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# ASSERTING PERMANENT SOVEREIGNTY OVER ANCESTRAL LANDS: THE BAKWERI LAND LITIGATION AGAINST CAMEROON

NDIVA KOFELE-KALE\*

## ABSTRACT

The Article focuses on the recently concluded Bakweri land case against Cameroon in the African Human Rights Commission. The Article uses this litigation as the basis for a re-examination of a host of issues relating to the enforcement of human rights, especially land rights, in post-colonial countries making the slow transition from single-party authoritarian rule to multi-party democratic states. More importantly, it takes a fresh look at the exhaustion of local remedies rule. It asks the relatively simple question: whether an indigenous people seeking to reclaim and assert permanent sovereignty over ancestral lands, forcibly expropriated

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from them during the period of colonial occupation and subsequently vested in the post-colonial State, should be required to comply with the exhaustion of domestic remedies rule in a country where the rule of law is in its infancy and where the judiciary is neither independent nor impartial. The Article argues that the exhaustion rule should be dispensed with where it is demonstrably clear that local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the claimant; and the respondent State does not have an adequate system of judicial protection that complainant can rely on. The Article concludes by advocating for the broadest interpretation possible of the exhaustion rule in order to (a) level the playing field for both parties—the defenseless citizen whose fundamental human rights have been violated and the powerful State responsible for the violation; (b) preserve the right of individual petition now entrenched in all international human rights instruments; and (c) give true meaning to the principle of equality-of-arms upon which all human rights contests are anchored.

## INTRODUCTION

Land and natural resource issues, particularly the dispossession of an indigenous people<sup>1</sup> of the lands they have historically owned and occupied, are issues of fundamental nature that implicate all the existing international human rights.<sup>2</sup> The ‘Scramble for Africa’ (a period roughly between the 1880’s and the start of the First World War, during which Europe’s major powers staked their territorial claims on the African continent) witnessed countless instances of land expropriations without consultation or compensation. By the time the scramble ended, Africa had been partitioned into spheres of influence under the hegemonic control of

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1. To bring some order to the multiple definitions of “indigenous people” floating around, the Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities offered this definition: “indigenous communities, *people* and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in these territories, or parts of them they form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.” Jose R. Martinez-Cabo, U.N. ESCOR, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *The Study of the Problem of Discrimination Against Indigenous Populations*, 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986) (hereinafter “U.N. Sub-Commission Report”).

2. See Erica-Irene A. Daes, Prevention Of Discrimination And Protection Of Indigenous Peoples And Minorities: Indigenous peoples and their relationship to land, at ANNEX: Relevant Legal Standards and Materials Concerning Indigenous Lands and Resources, E/CN.4/Sub.2/2001/21 (June 11, 2001); see also Erica-Irene A. Daes, Prevention of Discrimination: Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous peoples’ permanent sovereignty over natural resources: Preliminary report of the Special Rapporteur, submitted in accordance with the Sub-Commission resolution 2002/15, E/CN.4/Sub.2/2003/20 (21 July 2003).

Great Britain, France, Germany, Italy, Portugal, Spain and Belgium—who among them acquired thirty new colonies and 110 million subjects.<sup>3</sup> Partition and colonization left behind a trail littered with millions of landless people pushed out of their ancestral lands to make room for colonial agricultural and commercial needs. Sara Berry, who has studied this aspect of colonial occupation, notes that:

[t]he military and administrative officers who fanned out across Africa in the 1890s and early 1900s, using force or the threat of force to impose European rule, claimed far-reaching authority over the land of their newly acquired domains. Specific legislative instruments varied from one colony to another, but they conveyed a common message. From Senegal to Malawi, French and British authorities claimed that “by right of conquest,” all “vacant and ownerless” land belonged to the colonial state. Often judged “vacant and ownerless” on the basis of cursory inspection or none at all, vast tracts of land were then sold to European buyers, or awarded to private concessionaires who promised to “develop” the land by exploiting its mineral and forest resources.<sup>4</sup>

Because indigenous communally-owned prime real estate was expropriated, almost always by force, and generally without compensation, for the benefit of the white settler population,<sup>5</sup> it set the stage for frequent confrontations between the dispossessed Africans and the colonial authorities and white settler populations.<sup>6</sup>

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3. See THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA* at xxi (1992).

4. See Sara Berry, *Debating the land question in Africa*, Paper Presented at the World Bank, Washington, D.C., (Mar. 27, 2002), available at [http://info.worldbank.org/etools/docs/voddocs/175/359/debating\\_land.pdf](http://info.worldbank.org/etools/docs/voddocs/175/359/debating_land.pdf).

