity of the Commission.

Not based exclusively on news disseminated through the mass media (subsection 56(4)). The authors have been mindful of the need to submit the most direct and probative evidence available in support of their allegations. As will be demonstrated in

³ United Nations High Commission on Refugees, Emergency & Security Service, *Equatorial Guinea: The Position of Refugees and Exiles in 2001*, Writenet Paper No. 18/2001 (December 2001), page 9, available at <http://www.unhcr.org/home/RSDCOI/3dca82d32.pdf>.

⁴ See the Commission’s website at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>.

this and other submissions in this proceeding, Equatorial Guinea is almost universally recognized in published sources as a country in which fear is pervasive and physical torture and other forms of abuse are regularly used by the Government to suppress dissent and political opposition. Until 2005, there were no human rights associations legally registered in the country, and even now there are few if any nongovernmental organizations concerned directly with civil and political rights.⁵ It is, accordingly, risky in many cases for individuals who continue to reside in Equatorial Guinea – or who have relatives and friends there – to provide testimony or evidence in their own name in a proceeding such as this one. Despite these dangers, some individuals have been courageous enough to come forward and speak openly, and, wherever possible, the authors will attempt to give such individuals voice in this proceeding. The allegations of this Communication are also corroborated by evidence produced by national governments, including the Government of Equatorial Guinea; intergovernmental organizations, such as the United Nations, the Council of Europe and the Organization for Economic Cooperation and Development; international financial institutions such as the World Bank and the International Monetary Fund; respected nongovernmental organizations; and numerous other sources. Where journalistic reporting has been particularly illuminating, the authors have incorporated such materials as well.⁶

Submission within a reasonable period from the date the Commission is seized of the matter (subsection 56(6)). The present submission is filed within the time period requested by the Commission.

Not a case dealt with in accordance with the principles of the United Nations or African Charters (subsection 56(7)). No other United Nations or African Union body has addressed the factual situations set forth in this Communication.

The Requirement for Exhaustion of Local Remedies under Subsection 56(5).

Subsection 56(5) of the Charter provides as a condition for admissibility that communications must be “sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”

⁵ “The law establishes what types of NGOs can register, and human rights associations were added to the list in 2005; since then, human rights NGOs have been registered to address issues of the aged and disabled, HIV/AIDS, conservation, and environment.” United States Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices 2007— Equatorial Guinea* (March 11, 2008), Introduction and Section 1(b), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100479.htm>.

⁶ “It is common knowledge that information is always gotten from the media. The genocide in Rwanda, the human rights abuses in Burundi, Zaire, Congo to name but a few, were revealed by the media....The issue therefore should not be whether the information was gotten from the media, but whether the information was correct. Did the complainant try to verify the truth about these allegations? Did he have the means, or was it possible for him to do so, given the circumstances of his case?” *Dawda Jawara v. The Gambia*, ACHPR Nos. 147/95 and 149/96 (2000), Paragraphs 25-26.

This exhaustion requirement is “a well-established rule of customary law,”⁷ and important policy concerns underlie it. As the Commission has explained:

One purpose of the exhaustion [rule] is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgments of law at the national and international levels....

Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal....The exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants complain....

Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists.⁸

Notwithstanding these principles, the Commission has repeatedly recognized that in some situations, an attempt to pursue domestic remedies for violations of rights protected under the Charter would be futile, unduly prolonged, and/or, indeed, quite often dangerous for the claimant or those close to him or her.

Accordingly, the Commission has often excused claimants from having to satisfy the exhaustion requirement in “cases in which it is neither practicable nor desirable for the complainants or the victims to pursue such internal channels.”⁹ The Commission has declined to require proof of exhaustion where, for example, the “seriousness of the human rights situation in [a country] and the great numbers of people involved render such remedies unavailable in fact, or, in the words of the Charter, their procedure would probably be ‘unduly prolonged.’”¹⁰

The Commission has carefully drawn out the full implications of this equation between a purported local remedy that is “unavailable in practical terms,”¹¹ and the Charter characterization of such a remedy as “unduly prolonged.” Accordingly, the Commission has formulated “[t]hree major criteria” for determining whether to enforce

⁷ *Interhandel Case (Switzerland v. United States)*, Preliminary Objections, 1959 ICJ Rep. 6, 27 (March 21, 1959).

⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR No. 155/96 (2001), Paragraphs 37-39 (internal citations omitted).

⁹ *Malawi African Association and Others v. Mauritania*, ACHPR, Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000), Paragraph 85 (internal quotations marks omitted).

¹⁰ *Amnesty International and Others v. Sudan*, ACHPR Nos. 48/90, 50/91, 52/91 and 89/93 (1999), Paragraph 39. See also *Organization Mondiale contre la Torture v. Rwanda*, ACHPR Nos. 27/89, 46/91, 49/91 and 99/93 (1996), Paragraph 18 (“serious and massive violations of human rights...vast and varied scope of the violations alleged...large number of individuals involved”).

¹¹ *Malawi African Association and Others v. Mauritania*, Paragraph 85.

the exhaustion rule, “namely: the remedy must be *available, effective and sufficient*.”¹² The Commission has explained:

A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.¹³

It has been observed that in practice, these concepts have tended to overlap.¹⁴ Nonetheless, no matter how considered, the evidence of decades of rule by the Nguema/Mongomo group shows that recourse to the Equatoguinean judicial system to right the wrongs of the corruption system is wholly impracticable; and that no desirable end could be furthered by conditioning Commission review of this Communication on such a futile exercise.

As will be shown below, virtually every observer of the judicial system in Equatorial Guinea has found it to be so lacking in independence and authority that, as a practical matter, even where the law may appear on its face to provide a remedy for a serious wrong, such relief remains a dead letter in any case involving interests perceived to be important to senior officials or their close associates. Far from fulfilling its traditional function as the “bastion of protection of the individual’s rights against the abuses of State power,”¹⁵ the Equatoguinean legal system has been regularly used to justify and directly enforce the abuses of the corruption system.¹⁶

Unavailability of Domestic Remedies

As noted above, in considering whether to require exhaustion of local remedies, the Commission has found a domestic remedy to be *available* “if the petitioner can pursue it without impediment.”¹⁷ Commission cases have found such impediments in a number of circumstances that are also characteristic of Equatorial Guinea. The most obvious circumstance establishing the unavailability of domestic remedies is where, as in Equatorial Guinea, domestic law fails, as a threshold matter, in fact, or in definitive official interpretation, to provide for the right in question. The Commission has also found no local remedy to be available where significant practical barriers prevent claimants from accessing the courts: situations of serious and massive violations of Charter rights; a generalized fear of seeking recourse to the courts; and/or the *de facto* lack of access to legal counsel. We address each of these in turn below.

¹² *Dawda Jawara v. The Gambia*, Paragraph 31 (emphasis added).

¹³ *Dawda Jawara v. The Gambia*, Paragraph 32.

¹⁴ See generally Nsongurua J. Udombana, “So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights,” 97 A.J.I.L. 1, 21-34 (2003).

¹⁵ *Civil Liberties Organization v. Nigeria*, ACHPR No. 129/94 (1995), Paragraph 16.

¹⁶ While the authors of this Communication are in the position of pursuing a claim against the Government of Equatorial Guinea, the very same defects in the judicial system are equally – or even more gravely – manifested in criminal cases in which an accused seeks to defend himself against the allegations of the Government. In either posture, especially in any case raising issues of political or economic sensitivity, the Nguema/Mongomo group effectively employs the judicial system as but another organ of executive power.

¹⁷ *Dawda Jawara v. The Gambia*, Paragraph 32.

Failure of Domestic Law to Provide for the Peoples' Right to Freely Dispose of Their Wealth and Natural Resources

“Where a right is not well provided for in domestic law such that no case is likely to be heard....there cannot be...any remedies at all.”¹⁸ Equatoguinean law lacks any meaningful prohibition on the abuse of public office to divert the peoples' wealth into private hands. Though smaller scale theft or robbery is often prosecuted forcefully in Equatorial Guinea,¹⁹ the grander misappropriation of national wealth at stake in this case is generally clothed in the form of legal process, often through acts of Government expropriation for purportedly public use and/or contractual business arrangements. Virtually all important business opportunities – including access to decent employment – are controlled directly or indirectly by members of the Nguema/Mongomo group and close associates, whose *de facto* and often official monopoly or oligopoly power is ensured by the Government. High-level self-dealing is not just common but the norm in the Equatoguinean economy.

As was exhaustively detailed in a U.S. Senate Subcommittee investigation in 2004, the Nguema/Mongomo group has been able to ensure itself access to profitable co-investment opportunities with the international hydrocarbon companies, often with little or no capital invested or at risk.²⁰ Several such deals examined by the Senate investigating committee revealed little indication of rational business purpose for the international enterprises to include members of the Nguema/Mongomo group in the investment projects other than to comply with express or implied Governmental pressure.

Senate investigators uncovered, for example, a transaction involving the sale by Mobil Oil Corporation of a 15% stake in a joint oil-trading business, Mobil Oil Guinea Ecuatorial (MOGE), to President Obiang's holding company, Socio Abayak, S.A., in 1998 and 1999, for an aggregate of US\$ 2,300. Dividends declared by MOGE in 2001, 2002 and 2003 resulted in payments to Abayak of approximately \$10,500 in each of those years. By 2004, Abayak's MOGE investment was worth \$645,000. ExxonMobil was unable to explain to the Senate investigating committee why Abayak had been brought into the investment, or whether Abayak or Mobil had proposed it. A related December 23, 1997 Mobil internal memorandum suggests that legal or political, rather than business, considerations motivated inclusion of the President's company. Under the heading “LEGAL REQUIREMENTS AND ADVANTAGES, Capital Structure,” the

¹⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Paragraph 37.

¹⁹ See U.S. Department of State, Overseas Security Advisory Council, “Equatorial Guinea 2007 Crime & Safety Report” (February 9, 2007) (“criminals, if identified, are dealt with swiftly and sometimes harshly”), available at <https://www.osac.gov/Reports/report.cfm?contentID=61634>.

²⁰ See generally United States Senate, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, Minority Staff Report, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the PATRIOT Act – Case Study Involving Riggs Bank* (July 15, 2004) (hereafter, “U.S. Senate Riggs Bank Report”), available at <http://www.senate.gov/~govt-aff/ files/ACF5F8.pdf>.

memo says that “Mobil has to be in partnership with local Guineans. Abayak, a local company will be our partner, with 15% share.”²¹

The Equatoguinean Government has argued that there is nothing improper about such deals. In its detailed response to the U.S. Senate report, the Government publicly stated:

Foreign legislation, such as that of the United States [North America] does not control in Equatorial Guinea, for which reason neither does it prohibit the President of the Republic, Ministers, Functionaries, Citizens and foreigners residing in the Country from undertaking entrepreneurial initiatives....

[N]ot only did the President of the Republic and his family [already] have their assets before the oil economy, but so did other Equatoguineans...who dedicated themselves to entrepreneurial activities through investments in property, purchase of lands and creation of small and medium size businesses, whose holdings have gained in value and profitability with the presence of North American companies that by virtue of contracts of purchase and rental of properties of [Equatoguinean] nationals are paying significant amounts with which they have opened personal bank accounts in Equatorial Guinea and abroad, including the United States.²²

The position of the Government of Equatorial Guinea is, in effect, that express or implied use of government influence to direct to the Nguema/Mongomo group no-risk investment participations in foreign business investments, such as the Mobil Oil deal described above, constitutes a development strategy for the country.

These traditional properties are used for commercial transactions, and with them [Equatoguinean] nationals obtain significant sums of money to undertake business initiatives and to improve their own and their families' standard of living. In this way, many Equatoguineans, by availing

²¹ Responses to Supplemental Questions for the Record Submitted to Exxon-Mobil, including Attachments (no date, presumably 2004), Exhibit 54, in *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the PATRIOT Act, Hearing Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 108th Cong., 2nd Sess. (July 15, 2004)*, pages 834-40 (the memorandum is at page 840). Mobil merged with Exxon Corporation in 1999 to form ExxonMobil Corporation. The authors do not contest the right of a government to require local participation in foreign investments, as a means of providing opportunity for the country's nationals. The concern here is, rather, the abuse of such rules to steer unearned income to a small circle within the government elite, at the expense of development opportunities for the people overall.

²² Government of the Republic of Equatorial Guinea, “Reacción del Pueblo y Gobierno de Guinea Ecuatorial al Informe del Subcomité Permanente de Investigaciones del Senado de los Estados Unidos de América sobre Riggs Bank” (September 2004) (hereafter, “Reacción del Pueblo y Gobierno”), “Preliminary Considerations” and Paragraph 14, available at <http://www.ceiba-guinea-ecuatorial.org/guineees/template2.htm> (APDHE translation).

themselves of laws applicable in the Country and as a strategy for direct participation in the investments of foreign capital, are shareholders in many businesses involved in petroleum extraction, services, construction, fishing, timber, aviation, etc.; profits from which have served to create internal savings and to reinvest in financial assets within and outside the country in accordance with the financial regulations applicable in Equatorial Guinea and the Central African Monetary Union.²³

As a practical matter, however, lack of family or government connections has put such participations out of reach for all but a few Equatoguineans. In the Mobil Oil deal, Abayak was not just *any* “local company.”

In most states, the law prohibits transactions between government officials and private entities over whom the officials have, or may appear to have, power through the authorities of their offices, or at least provides strict conditions for such arrangements, including transparency, full disclosure of any such potential conflicts of interest, and the affected official’s recusal from direct decision-making related to such transactions. Equatorial Guinea had no law even addressing conflicts of interest until 2004, and, even now, that law is narrowly drafted, weak on its terms, and virtually never enforced.

As officially construed by the Equatoguinean Government, the Law on Ethics and Dignity in the Exercise of Public Function only addresses some conflicts of interest in transactions in which an official is personally directly involved, and only covers dealings with government agencies over which the official has “direct functional competence.”²⁴ Article 12(a) generally bars the official from providing “services” to businesses dealing with government agencies within the official’s “direct functional competence,” but places no bar on the official’s *ownership* of equity interests in such businesses. Article 12(b) seems to bar direct or indirect ownership interests, but only in businesses that are “providers” or suppliers to government agencies in which the official “carries out [his or her] functions.” As explained by the Government, the Law “prohibits members of the Government and senior Functionaries from devoting themselves directly to commercial

²³ “Reacción del Pueblo y Gobierno,” “Preliminary Considerations” (APDHE translation).