5. This insatiable appetite to claim ‘native’ land as the Crown’s was very much evident in the Belgian Congo, German South-West Africa and British Rhodesia, to mention the most notorious instances of colonial land grabbing. See e.g., Alois S. Mlambo, ‘*Land Grab*’ or ‘*Taking Back Stolen Land*’: *The Fast Track Land Reform Process in Zimbabwe in Historical Perspective*, 3 *HISTORY COMPASS* 1 (2005); Adam Hochschild, *KING LEOPOLD’S GHOST—A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* 1, 70-71 (2006); Catherine Coquery-Vidrovitch, *LE CONGO AU TEMPS DES GRANDES COMPAGNIES CONCESSIONAIRES, 1898-1930* (1972); Jean Surat-Canale, *FRENCH COLONIALISM IN TROPICAL AFRICA, 1900-1945* (1971); and William H. (Lord) Hailey, *AN AFRICAN SURVEY* (1956).

6. In colonial Kenya, British settlers appropriated for themselves 12,000 square miles (31,000 Km<sup>2</sup>) of coveted Kikuyu lands nestled in the salubrious central Highlands. The dispossessed Kikuyu then tried to take back these ancestral lands under white settler occupation, the ensuing struggle led to an uprising that claimed the lives of an estimated 70,000 Kikuyus in what became known as the Mau Mau Rebellion. For an excellent account of this tragic history, see David Anderson, *HISTORIES OF THE HANGED: THE DIRTY WAR IN KENYA AND THE END OF EMPIRE* (2005); Caroline Elkins, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN’S GULAG IN KENYA* (2005); Wunyabari O.

Germany, which came late into the colonial race as well as the land grabbing spree, more than made up for this tardy entry as can be seen from the ruthless efficiency with which she gobbled up some of the most desirable lands in German South-West Africa (now Namibia) and Kamerun (present day Cameroon).<sup>7</sup> The arbitrary and uncompensated alienation of some of the most fertile Bakweri land<sup>8</sup> was strongly resisted by this group, the reclamation of which has remained a major point of contention since then. This Article focuses on the century old struggle<sup>9</sup> to reclaim and assert permanent sovereignty over ancestral lands seized from this group, by force and without compensation, for the benefit of private German commercial interests. The particular focus of the Article

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Maloba, MAU-MAU AND KENYA: AN ANALYSIS OF A PEASANT REVOLT (1998); Ngugi wa Thiong'o, A GRAIN OF WHEAT (1967); and Jomo Kenyatta, FACING MOUNT KENYA (1962).

7. Kamerun was a German Protectorate from 1884 to 1915 when German rule came to an end following their defeat at the hands of the French and British. Thereafter, a condominium was established and provisionally administered by the victorious powers. An agreement to end the condominium was reached in 1916 and the old German protectorate was then partitioned between France and the United Kingdom with France receiving four-fifths of the area. When in 1922 the territories became mandates of the League of Nations, French and British control over their respective zones was confirmed. *See* League of Nations Covenant art. 22. Following the replacement of the League of Nations Mandate arrangement with the United Nations Trusteeship system, the two Cameroons automatically become Trust Territories under the provisions of Chapter XII of the Charter of the United Nations. *See* Trusteeship Agreement for the Territory of the Cameroons Under British Administration. U.N. Doc. A/296 (28<sup>th</sup> April 1947), 118 U.N.T.S. 120 (1947) (approved by the General Assembly of the United Nations on 13 December 1946). During the mandate and trusteeship period, Cameroons, under United Kingdom Trusteeship authority was administered as part of the Southern Provinces, then of the Eastern Provinces, and finally of the Eastern Region of Nigeria. In 1960, Cameroons, under French Trusteeship gained its independence from France, and the following year the other Cameroons achieved its independence by joining the French-speaking Republic of Cameroon. The reunification of the former Trust Territories gave birth to the Federal Republic of Cameroon, which in 1972 morphed into the United Republic of Cameroon, and since 1984 the Republic of Cameroon. All the expropriated land under discussion was in the British sector.

8. The Bakweri occupy the south-eastern slopes of Mount Cameroon in the former British sector of the old German Protectorate. When they entered their present territory as early as 1750 and perhaps even earlier, the area was unoccupied. *See* Edwin Ardener, COASTAL BANTUS OF THE CAMEROONS 24 (1956); *see also* Edwin Ardener & Shirley Ardener, KINGDOM ON MOUNT CAMEROON: STUDIES IN THE HISTORY OF THE CAMEROON COAST 1500-1970 (1996). Their continuous presence in this area satisfies the Rapporteur Martinez-Cabo's test of "historical continuity," meaning "the continuation for an extended period reaching into the present of one or more of the following factors:" 1. occupation of ancestral lands, or at least of part of them; 2. common ancestry with the original occupants of these lands; 3. culture in general, or in specific manifestation (such as religion, living under a tribal system, membership of indigenous community, dress, means of livelihood, lifestyle, etc.); 4. language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main preferred, habitual, general or normal language); 5. residence on certain parts of the country, or in certain regions of the world; 6. other relevant factors. *See* U.N. Sub-Commission Report, *supra* note 1, at 379.

9. *See, e.g.*, Petition of the Bakweri Land Committee, Cameroons under British Mandate, 18 J. of the Royal African Society 302, 307 (Oct. 1948); Petition of the Bakweri Land Committee to the Trusteeship Council, U.N.O. Dec. T/PET.4.3, Report of the Trusteeship Visiting Mission (1949); Petitions from Bakweri Land Committee; Summary of the Findings and Recommendations of the Investigating Officer and the Preliminary Observations of the Nigerian Government (1949); *see also* P.M. Kale, Memorandum submitted to the Secretary of State for the Colonies as a member of the Delegation of the National Council of Nigeria and the Cameroons, PAN AFRICA (Oct.-Nov. 1947).

is the recent litigation brought against Cameroon by the Bakweri Land Claims Committee (hereinafter “BLCC”)<sup>10</sup> in the African Commission on Human and Peoples’ Rights.

### 1. The Bakweri Seise the African Human Rights Commission

In October of 2002, the Bakweri Land Claims Committee, on behalf of the Traditional Rulers, Notables and Elites of the indigenous minority Bakweri peoples of Cameroon, cited the State of Cameroon before the African Commission on Human and Peoples’ Rights<sup>11</sup> (the highest human rights tribunal in the continent) for violations of various provisions of the African Charter on Human and Peoples’ Rights<sup>12</sup> (hereinafter “Banjul Charter”), more specifically for violating Bakweri rights over ancestral land occupied by a State-owned agro-industrial corporation, the Cameroon Development Corporation (hereinafter “CDC”). BLCC sought a declaration from the Commission to the effect that (1) lands occupied by the CDC are Private Property as defined in positive law<sup>13</sup> belonging to the Bakweri; (2) the Bakweri be fully involved in the CDC privatization negotiations to ensure that their interests are effectively protected following the privatization of this corporation; (3) ground rents owed the Bakweri people dating back to 1947 be paid to a Bakweri Land Trust Fund for the benefit of the dispossessed indigenes; (4) the Bakweri acting jointly and severally be allocated a specific percentage of shares in each

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10. BLCC is the predecessor to the Bakweri Land Committee (herinafter “BLC”) which was organized in 1946 by Bakweri traditional rulers, notables and elites, with its principal mission of reclaiming all Bakweri lands that had been expropriated by the Germans in the 19<sup>th</sup> century. Indeed, in its very first letter on this subject, dated 18 June 1946 and addressed to the colonial administration, BLC served notice of its determination to lead the struggle for restitution of ancestral Bakweri lands. The letter informed the Resident, Cameroon Province that “the nature and functions” of BLC are as follows to: (a) “continue to exist as long as Bakweri people lived”; (b) “be in charge of all land in the Victoria Division which virtually belongs to the Natives;” and (c) to adjudicate “any complaints whether how trifling, which have anything to do with the land” in question. See Letter to The Resident Cameroon Province, Ref. No. 3. B.L.C./2/1 of 16<sup>th</sup> June 1946 (on file with author). This was but the first in a long series of petitions, memoranda, and statements that BLC sent to the colonial authorities in Nigeria, the Colonial Office in London, and the United Nations Trusteeship Council in New York. After independence in 1960 and the reunification of the two Cameroons in 1961, the BLC (and its successor BLCC) continued the campaign for restitution and compensation through another spate of memoranda, position papers, and petitions to successive Cameroonian Governments. Sometime in 2000, the leadership of BLC decided to change the name of this organization to the Bakweri Land Claims Committee, by adding “claims” to better convey its central mission, the reclamation of expropriated Bakweri lands.

11. The action was filed pursuant to Articles 55, 56 and 58 of the African Charter of Human and Peoples’ Rights and was listed as *Communication 260/2002: Bakweri Land Claims Committee vs Cameroon*.

12. See African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, reprinted at 21 I.L.M. 58 (1982). The Charter was adopted by the Organization of African Unity on June 27, 1981 and entered into force October 21, 1986.

13. See Ordinance No. 74-1 of 6 July 1974 to Establish Rules Governing Land Tenure as amended by Ordinance No. 19/83 of 20 November 1983 (Cameroon) (hereinafter “1974 Land Tenure Law”).