²⁴ Article 12 of the Law, Decree-Law Number 1/2004, February 5, 2004, on Ethics and Dignity in the Exercise of Public Function, provides:

Article 12- It is incompatible with the exercise of public function:

a)- to manage, administer, represent, sponsor, advise, or in any other manner, provide services to someone who administers or has a concession or is a provider [*proveedor*: supplier] to the State, or who conducts activities regulated by the State, provided always that the public office held has direct functional competence regarding the contracting, procuring, administration or control of such concessions, benefits or activities.

b)- to be a provider [*proveedor*: supplier] oneself or through third parties of all organisms of the State in which [the official] carries out [his or her] functions. (APDHE translation.)

activities, though they may, however, do this through other persons.”²⁵ This constricted understanding of the range of possible harmful conflicts leaves little room for control of the use of family members, close associates or “straw men” to avoid the letter of the law.

Such a permissive rule would do little to staunch high-level corruption even in a governance environment of effective transparency and serious commitment to enforcement.²⁶ In the notoriously secretive context of Equatorial Guinea, the Law on Ethics, it appears, has served as virtually an official justification for stealing from the public. At least that is how one senior government official has publicly construed it.

In an affidavit filed in a South African court in August 2006, the President’s oldest son, and Minister of Forestry, Teodorín Nguema Obiang Mangué, explained, under oath:

Cabinet Ministers and public servants in Equatorial Guinea are by law allowed to own companies that in consortium with a foreign company can bid for government contracts and should the company be successful, then what percentage of the total cost of the contract the company gets, will depend on the terms negotiated by the parties.

²⁵ “Reacción del Pueblo y Gobierno,” Paragraph 64 (APDHE translation). See also the “Preliminary Considerations” section of the same document:

Decree Law Number 1/2004, of February 5 [2004], on Ethics and Dignity in the Exercise of Public Function (Art. 12), establishes the mechanisms and controls to ensure that no conflict emerges between public office and private activities. Within the framework of this Law, and respecting conflict of interests, the authorities may promote the creation of businesses directed by third parties. The Law on Ethics and Dignity in the Exercise of Public Function only prohibits the *personal and direct* management of business by Political and Administrative Authorities, Civil or Military.

In the Republic of Equatorial Guinea, family relatives of authorities and political leaders are not prohibited from engaging in business. (APDHE translation; emphasis added.)

²⁶ See United States Department of State, *Country Reports on Human Rights Practices 2007 – Equatorial Guinea*, Section 3. The Law (Articles 5-11) also provides that:

Officials...must declare their assets, but there were no reports that they ever complied. There was no requirement for an official to divest himself of business interests that were in areas that his agency oversaw. When that was ostensibly done, under international pressure, the divestment generally was only a facade; another family member or associate nominally took over, or a business group was formed that falsely appeared to have no connection to the official....The law did not provide for public access to government information, and citizens and non-citizens, including foreign media, were generally unable to access government information.

Responsibility for overseeing compliance with the Law on Ethics and Dignity in the Exercise of Public Function rests with the National Commission on Public Ethics, an “independent organ” acting with “functional autonomy” within the President’s office (“*Jefatura del Estado*”). All members of the Commission are appointed by the President. Articles 21-22.

But in any event, it means that a cabinet minister ends up with a sizeable part of the contract price in his bank account.²⁷

Serious and Massive Nature of the Spoliation Committed by the Nguema/Mongomo Group

In *Amnesty International and Others v. Sudan*, the Commission found that “the seriousness of the human rights situation...and the great numbers of people involved render[ed domestic] remedies unavailable in fact.”²⁸ The Commission explained that in applying subsection 56(5), it has “drawn a distinction between cases in which the complaint deals with violations against victims identified or named and those cases of serious and massive violations in which it may be impossible for the complainants to identify all the victims.”²⁹ In the former case, the Commission considered that so long as there were judicial remedies available that met the fair trial standards of Article 7, the exhaustion rule should be applied. In “serious and massive” cases, by contrast, “read[ing] Article 56.5 in the light of its duty to protect human and peoples’ rights as provided for by the Charter,” the Commission noted that it does not hold the requirement of exhaustion of local remedies to apply “literally, especially in cases where it is impractical or undesirable for the complainants or victims to seize the domestic courts.”³⁰

The present Communication focuses on different Charter rights than the mass arrests and tortures complained of in the Sudan case, but the spoliation perpetrated by the Nguema/Mongomo group in Equatorial Guinea is comparably massive and serious. Moreover, as discussed below, adjusting for the much smaller population, the Government of Equatorial Guinea has indeed employed such measures as mass arrests and torture on a comparably wide scale in defense of the corruption system.³¹

²⁷ Affidavit of Teodoro Nguema Obiang, Minister of Forestry, filed in the Matter between Maseve Investments 7 (PTY) Ltd., Applicant, and The Government of the Republic of Equatorial Guinea, Teodoro Nguema Obiang, *et al.*, Respondents, High Court of South Africa (Cape Provincial Division), No. 1407/2006 (August 8, 2006), Paragraphs 11.2-11.2.2, available at <http://www.lawweekly.com/images/stories/07/09/Obiangaffidavit.pdf>.

²⁸ *Amnesty International and Others v. Sudan*, Paragraph 39.

²⁹ *Amnesty International and Others v. Sudan*, Paragraph 30.

³⁰ *Amnesty International and Others v. Sudan*, Paragraph 38 (internal quotation marks omitted).

³¹ See, e.g., United States Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices 2002 – Equatorial Guinea* (March 31, 2003), Section 1(e), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18181.htm>:

Beginning on May 22[, 2002], a special tribunal convicted 68 prisoners and their relatives and sentenced them from 6 to 20 years in prison for a purported coup d’état plot against President Obiang. Those sentenced included leaders of the three main opposition parties....There were numerous irregularities associated with the trial, including evidence of torture and a lack of substantive proof....The judge consistently overruled the defense attorney’s attempt to question the prisoners about torture. Prisoners who renounced confessions allegedly were tortured upon their return to prison.

See also Amnesty International, Public Statement, News Service No. 257, AI Index: AFR 24/017/2005, “Equatorial Guinea/Nigeria: Concerns about an Unfair Trial, Torture and Possible ‘Disappearance’”

Because the “right to dispose of their wealth and natural resources” specified in Article 21 intrinsically belongs to the people of Equatorial Guinea, systematic diversion of the benefits of that wealth to a small ruling group is inevitably massive in its impact. The victims of the corruption system comprise the overwhelming preponderance of the peoples of Equatorial Guinea, who eke out their subsistence on less than US\$ 1 a day³² in the third largest hydrocarbon producer in Sub-Saharan Africa. Thousands of these people have been specifically victimized as legitimate individual and collective owners of land and other types of property that has been unlawfully seized by the Government for the benefit of members of the Nguema/Mongomo group, or as tenants and residential property owners who have been forcefully evicted from their homes without appeal and, generally, without reasonable compensation or alternative places to live;³³ as individuals, families and communities that have suffered, or seen loved ones suffer, death or serious illness because of the absence of sanitation,³⁴ potable water,³⁵ and/or adequate health

(September 23, 2005), available at
<http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR240172005>:

Amnesty International is concerned about allegations of torture and unfair trial of about 70 people charged with offenses related to an alleged coup attempt in Equatorial Guinea on 8 October 2004....Allegations of torture made in the course of the trial were ignored and....no investigation into allegations has been conducted.