## 108 ANNUAL SURVEY OF INT'L &amp; COMP. LAW [Vol. XIII

of the privatized companies; and (5) BLCC be represented in the current and all future policy and management boards, as was the case in colonial times.<sup>14</sup>

The action was filed eight years after a Presidential Decree announced the privatization of the CDC and after the Bakweri had failed to secure assurances from the Government that the sale of the CDC would not adversely affect their rights over ancestral lands. At its 33<sup>rd</sup> session in May 2003, the African Commission on Human and Peoples' Rights (hereinafter "Commission") took the extraordinary step of addressing an "Urgent Appeal" to the Cameroon's President, Paul Biya, to "suspend the alleged detrimental alienation of the disputed Cameroon Development Corporation (CDC) lands in the Fako Division,<sup>[15]</sup> pending a decision on the matter before the African Commission."<sup>16</sup> At its 36<sup>th</sup> Ordinary Session, the Commission reached a decision: (a) declaring the case inadmissible for non-exhaustion of domestic remedies as required under Article 56(5) of the Banjul Charter,<sup>17</sup> but in view of the grave human rights issues raised by BLCC on behalf of the indigenous Bakweri people; (b) offering to avail its good office, through the Rapporteur of the *BLCC v. Cameroon* Communication, to the contending parties, with a view to enabling them resolve the matter amicably;<sup>18</sup> and (c) referring the recommendation for an amicable settlement to the Assembly of the Heads of State and Government of the African Union for approval.<sup>19</sup>

The parties were subsequently notified that the Commission's Eighteenth Annual Activity Report, which incorporated the decisions pertaining to the BLCC case, had received the imprimatur of the African Union.<sup>20</sup> With this endorsement, the way was now open for both parties to enter

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14. See Bakweri Land Claims Committee, Communication Under Articles 55, 56 and 58 of the African Charter on Human and Peoples' Rights Concerning Violations of Land Rights of an Indigenous Ethnic Minority in Cameroon (Oct. 4, 2002) (hereinafter "BLCC Memorial") [on file with author].

15. A division is an administrative unit under the command of a Senior Divisional Officer. There are roughly 54 divisions in Cameroon and Fako Division is in the South West Province, one of two English-speaking provinces out of the ten provinces in the country. The South West and North West provinces were part of the former Cameroons under United Kingdom Trusteeship. The other eight provinces are French-speaking and were the former Cameroons under French Trusteeship. See *supra* note 7.

16. African Commission on Human and Peoples' Rights, Urgent Appeal to H.E. President Paul Biya (May 2003) [on file with author].

17. See *Bakweri Land Claims Committee v. Cameroon*, African Comm'n H. & Peoples' R., Comm'n 260/2002 (2004).

18. See Letter to BLCC Counsel from the African Human Rights Commission, Ref.: ACHPR/COMM/2 (Jan. 25, 2005) [on file with author].

19. *Id.*

20. See Letter to BLCC Counsel from the African Human Rights Commission Ref. ACHPR/LPROT/COMM 260/CAM/NGL (Feb. 3, 2006) (on file with author).

into negotiations under the auspices of the Commission with a view to resolving amicably this long-standing land problem. Thus came to a close one of the most compelling chapters of a post-colonial campaign waged by an indigenous group to reclaim ancestral lands unlawfully expropriated while their country was under colonial occupation. Between 1946, when the United Nations Trusteeship Committee first vetted this matter, and when the Commission was seised of this complaint, a small, determined and politically astute minority people made clever use of non-violent methods of protest, petitions and remonstrations to vindicate their group rights to land they have traditionally owned or otherwise occupied or used since time immemorial.<sup>21</sup>

## 2. Significance of the Bakweri Land Case

*Communication No. 260/2002: BLCC v. Cameroon*, as the matter was listed in the docket of the Commission, was a case of first impression, as it was the first time that the Commission had been seised of a complaint by an indigenous minority group relating to title over land once considered *terra nullius* (unoccupied land). *BLCC v. Cameroon* presented the continent's highest human rights body with a rare opportunity to pronounce on one of the most contentious but unresolved issues from Africa's painful colonial past. The case itself and the Commission's handling of it have raised some interesting doctrinal issues that continue to provoke debate in scholarly circles and in the jurisprudence of several international tribunals. At the core of the complaint and the Commission's decision is the issue relating to the enforcement of human rights, especially land rights, in post-colonial countries making the slow transition from single-party authoritarian rule to multi-party democracies. But this case has a value apart from and equally important to the issues of land expropriation without proper consultation or compensation. It also confronts issues relating to the appropriate forum where human rights violations of this nature can be properly handled. Furthermore, it addresses questions relating to the receptiveness of domestic courts to cases of this stripe, where the State is the respondent, and the proper standard to be used for determining whether a complainant has satisfied the exhaustion of domestic remedies requirement. In relatively simple language, the Bakweri land case sought to find out: whether victims of hu-