All but two of the defendants reportedly stated in court that they had been tortured in detention and some reportedly still bore visible marks. One man apparently had to be carried in and out of court as he was still unable to walk. One woman is reported to be suffering from vaginal bleeding resulting from torture....The trial did not conform to international standards of fair trials.

The 70 or so people involved in each of the trials described above come from a total population in Equatorial Guinea of about 550,000. A proportionately comparable number of Nigerians (population 135,000,000) would be more than 17,000.

³² República de Guinea Ecuatorial y Sistema de las Naciones Unidas, *Balance Común de País (CCA), Versión Validada* (September 2006), page 7 (Executive Summary) (60% of population earns less than US\$ 1 per day), available at
[http://209.85.165.104/search?q=cache:LEt2Ndd4Z1IJ:www.undg.org/docs/7647/CCA%2520ESPA%C3%91OL%2520Versi%C3%B3n%2520Final%2520Validada%2520Sept%25202006.doc+Balance+Com%C3%B3n+de+País+\(CCA\)+Versi%C3%B3n+Validada+Guinea+Ecuatorial&hl=en&ct=clnk&cd=1&gl=us](http://209.85.165.104/search?q=cache:LEt2Ndd4Z1IJ:www.undg.org/docs/7647/CCA%2520ESPA%C3%91OL%2520Versi%C3%B3n%2520Final%2520Validada%2520Sept%25202006.doc+Balance+Com%C3%B3n+de+País+(CCA)+Versi%C3%B3n+Validada+Guinea+Ecuatorial&hl=en&ct=clnk&cd=1&gl=us).
 See also Système des Nations Unies, *Cadre d'assistance des Nations Unies pour le développement (UNDAF) en Guinée Equatoriale pour la période 2008-2012* (February 12, 2007), page 67 (67% of Equatoguineans live on less than \$1 a day in period 1994-2001), available at
<http://www.undp.org/execbrd/word/UNDAF%20RMs/UNDAF%20EQG%20VERSION%20FINALE%20FR.doc>.

³³ See, e.g., Amnesty International, “Guinea Ecuatorial: Los Desalojos Forzosos Violan los Derechos Humanos,” AI Index: AFR 24/009/2007 (June/July 2007) (about 1,000 families forcefully evicted from Malabo and Bata since 2003), available at
<http://www.amnesty.org/es/library/asset/AFR24/009/2007/es/8c050d6c-a2af-11dc-8d74-6f45f39984e5/af240092007es.html>.

³⁴ Only 53% of Equatoguineans have access to adequate sanitation facilities. See official United Nations “Millennium Development goals indicators” website (hereafter, “MDG Indicators website”),
<http://mdgs.un.org/unsd/mdg/Data.aspx>.

³⁵ Forty-three percent of Equatoguineans have access to safe drinking water. MDG Indicators website.

care;³⁶ and children who have been robbed of dignity and economic opportunity for lack of free minimally acceptable education.³⁷ Smaller but still important numbers of people have been blacklisted from employment and education,³⁸ imprisoned without legal grounds,³⁹ or subjected to torture or other inhuman treatment,⁴⁰ for their actual or perceived protest against the system. Simply from a logistical standpoint, it would be inconceivable for any significant portion of these victims to be able to have their day in court even if the courts were in position to provide justice.

The seriousness and breadth of impact of the Charter violations in this case also weigh heavily in favor of waiving the exhaustion requirement to the extent that the normal rule is justified by the “rationale...that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal.”⁴¹ First, the claim addresses the conduct of some of the most senior officials within the Government, individuals who would, as a practical matter, be the ones with authority and power to redress the wrong of grand corruption. Moreover, as the Commission observed with regard to the Ogoni people in Nigeria, whose spoliation and other grievances were addressed by the Commission in 2001, it will hardly be “necessary here to recount the international attention that [the corruption system in Equatorial Guinea] has received to argue that the [Equatoguinean] government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies.”⁴² Equatorial Guinea

³⁶ For example, the infant mortality rate for 2005 was 123 per 1,000 live births. This reflects a continued worsening trend from the years 2000 (120 per 1,000 births), 1995 (112 per 1,000 births), and 1990 (103). Similarly, the under-five mortality rate for 2005 was 205 per 1,000 live births, compared with 200 in year 2000, 187 in year 1995, and 170 in 1990. The percentage of one-year-old children immunized against measles has stagnated at 51% since 1999, down from 81% in 1995, and 88% in 1990. MDG Indicators website.

³⁷ Though the primary school completion rate improved from 44.4% in 2003 to 54.3% in 2005, it remains substantially worse than the 1999 rate of 61.0%. MDG Indicators website.

³⁸ See, e.g., United States Department of State, *Country Reports on Human Rights Practices 2006 – Equatorial Guinea*, Sections 2(a) and 6(a):

In past years some qualified professionals were moved out of teaching positions because of their political affiliations or critical statements reported to government officials....[M]ost professors practiced self-censorship in order to avoid problems....According to...the International Labor Organization, the government continued to influence employment in all sectors. Requirements to utilize employment and security agencies controlled largely by the president’s relatives continued.

³⁹ See United Nations Press Release, “Visita del Grupo de Trabajo sobre la Detención Arbitraria a Guinea Ecuatorial” (July 13, 2007) (reporting findings of a 2007 mission by the United Nations Human Rights Council Working Group on Arbitrary Detentions), available at <http://www.unhchr.ch/huricane/huricane.nsf/view01/4DB693A1A20AD0D2C125731A002D6AF9?opendocument>.

⁴⁰ See discussion at pages 20-22 below.

⁴¹ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Paragraph 38.

⁴² *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Paragraph 38.

routinely ranks near the bottom, for example, of Transparency International's "Corruption Perception Index," placing at number 168 (out of 179) in 2007.⁴³

Generalized Fear

The Commission has stressed that:

The existence of a remedy must be sufficiently certain, not only in theory but also in practice....Therefore, if the applicant cannot turn to the judiciary of his country because of generalized fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.⁴⁴

As detailed below, the human rights reporting on Equatorial Guinea throughout the decades of rule of the Nguema/Mongomo group has been a constant refrain of concern regarding grave violations of fundamental rights and complete absence of accountability for serious crimes committed by or on behalf of Government officials.⁴⁵

Access to Legal Counsel

In examining the ability of a country's judiciary to provide remedies for Charter violations, the Commission has not automatically found domestic remedies available with respect to a specific communication even where it has concluded that there were provisions of law that would permit effective recourse for some. *In Purohit and Moore v. The Gambia*, the Commission noted that it "cannot help but look at the nature of people...represented in the...communication...[to determine whether] the remedies

⁴³ Available at http://www.transparency.org/news_room/in_focus/2007/cpi2007/cpi_2007_table. See also World Bank, *Governance Matters 2007*, Worldwide Governance Indicators website, Equatorial Guinea, Control of Corruption (2006) (showing Equatorial Guinea at low end of the "0th - 10th Percentile"), available at http://info.worldbank.org/governance/wgi2007/mc_chart.asp. See also, e.g., United States Department of State, *Country Reports on Human Rights Practices 2006 – Equatorial Guinea*, Section 3:

Official corruption in all branches of the government remained a serious problem....Wealthy individuals were able to buy the licenses needed to operate and had the influence to squeeze out competitors....The government removed some officials from office for misuse of public trust (corruption), but none were prosecuted and some were moved to other government positions.

See generally, United States Senate Riggs Bank Report.

⁴⁴ *Dawda Jawara v. The Gambia*, Paragraph 35.

⁴⁵ See, most recently, United Nations Press Release, "Visita del Grupo de Trabajo sobre la Detencion Arbitraria a Guinea Ecuatorial" (July 13, 2007) (reporting findings of a 2007 mission by the United Nations Human Rights Council Working Group on Arbitrary Detentions that found cause for "deep concern" regarding detentions of political prisoners, kidnapping from foreign countries, secret detentions, indefinite detentions without charge or trial, summary trials of civilians without appeal before military tribunals, extended hand- and foot-shackling and other physical mistreatment, etc.).

available...are realistic remedies for them.”⁴⁶ In *Purohit*, the Commission considered whether “people picked up from the streets or people from poor backgrounds” who were detained as voluntary or involuntary patients under Gambia's Lunatics Detention Act would, as a practical matter, be able to avail themselves of applicable constitutional protections, in circumstances where no legal assistance or aid would be provided to them. The Commission found they would not. Legal protections, it explained, cannot be considered available to the category of people actually “likely to be...picked up” under the Lunatics Detention Act, even if adequate protections would be “available to the wealthy and those that can afford the services of private counsel.” That “the avenues for redress are there if you can afford it” is not enough.⁴⁷

The divestment of wealth and livelihood from the majority of Equatoguineans lies at the core of this Communication. Most Equatoguineans survive for all practical purposes outside the monetary economy.⁴⁸ The people whose interests are most centrally represented in this Communication struggle for shelter, food and water and do not have financial resources to hire one of the handful of lawyers who practice in Equatorial Guinea. In Equatorial Guinea, even criminal defendants, let alone victims or civil plaintiffs, lack access to legal aid.⁴⁹ Most of the individuals and communities that endure the brunt of the corruption system are, because of their poverty and because of the threat of violent repression discussed above, unable to assert their claims on their own behalf, either in Equatoguinean courts or to the Commission.

The authors do not claim, however, that it is *only* the very impoverished who have been victimized by the corruption system. The Nguema/Mongomo group has been all-inclusive in the wealth it has targeted, and has by no means limited itself to appropriation of state-owned assets. While diversion of the most important resources, hydrocarbons and timber, accounts for the biggest portion of the misappropriated wealth, proprietors of privately owned commercial land and businesses and other assets have also seen their properties expropriated for the benefit of senior officials or close associates of the Nguema/Mongomo group, generally without meaningful compensation or redress. It is in the nature of the circumstances prevailing in Equatorial Guinea that those victims who were relatively more privileged are generally better able to come forth and tell their stories, and even, occasionally, try to seek local redress.⁵⁰ Some of their experiences are

⁴⁶ *Purohit and Moore v. The Gambia*, ACHPR No. 241/2001 (2003), Paragraphs 35-37.

⁴⁷ *Purohit and Moore v. The Gambia*, Paragraphs 35-37.

⁴⁸ United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), Equatorial Guinea Country Profile (as of September 2006), available at <http://www.unohrrls.org/en/orphan/82/>.

⁴⁹ United States Department of State, *Country Reports on Human Rights Practices 2007 – Equatorial Guinea*, Section 1(d) (“Although in principle a bail system and public defenders were available upon request, this was not generally known by the public, and these systems did not operate effectively in practice.”) Of course, as in most countries, legal aid for *civil plaintiffs* is unknown in Equatorial Guinea.

⁵⁰ One such rare case is that of Angel N. Oló Bahamonde, who brought to the U.N. Human Rights Committee claims arising from his arbitrary arrest and detention, the confiscation of agricultural properties and crops, and other violations. In support of his argument seeking waiver of the exhaustion of local remedies rule, he submitted to the Human Rights Committee copies of his “numerous démarches, administrative, judicial or otherwise, to obtain judicial redress, adding that all the avenues of redress that in the State party's opinion are open to him have been systematically blocked by the authorities and President

cited in this Communication and in other evidence that the authors of this Communication propose to adduce, if the Commission deems the Communication admissible. Such experiences are important, both because they are in themselves grave injustices, and also because they serve to illustrate the manner in which the corruption system functions more broadly. The authors of this Communication hope that as it considers some of the more readily documented examples provided, the Commission will remain mindful that the typical victim of the corruption system in Equatorial Guinea is impoverished.

Ineffectiveness and Insufficiency of Domestic Remedies

While the test of *availability* can be seen as an examination of whether the claimant can, as a matter of law and of fact, gain *access* to judicial process for redress for his or her injury, the companion tests of *effectiveness* and *sufficiency* appraise whether an aggrieved party would be wasting his or her time and effort in seeking redress from the court system.

As applied in prior cases, the test of effectiveness inquires as to the fairness of a proceeding that would be used to reach a decision on the merits of the claim – whether there is a reasonable likelihood that the process would uphold the rights of a worthy petitioner. “[A] remedy that has no prospect of success does not constitute an effective remedy.”⁵¹ In examining effectiveness, the Commission's decisions recognize that it is “improper to insist on the complainant seeking remedies from a source which does not operate impartially and ha[s] no obligation to decide according to legal principles. [In such a case, t]he remedy is neither adequate nor effective.”⁵² To the extent that sufficiency can be distinguished, it may be seen as focusing on whether even a favorable decision on the merits would actually be “capable of redressing the complaint.”⁵³ On this logic, a court lacking legal authority or *de facto* power to mandate and enforce a meaningful remedy for a wrong determined to have occurred would not constitute a sufficient remedy for that wrong. The bottom line in these inquiries is whether or not in fact “the judiciary can provide [a] check on the executive branch of government.”⁵⁴

Ineffectiveness of Judicial Remedies in Equatorial Guinea

Many of the situations in which remedies are found ineffective and/or insufficient concern the formal ouster of the courts by military or other executive power from

Obiang himself.” Though the Government of Equatorial Guinea responded to these claims, submitting legal documents that it maintained established remedies available to Mr. Oló Bahamonde, the Human Rights Committee was unpersuaded and, on the merits, found for the complainant, upholding his right to appropriate remedy, including return of the confiscated properties or payment of appropriate compensation. *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D468/1991 (1993), Paragraphs 5.1 and 11.

⁵¹ *Dawda Jawara v. The Gambia*, Paragraph 38.

⁵² *The Constitutional Rights Project v. Nigeria*, ACHPR No. 87/93 (1995), Paragraph 8.

⁵³ *Dawda Jawara v. The Gambia*, Paragraph 32.

⁵⁴ *The Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, ACHPR No. 102/93 (1998), Paragraph 41.

jurisdiction over the rights at issue.⁵⁵ The situation in Equatorial Guinea is different in form, though not in substance, from such cases. Equatoguinean courts are, as they always have been, a *de facto* instrument of the executive apparatus. They have been controlled, rather than supplanted.