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21. For this history of unrelenting protest and remonstrations, see, e.g., Petition of the Bakweri Land Committee, Cameroons under British Mandate, 18 AFRICA 30 (1948); Petition of the Bakweri Land Committee to the Trusteeship Council, U.N.O. Dec. T/PET.4.3, Report of the Trusteeship Visiting Mission (1949); Petitions from Bakweri Land Committee; Summary of the Findings and Recommendations of the Investigating Officer and the Preliminary Observations of the Nigerian Government (1949); and P.M. Kale, Memorandum submitted to the Secretary of State for the Colonies as a member of the Delegation of the National Council of Nigeria and the Cameroons, PAN AFRICA (Oct.-Nov. 1947).



man rights violations, of the kind this group has endured, should be required to comply with the exhaustion of domestic remedies rule in a State where the rule of law is still in gestation and where the judiciary is neither independent nor impartial.<sup>22</sup> And whether, it can be said, in a context such as this, that an effective remedy exists which complainant could avail itself of. More importantly, what forum is open to a complainant in a politically charged<sup>23</sup> case, which involves lands leased to a *State-owned* corporation and from which the respondent State has for over forty years been receiving ground rents meant for the landowners; and where the prospect of losing this steady source of revenue is clearly not lost on respondent State; and where it is evident that the property respondent State intends to privatize would not be as attractive to potential investors if stripped of the rich, fertile lands it occupies; and where the private landowners are required to vindicate their property rights in a court system that hardly meets internationally-accepted norms of independence, impartiality and fairness?

It is our view that, in the circumstances just described, insisting that such a complainant must exhaust all domestic remedies is tantamount to a denial of his right to seek redress for the harm done. To avoid this predictable outcome the exhaustion of local remedies rule should be given its broadest interpretation possible in order to (a) level the playing field for both parties—the defenseless citizen whose fundamental human rights have been violated and the powerful State responsible for the violation; (b) preserve the right of individual petition now entrenched in all international human rights instruments; and (c) give true meaning to the

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22. In its 1999 Human Rights Report on Cameroon, the United States Department of State described Cameroon's judiciary as one that "cannot act independently and impartially, since all judges and magistrates are directly nominated by the President." The Report goes on to observe that "*politically sensitive cases never are heard.*" U.S. State Department, 1999 Country Reports on Human Rights: Cameroon (Feb. 23, 2000) (Emphasis added), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/231.htm>. Two years later, the situation had not changed as the 2001 edition of the same Human Rights Report notes: "Corruption and inefficiency in the courts remained serious problems. Justice frequently was delayed or denied before reaching the trial stage. . . . *Political bias often brought trials to a halt or resulted in an extremely long process, punctuated by extended court recesses. Powerful political or business interests appeared to enjoy virtual immunity from prosecution; some politically sensitive cases were settled with a payoff and thus never were heard.*" U.S. State Department, 2001 Country Reports on Human Rights: Cameroon (Mar. 4, 2002) (Emphasis added), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8285.htm>.

23. The Bakweri land question falls in this category of cases for at least three reasons. First, because it implicates the crown jewel of a Privatization Program that Government is determined to see through. Second, it pits the Bakweri people against a Prime Minister and Head of Government as well as an Assistant Secretary-General at the Presidency, both of whom are Bakweri, but, not being elected officials, hold their offices at the pleasure of the President. Finally, it places Government in a face off with a politically-conscious minority tribe that has refused to stay quiet and watch its ancestral lands being sold to non-natives. This is not the kind of politically-sensitive litigation that a judiciary firmly under the control of the President of the Republic would like to handle and it is a contest which plaintiffs are not likely to receive a fair hearing.

principle of equality-of-arms upon which all human rights contests are anchored.<sup>24</sup>

The Article will discuss the Bakweri case against Cameroon from its inception to the Commission's final decision. Part I will present an historical background of the Bakweri land problem and the reasons behind the decision to commence legal action against Cameroon at this time. This case history is followed in Part II by a presentation of the case itself beginning with the Bakweri claims, followed by a discussion of Cameroon's Preliminary Objections together with complainant's response to these objections. Part III discusses the Commission's decision taken at its 36<sup>th</sup> Ordinary Session which held from 23<sup>rd</sup> November to 7<sup>th</sup> December.<sup>25</sup> Finally, in Part IV, the Article will re-visit the exhaustion rule, in the context of human rights claims brought against States where the court system does not enjoy the kind of independence from the executive branch that is implied in the local remedies rule.<sup>26</sup> While not quarreling with the soundness of this rule, the Article will however question its rigid