While the Constitution of Equatorial Guinea purports to ensure that “[t]he judicial power shall be independent of the executive and legislative powers,”⁵⁶ the actual constitutional structure of the state ensures the contrary. Under article 86, the Head of State is self-contradictorily designated as “first magistrate of the nation...[who] shall guarantee the independence of the judicial power.” This is no mere formality. Under the Constitution, the President has the *sole* power to appoint the most important members of the judiciary, including Supreme Court justices,⁵⁷ members of the Constitutional Council,⁵⁸ and members of the Higher Judicial Council.⁵⁹ The Higher Judicial Council, in turn, appoints all other judges.⁶⁰

Moreover, the Constitution expressly denies all members of the judiciary any immunity whatsoever for actions taken in the course of their professional duties,⁶¹ contrary to international norms providing for “personal immunity in civil suits” for judicial acts or omissions, and requiring “guaranteed tenure....subject to...removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.”⁶²

⁵⁵ See, e.g., *Dawda Jawara v. The Gambia* (military state of emergency); *The Constitutional Rights Project v. Nigeria* (military state of emergency); *The Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (military state of emergency); and *Lawyers for Human Rights v. Swaziland*, ACHPR No. 251/2002 (2005) (King had abrogated the democratic constitution and “Complainant ha[d] presented...information demonstrating that the King [was] prepared to utilise the judicial power vested in him to overturn court decisions.” (Paragraph 27)).

⁵⁶ Constitution of the Republic of Equatorial Guinea (1996) (hereafter, “Constitution”), Article 83, available at <http://www.ceiba-guinea-ecuatorial.org/guineeangl/indexbienv1.htm>.

⁵⁷ Constitution Article 91.

⁵⁸ Constitution Article 94.

⁵⁹ Constitution Article 98. Article 93 also grants the President sole appointment power for the office of Attorney General.

⁶⁰ “The president appoints members of the Supreme Court, who reportedly took instructions from him. The Supreme Council of the Judicial Power [Higher Judicial Council] appoints and controls judges. President Obiang is president of that entity, and the president of the Supreme Court is its vice president.” United States Department of State, *Country Reports on Human Rights Practices 2007 – Equatorial Guinea*, Section 1(e).

⁶¹ Constitution Article 87.

⁶² See, e.g., “Basic Principles on the Independence of the Judiciary,” Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, endorsed by General Assembly Resolution 40/32 and 40/146, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm:

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists....

Numerous U.N. observers have highlighted the unbroken history of judicial subordination to the Executive in Equatorial Guinea. The U.N. Human Rights Commission first became concerned regarding the human rights situation in Equatorial Guinea in 1976, under a confidential procedure, and, from 1979 until 2002 under a public procedure through appointment of Special Rapporteurs (and, in 2000 – 2002, a Special Representative) mandated to report on the human rights situation. Fernando Volio Jiménez, of Costa Rica, served in that role for each year until 1993, when he was succeeded by Alejandro Artucio, of Uruguay. Mr. Artucio's mandate was also renewed each year until 1999, when he was succeeded by Gustavo Gallón, of Colombia, as Special Representative.

Attached to this submission is an Affidavit, dated March 18, 2008, submitted by Mr. Gallón describing his experience as the last human rights Special Representative in Equatorial Guinea and setting out his conclusions regarding the effectiveness of judicial remedies in Equatorial Guinea for violations such as those under examination in this case.

Mr. Gallón's mandate was renewed in 2000 and 2001.⁶³ In April 2002, the Commission on Human Rights terminated Mr. Gallón's mandate, "despite protest from the international community and the former Special Representative himself."⁶⁴ At that time, human rights in Equatorial Guinea had been subject to these special reporting procedures longer than any other country.⁶⁵ As of March the same year, the Government of Equatorial Guinea had refused seven requests from the president of the African Commission for an invitation to visit the country.⁶⁶

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions....

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties....

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

⁶³ United Nations Commission on Human Rights, 58th Session, "Report on the human rights situation in the Republic of Equatorial Guinea submitted by the Special Representative Mr. Gustavo Gallón," E/CN.4/2002/40 (January 24, 2002) (hereafter, "2002 U.N. Human Rights Report"), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G02/103/39/PDF/G0210339.pdf?OpenElement>.

⁶⁴ United States Department of State, *Country Reports on Human Rights Practices 2002 – Equatorial Guinea*, Section 4. See also Affidavit of Gustavo Gallón, dated March 18, 2008, annexed hereto.

⁶⁵ 2002 U.N. Human Rights Report, page 4.

⁶⁶ United States Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices 2001 – Equatorial Guinea* (March 4, 2002), Section 4, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8367.htm>.

In his 1994 report Special Rapporteur Arturo Artucio had “no doubt...that the independence of the Judiciary is not guaranteed” in Equatorial Guinea.⁶⁷ Ten years later, the United Nations Human Rights Committee found cause for “concern at the absence of an independent judiciary in the State party and at the conditions for the appointment and dismissal of judges, which are not such as to guarantee the proper separation of the executive and the judiciary.”⁶⁸

Similarly, an International Bar Association mission to Equatorial Guinea in 2003 concluded that “in practice, members of the Supreme Court report to the President and their appointments are revocable, although Article 91 of the Constitution stipulates that they shall serve for five years.”⁶⁹

More recent reporting indicates no material change in the situation. This month, in its most recent (2007) *Country Report on Human Rights Practices* for Equatorial Guinea, for example, the U.S. Department of State found that:

⁶⁷ United Nations Commission on Human Rights, 50th Session, “Report on the human rights situation in the Republic of Equatorial Guinea prepared by Mr. Alejandro Artucio, Special Rapporteur of the Commission,” E/CN.4/1994/56 (January 1, 1994) (hereafter, “1994 U.N. Human Rights Report”), Paragraph 54, available at

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/1a4ce1c8a78d3ea880256732004bcf2f?Opendocument>.

See also, e.g., United Nations Commission on Human Rights, 53rd Session, “Report on the human rights situation in the Republic of Equatorial Guinea submitted by Mr. Alejandro Artucio, Special Rapporteur of the Commission,” E/CN.4/1997/54 (January 20, 1997) (hereafter, “1997 U.N. Human Rights Report”), Paragraph 18 (“The independence of the judiciary cannot be said to be adequate.”), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G97/102/28/PDF/G9710228.pdf?OpenElement>.

⁶⁸ United Nations Human Rights Committee, 81st Session, “Concluding Observations on the Situation of Civil and Political Rights: Equatorial Guinea,” CCPR/CO/79/GNQ, (July 30, 2004), Paragraph 7, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ff303399c6edc0c0c1256efc00565697?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ff303399c6edc0c0c1256efc00565697?Opendocument). See also United Nations Commission on Human Rights, 59th Session, “Report submitted by Mr. Ambeyi Ligabo, Special Rapporteur on the right to freedom of opinion and expression,” E/CN.4/2003/67/Add.2 (January 9, 2003), Paragraph 43 (“[J]udges are appointed by cooptation, which can favour nepotism...they have hardly any legal training or background in addition to law studies...members of the judiciary and lawyers receive no training in human rights norms and standards.”), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/06f580d099cbd229c1256ccb0036d582/\\$FILE/G0310035.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/06f580d099cbd229c1256ccb0036d582/$FILE/G0310035.doc).