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24. Equality of arms is an essential element of fair hearing, a principle guaranteed in all human rights instruments. *See e.g.*, Universal Declaration of Human Rights art. 10, G.A. Res. 217A (III), U.N. Doc A/810, at 71, (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 14(1), G.A. Res. 2200A (XXI), U.N. Doc A/6316, at 49, (Mar. 23, 1966); European Convention on Human Rights and Fundamental Freedoms art. 6(1), Mar. 9, 1953, CETS Doc. No. 005; American Declaration on the Rights and Duties of Man art. XXVI, O.A.S. Res. XXX (1948); American Convention on Human Rights art. 8, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65 Rev. 1, Corr. 1, *entered into force* July 18, 1979; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 20(1), U.N. Doc S/25704, at 36, and S/25704/Add.1, S.C. Res. 827, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 art. 19(1), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), as amended by S.C. Res. 1165, U.N. Doc. S/RES/1165 (Apr. 30, 1998), S.C. Res. 1329, U.N. Doc. S/RES/1329 (Nov. 30, 2000), S.C. Res. 1411, U.N. Doc. S/RES/1411 (May 17, 2002), S.C. Res. 1431, U.N. Doc. S/RES/1431 (Aug. 14, 2002); and Rome Statute of the International Criminal Court art. 64(2), 67(1), July 17, 1998, U.N. Doc. A/CONF.183/9\*, 2187 U.N.T.S. 3.. The equality of arms principle requires both parties in a trial be treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case. The Human Rights Committee has stated that a fair hearing requires a number of conditions, including equality of arms, respect for the principle of adversary proceedings and expeditious procedure. *See Morael v. France*, Human Rights Committee, Communication No. 207/1986, U.N. Doc. A/44/40, 1989, at 210 (July 28, 1989). It requires that the State as well as the complainant is afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage *vis-à-vis* the opposing party. *See* European Court judgments in the cases of *Ofrer* and *Hopfinger*, Nos. 524/59 and 617/59, Dec. 19.12.60, Yearbook 6, p. 680 and 696; *see also* Kaufman v. Belgium (1986) 50 DR 98, EcmHR 15.

25. *See* Bakweri Land Claims Committee v. Cameroon, African Commission on Human and Peoples' Rights Communication 260/2002 (2002).

26. *See* Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), P.C.I.J. (Ser. A/B) No. 76, at 18 (1939).

application in this case while advancing a plea for a much more flexible and nuanced approach in future cases that come before the Commission.

#### PART I: HISTORICAL BACKGROUND TO THE BAKWERI LAND LITIGATION

The lawsuit initiated by BLCC was one of David-and-Goliath-like proportions, and its origins can be traced back to the period when Cameroon was a German Protectorate,<sup>27</sup> but the immediate cause was the July 1994 Presidential decree<sup>28</sup> in which the State of Cameroon announced that the Cameroon Development Corporation, the crown jewel of Cameroon's economy,<sup>29</sup> was among fourteen state-owned companies earmarked for privatization or sale to foreign private entrepreneurs. This would have meant the alienation of approximately 400 square miles (104,000 hectares) of land which the Bakweri have traditionally owned or otherwise occupied or used. Because the transfer of two-thirds of their total land area into private hands ran the real risk of extinguishing forever native title rights and interests in this land,<sup>30</sup> the Bakweri decided not to take this lying down. In a hastily summoned Assembly of Traditional Rulers, Notables and Elites, the Bakweri served notice of their resolve "to pursue this matter in all international for a available to [them] including, if necessary, the United Nations until [they] are vindicated."<sup>31</sup>

The land in question was forcibly, arbitrarily, and illegally, in contravention of all the principles governing land tenure among the indigenous

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27. For an excellent account of that period, see Harry R. Rudin, *GERMANS IN THE CAMEROONS 1884 - 1914: A CASE STUDY IN MODERN IMPERIALISM* 111-112 (1938).