⁶⁹ International Bar Association, *At the Crossroads, Report of a Mission to Equatorial Guinea by the International Bar Association Human Rights Institute* (October 2003) (hereafter, “At the Crossroads”), Paragraph 4.13, available at http://www.ibanet.org/images/downloads/Equatorial_Guinea_Report.pdf. The report continues:

[I]t was widely reported to the delegation that in practice judges serve at the pleasure of the President, and in general they are appointed by the Chief of State by virtue of their belonging to the President’s family, clan or political party. The IBA delegation was also concerned to hear from a number of sources that the judges appointed were expected to be “loyal” to the Government. The delegation concluded that demanding “loyalty” from judges amounted to a fetter upon their ability to determine cases with independence and impartiality as required in various international standards.

Ibid., Paragraph 4.14.

All branches of government were dominated by President Teodoro Obiang Nguema Mbasogo and his clan....Judges served at the pleasure of the president, and they were appointed, transferred, and dismissed for political as well as competency reasons. Judicial corruption was widely reported, and cases were sometimes decided on political grounds....Civil cases rarely came to trial, reportedly because of lack of faith that judgment would be fair and transparent, and because the general population had a limited understanding of the process.⁷⁰

The impotence of the judiciary as a check on the executive is illustrated by the pervasive practice of arbitrary arrest and detention, persisting as a “serious problem[]” into 2007, with “many persons...taken into custody on the verbal orders of officials.”⁷¹ Despite widely reported pledges made by the President during his November 2006 visit to Spain to release all political prisoners,⁷²

[s]ome 58 identified “prisoners of conscience,” or political prisoners, remained detained at [2007] year’s end, at least four of whom had not been tried; other had been convicted of “crimes against the state” without adequate representation. The right to appeal was seldom exercised and even more rarely successful. These prisoners were all members of opposition parties or persons the government accused of involvement in coup attempts.⁷³

The legal system has proven itself not only ineffective, but irrelevant and all but invisible as a protection against the worst abuses of personal rights in Equatorial Guinea.

⁷⁰ United States Department of State, *Country Reports on Human Rights Practices 2007 – Equatorial Guinea*, Introduction and Section 1(e).

⁷¹ United States Department of State, *Country Reports on Human Rights Practices 2007— Equatorial Guinea*, Introduction and Section 1(d). See also United Nations Press Release, “Visita del Grupo de Trabajo sobre la Detención Arbitraria a Guinea Ecuatorial” (July 13, 2007).

⁷² “Obiang se compromete ante Zapatero a liberar a los presos políticos,” ABC (November 15, 2006) (President Obiang promises to Spanish Prime Minister José Luis Rodríguez Zapatero to release political prisoners), available at http://www.abc.es/hemeroteca/historico-15-11-2006/abc/Nacional/obiang-se-compromete-ante-zapatero-a-liberar-a-los-presos-politicos_1524269060743.html.

⁷³ United States Department of State, *Country Reports on Human Rights Practices 2007 – Equatorial Guinea*, Introduction and Section 1(e). See also Amnesty International Urgent Action, “Equatorial Guinea: Detention without charge or trial/ Harsh detention conditions: Brigida Asongsua Elo,” AI Index: AFR 24/001/2008 (February 11, 2008) (arrest and detention without charge or trial, in harsh conditions amounting to “cruel and degrading treatment,” of wife of prisoner of conscience Guillermo Ela Nguema, who is serving 20-year prison sentence after May 2002 conviction in “unfair trial” of plotting to overthrow the government), available at <http://www.amnesty.org/en/library/asset/AFR24/001/2008/5e33a772-d8d1-11dc-95ba-577b59b8145d/af240012008eng.html>.

While apparently somewhat abated in recent years, torture remains a tool employed by the Government, as noted by virtually every observer who has investigated the matter, including U.N. special rapporteurs,⁷⁴ the U.N. Human Rights Committee,⁷⁵ the European Parliament,⁷⁶ the U.S. Department of State,⁷⁷ and NGOs such as the International Bar Association,⁷⁸ and Amnesty International.⁷⁹

⁷⁴ See, e.g., 1994 U.N. Human Rights Report, Paragraph 42 (“persistent pattern of arbitrary arrests, torture, ill-treatment and persecution of political activists and leaders of the opposition parties”); 1997 U.N. Human Rights Report, Paragraph 40 (“cases of torture and ill-treatment of prisoners continue to occur, although the number of complaints received is considerably lower than in previous years”); 2002 U.N. Human Rights Report, Paragraph 24 (“[B]ecause of the legal insecurity that prevails...arbitrary detentions, inhuman treatment and torture...continue as if they were perfectly normal.”); United Nations Commission on Human Rights, 58th Session, “Report of the Special Rapporteur on the question of torture, Theo van Boven,” E/CN.4/2003/68/Add.1 (February 27, 2003), Paragraphs 480-501 (reporting more than 20 specific cases of torture or other physical abuse; the Special Rapporteur notes that “no response has been provided to the cases brought to the attention of the Government since 1998 as well as to urgent appeals.”), available at <http://www.derechos.org/nizkor/torture/vanboven03/>.

⁷⁵ United Nations Human Rights Committee, 81st Session, “Concluding Observations on the Situation of Civil and Political Rights: Equatorial Guinea,” CCPR/CO/79/GNQ, (July 30, 2004), Paragraph 3 (“concern at the substantiated accusations of systematic torture and ill-treatment in the State party and at the use of statements and confessions obtained through torture”), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ff303399c6edc0c0c1256efc00565697?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ff303399c6edc0c0c1256efc00565697?Opendocument).

⁷⁶ See, e.g., European Parliament Resolution, Bulletin EU 6-2002, Human rights (8/15), Equatorial Guinea, Point 1.2.8 (June 13, 2002) (“Parliament called for annulment of the unfair political trials resulting in the sentencing of 68 opposition leaders, and condemned the torture and ill-treatment in breach of all the human rights conventions signed by Equatorial Guinea.”), available at <http://europa.eu/bulletin/en/200206/p102008.htm>.

⁷⁷ See, e.g., United States Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices 1999 – Equatorial Guinea* (February 23, 2000) (“Members of the security forces generally commit abuses with impunity. Prison conditions remained life threatening. Prisoners often are subjected to torture in order to extract confessions.”), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/244.htm>; United States Department of State, *Country Reports on Human Rights Practices 2006 – Equatorial Guinea* (“On November 2, [2006] a law criminalizing torture and other cruel, inhuman, or degrading acts went into effect.... However, during the year torture and cruel treatment continued in the country's jails and prisons. Beatings and threats with loaded weapons were most frequently reported....”).

⁷⁸ At the Crossroads, Paragraph 2.75 (“Torture would appear to be used systematically by the police and security forces. The judiciary has ignored allegations of torture when presented with victims of torture and other ill treatment at court.”).