28. See Decree No. 94/125 of July 14, 1994 (Cameroon).

29. In its heyday, the corporation accounted for 65 percent of the export tonnage and 55 percent of the export earnings of former British Cameroons. It ran hospitals and clinics, schools and community centers, and provided a wide range of social services for employees and non-employees. The corporation's labor force of over 17,000 was second only to that of the Government. See Willard R. Johnson, *THE CAMEROON FEDERATION: POLITICAL INTEGRATION IN A FRAGMENTARY SOCIETY* 97 (1970); See also, Sanford H. Bederman, *Plantation Agriculture in Victoria Division, West Cameroon: An Historical Introduction*, *GEOGRAPHY*, vol. LI, no. 4 at 354-356 (Nov. 1966); Sanford Bederman & Mark Delancey, *The Cameroon Development Corporation 1947-1977: Cameroonization and Growth*, in *AN AFRICAN EXPERIMENT IN NATION-BUILDING: THE BILINGUAL REPUBLIC OF CAMEROON SINCE REUNIFICATION* 251-278 (Ndiva Kofele-Kale, ed. 1980); Edwin Ardener, Shirley Ardener & W.A. Warmington, *PLANTATION AND VILLAGE IN THE CAMEROONS: SOME SOCIAL AND ECONOMIC ISSUES* (1960); Piet Konings, *Plantation Labour And Economic Crisis In Cameroon*, 26 *DEVELOPMENT & CHANGE* 525-549 (1995); Piet J. J. Konings, *Privatisation of Agro-Industrial Parastatals and Anglophone Opposition in Cameroon*, 34 *J. COMMONWEALTH & COMP. POL.* 199-217 (1996); Simon Joseph Epale, *PLANTATIONS AND DEVELOPMENT IN WESTERN CAMEROON, 1885-1975: A STUDY IN AGRARIAN CAPITALISM* (1985).

30. See Bakweri Land Committee, Memorandum of the Bakweri People on the Presidential Decree to Privatize or Sell the Cameroon Development Corporation, Buea (July 27, 1994) (on file with author).

31. See Bakweri Ancestral Lands Shall Not be Alienated without the Consent of the Natives: Submission of Counsel for the Bakweri: Buea, Thursday, August 18, 1994 (on file with author).

Bakweri, seized from the Bakweri landowners between 1887 and 1905 during the period of German colonial occupation and handed over to private German companies and individuals.<sup>32</sup> This large scale expropriation of private property would later be condemned by the British colonial authorities and the United Nations General Assembly<sup>33</sup> and in a Report submitted to the Trusteeship Council by a Visiting Mission sent out to the then British Southern Cameroons in November 1949. The Report states in its paragraph 63:

That these customary principles in the strictest sense— particularly the prohibition against absolute alienation— were contravened at least in the early stages of German development of the Territory is apparent from events after 1884. During the German administration of Kamerun, some 460 square miles of land in the Victoria and Kumba Divisions were alienated by the German Government to plantation companies, missions, and individuals. Available records of the methods by which this was done are not complete, but on the whole, the evidence that is available suggests that during the first 12 years of the occupation, there was no regular procedure, and that land was taken by whatever means seemed most convenient in each locality concerned— whether by purchase at small sums from local chiefs, or by simple ex-propiation. The German Government in turn sold estates into private hands or in a minority of cases, granted leases. The United Kingdom Authorities have pointed out, however, that demarcation of Crown Land was never done systematically nor did a Land Commission ever deal generally with all unoccupied land in Kamerun. When land was required for plantation purposes, the Commissioner was convened; if any claims were established the owners would be compensated by the planter or plantation company, this compensation being set off against the purchase price paid to Government. If the owners were actually settled within the area, they would be required to move to reserves outside the area, on the basis, under an agreement of

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32. The two leading German firms that dominated plantation agriculture in the protectorate were Woermann and Jantzen und Thormalen. *See, e.g.*, William H. (Lord) Hailey, *AN AFRICAN SURVEY* 775 (1945) (noting that fifty estates, about 258,000 acres in all, were alienated to German private individuals); *see also* Cyprian F. Fisiy, *THE DEATH OF A MYTH SYSTEM: LAND COLONIZATION ON THE SLOPES OF OKU, MOUNT CAMEROON* (1992) (placing the number of German-owned estates on the eve of World War I at 58).

33. *See* U.N. Trusteeship Council [TCOR] Report of the U.N. Trusteeship Council Visiting Mission to the Cameroons under U.K. Trusteeship, U.N. Doc. T/461 at 189, ¶16 (Nov. 1949).

1904, that "apart from land built and farmed upon by natives each hut is to be given six hectares."<sup>34</sup>

The dispossession and expropriation of Bakweri land met with stiff resistance<sup>35</sup> from the Buea people, who in the end lost out to the superior German military might. As punishment for their resistance, the Bakweri were forcibly relocated to "native reserves" ("*reservats*").<sup>36</sup> However, with the help of some foreign missions, notably the Basel Mission,<sup>37</sup> the Bakweri were able to protest directly to the German Imperial Government in Berlin about their inhumane treatment at the hands of the local German colonial administration. Although Berlin attempted some corrective measures to ease the plight of the Bakweri, these were aborted at the outbreak of the First World War in 1914.