⁷⁹ See, e.g., Amnesty International USA, “Medical care urgently needed for over 60 political prisoners, Equatorial Guinea: New information: death of Juan Asumu Sima,” AI Index: AFR 24/ (September 17, 2002) (“According to reports, Juan Asumu Sima was severely tortured in pre-trial detention. He reportedly had scars, consistent with torture/ill-treatment, on legs and arms. Like several other defendants...[he] was denied [medical treatment].”), available at <http://www.amnestyusa.org/document.php?lang=e&id=18908CA3692FEF0780256C3E001062DE>; Amnesty International Report 2005 (“Dozens of soldiers and former military personnel as well as political opponents...detained without charge or trial. Many appeared to have been tortured in detention and at least one reportedly died as a result.”); Amnesty International Report 2006 (“Police tortured or ill-treated detainees with impunity. At least one detainee was reported to have died as a result of torture. Those responsible were not brought to justice.”). The Amnesty International Report 2007 reports one instance it characterizes as torture (resulting in death) and nine instances of flogging (50 lashes each), though it also notes “fewer reports of political arrests [in 2006] than in previous years,” as well as the passage of an anti-torture law. The 2007 Report is available at <http://thereport.amnesty.org/eng/Regions/Africa/Equatorial-Guinea>.

In 2006, “torture and cruel treatment” were reported as “continu[ing]” in the country’s jails and prisons, with “numerous reports that security forces beat opposition party activists, often on the orders of local officials, who apparently had support at higher levels and acted with impunity.” Despite “widely occurring torture” in prior years and during 2006, however, no one responsible was charged with a crime.”⁸⁰

In 2007, at least four cases of official torture received prominent attention even within the country after national television broadcast Parliamentary sessions during which opposition members of Parliament from the Convergencia para la Democracia Social (CPDS) criticized the Government for permitting police officials to torture with impunity.

Following the unprecedented television exposure of these cases, the Government arrested four police officers in connection with these cases, in October 2007.⁸¹

The Government has, however, taken no action to sanction those responsible for thousands of cases involving arbitrary arrest and detention, torture, even extrajudicial execution that have been reported by credible sources. Even in the bare handful of cases in which some kind of legal action was taken against a major abuser, the outcomes have been discouraging. U.N. human rights Special Rapporteur Alejandro Artucio provided this account of perhaps the most notorious case:

To illustrate the impunity of the perpetrators of violations of civil and political rights, the Special Rapporteur will mention the case of the former Chief of Police in Malabo, Mr. Cayo Ndó Mbá, to which he referred in his previous report...as being the only case he knows in which a member of the security forces was prosecuted, tried and sentenced to imprisonment (two years and four months for the homicide of a peasant, Mr. Martín Obama Ondo). The Special Rapporteur has ascertained that not only did the former police chief not serve his sentence, but in August 1996 he was promoted to the rank of chief of the Gendarmería in Bata, where he has again been reported to have practised torture and ill-treatment.⁸²

⁸⁰ United States Department of State, *Country Reports on Human Rights Practices 2006 – Equatorial Guinea*, Section 1(c). Among the cases of torture for which no one was prosecuted were the torture of (i) “approximately 70 persons charged with offenses related to an alleged coup attempt in October 2004, before and during their secret military trial...the group consist[ing] of former military officers and relatives of the alleged leaders of the coup attempt, Lieutenant Colonel Cipriano Nguema Mba”; (ii) five persons arrested on Corsico Island; (iii) Weja Chicampo; and (iv) Lieutenant Colonel Maximiliano Owono Nguema. Ibid.

⁸¹ United States Department of State, *Country Reports on Human Rights Practices 2007— Equatorial Guinea*, Section 1(c).

⁸² 1997 U.N. Human Rights Report, Paragraph 78.

Insufficiency of Judicial Remedies in Equatorial Guinea

For all the reasons set out above, the likelihood that a particular victim of the corruption system will find any “prospect of success”⁸³ in an Equatoguinean court is virtually nil. Accordingly, it will be an extremely unusual case that will actually put to the test the “sufficiency” of a judicial remedy – the court’s ability to enforce a ruling adverse to the interests of a key member of the Nguema/Mongomo group. Amerada Hess Corporation, however, did recount one example of such a case to the U.S. Senate Subcommittee investigators in their 2004 investigation into Riggs Bank, revealing in stark relief the degree of executive interference that is applied in cases where the family interests of certain senior officials are at stake.

In an interview with Subcommittee staff, a Hess representative explained that in 2003, Hess was served with a court order instructing it to stop paying the President’s relative [a fourteen year old boy, who was “represented by his mother”] and make rental payments to another Equatorial Guinea citizen whom the court declared had documented that he was the legitimate property owner. Hess complied, and approximately two months later a minister of the E.G. government asked Hess why it had stopped making payments on the lease and informed Hess that the youth was his Godson. When Hess informed the Minister of the court order, the Minister called the judge who had issued the court order. According to Hess, while on the telephone with the Minister, the judge rescinded the court order, and Hess started paying the relative for the lease again.⁸⁴

Conclusion

The Nguema/Mongomo group has maintained unchallenged domination of Equatorial Guinea since the country’s independence in 1968. Throughout that history, the legal system in Equatorial Guinea has lacked the will or ability to act as any kind of independent check on the continuing consolidation of economic and political power by the ruling group. Indeed, the legal system has largely played an assisting role to the Nguema/Mongomo corruption system by furnishing the appearance of lawful process to justify and enforce the diversion of the major sources of wealth of the Equatoguinean people into the hands of the Nguema/Mongomo group. The people of Equatorial Guinea have long understood the grave risks of challenging the perceived interests of powerful officials, and the futility of seeking legal redress from a cowed judiciary. As vividly shown by Amerada Hess’ dealings with the President’s teenaged relative, the authority of the courts and rule of law in Equatorial Guinea are merely a façade for unconstrained rule by executive fiat in the interests of a small group. By any measure, the search of the Equatoguinean peoples for a remedy for the corruption system has been “unduly prolonged.”

⁸³ *Dawda Jawara v. The Gambia*, Paragraph 38.

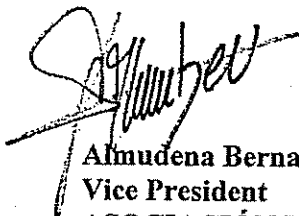
⁸⁴ U.S. Senate Riggs Bank Report, page 101 and note 345.

On January 30, 2005, the Republic of Equatorial Guinea joined what are now 41 African states in signing the African Union Convention on Preventing and Combating Corruption.⁸⁵ In so doing, Equatorial Guinea affirmed its recognition, as matters of continental concern, of the “devastating effects [of corruption and impunity] on the economic and social development of the African peoples,” and the concomitant “need to address the root causes of corruption on the continent.”⁸⁶ Yet the Government of Equatorial Guinea has so far failed to break free of the corrupting stranglehold of the Nguema/Mongomo elite, which, on a scale unique in Africa, runs an entire nation – including all the organs of the state – as its own private business, entirely insulated from independent oversight. If there is any situation that calls out for action by the Commission to vindicate the rights of the peoples under Article 21, it is this case.

⁸⁵ See list of signatories and parties to the African Union Convention on Preventing and Combating Corruption (as of October 2007), available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf>.

⁸⁶ African Union Convention on Preventing and Combating Corruption (2003), Preamble, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating_%20Corruption.pdf.

In view of the above, the *Asociación pro Derechos Humanos de España* hereby requests the Commission to find this Communication 347/07 admissible under Article 56 of the Charter.



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