### 1. From Private German Estates to State-owned CDC Plantations

In the years before the First World War, these alienated Bakweri lands were developed into large plantation estates by their German owners. After the war ended, these plantations were put up for auction, but an embargo on bidding was placed on the ex-enemy nationals. However, since they were the only buyers who showed any interest, the legislation which had prohibited the acquisition of these estates by ex-enemy subjects was repealed.<sup>38</sup> As a result, most of the estates were repurchased by their former owners with the assistance of the German Government.<sup>39</sup> Following the outbreak of the Second World War in 1939, these plantations were again sequestered and declared enemy property<sup>40</sup> and vested by the Nigerian Government in the Public Custodian of Enemy Property for the duration of the war.<sup>41</sup> When the war ended, the British Colonial Government bought back all the erstwhile German estates from the Cus-

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34. U.N. Trusteeship Council [TCOR], Report of the U.N. Trusteeship Council Visiting Mission to the Cameroons Under United Kingdom Trusteeship, U.N. Doc. T/461 (Nov. 1949) at 189, ¶63.

35. The extension of German control in the Cameroon mountain area met its first serious resistance from the Bakweri of Buea when, in 1891, an expeditionary force sent against was routed and its German commander, Gravenreuth, killed. In a second expedition three years later, the Buea people were defeated, made to pay an indemnity and forcibly relocated to native reservations. For an account of this epic battle from the eyes of a Bakweri chronicler, see Paul Monyongo mo'Kale, *A BRIEF HISTORY OF THE BAKWERI* (1939); see also *KINGDOM ON MOUNT CAMEROON*, *supra* note 8.

36. See *GERMANS IN THE CAMEROONS*, *supra* note 27, at 111-112; see also CHARLES KINGSLEY MEEK, *LAND TENURE AND LAND ADMINISTRATION IN NIGERIA AND THE CAMEROONS* 405 (1957).

37. See, e.g., *PLANTATION AND VILLAGE*, *supra* note 29, at 313.

38. See *Ex-Enemy Immovable Property Ordinance No. 22 (1924)* (U.K. Colonial Legislation).

39. See *LAND TENURE AND ADMINISTRATION*, *supra* note 36, at 355.

40. See *Ex-Enemy Lands (Cameroon) Ordinance, No. 38 §4 (1946)*; and *Ex-Enemy (Likomba Estates) Ordinance, No. 22 (1947)*.

41. See *LAND TENURE AND ADMINISTRATION*, *supra* note 36, at 355.

todian of Enemy Property at a cost of £850,000 sterling. Under pressure from the Bakweri people through their agent the Bakweri Land Committee (which had kept up the fight for the return of all expropriated Bakweri lands, carrying it all the way to the United Nations Trusteeship Council),<sup>42</sup> the British Colonial Government, which was administering Cameroon under the League of Nations Mandate system, declared these ex-enemy property as “Native Lands”<sup>43</sup> and placed them under the custody of the Governor of Nigeria to hold in trust for the Bakweri people. The lands were subsequently leased in 1946 to a newly created statutory corporation, the Cameroon Development Corporation, for a period of 60 years with effect from January 1947, to administer and develop these lands until such time that the inhabitants of the territory people were capable of managing them without outside assistance.<sup>44</sup>

The CDC was created as a public corporation (without private shareholders) to operate on a commercial basis, but with broad socio-economic objectives which, in partnership with Government, would develop the rich and fertile lands of Fako Division for the common benefit of the inhabitants of the British Cameroons. By the terms of the 1947 lease, the CDC was required, and it agreed, to pay ground rents to the landowners. Throughout this leasehold, the corporation set aside each year a sum of money as rent for the use of Bakweri lands. However, in breach of the terms of the lease, the rents were paid into the public treasury rather than to the local councils in Bakweri land.<sup>45</sup>

## 2. Bakweri Reaction to the Privatization of CDC

Shortly after the presidential decree of July 1994 announcing the privatization of CDC became public, the Bakweri addressed a Memorandum, signed by 125 Bakweri Chiefs, Notables and Elites,<sup>46</sup> to Cameroon’s President voicing their opposition to the privatization exercise for fear that it would adversely affect their rights to their ancestral lands occupied by the CDC plantations. As no acknowledgment was received to that

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42. See e.g., Petition of the Bakweri Land Committee, Cameroons under British Mandate, 18 J. of the Royal African Society 302, 307 (Oct. 1948); Petition of the Bakweri Land Committee to the Trusteeship Council, U.N.O. Dec. T/PET.4.3, Report of the Trusteeship Visiting Mission (1949); Petitions from Bakweri Land Committee; Summary of the Findings and Recommendations of the Investigating Officer and the Preliminary Observations of the Nigerian government (1949); see also PLANTATION AND VILLAGE, *supra* note 29, at 316-317.

43. See Land and Native Rights Ordinance (1958) Cap. 96, §3 (Nigeria).

44. See Cameroon Development Corporation Ordinance, No. 39 (1946) (on file with author).

45. See Bakweri Land Committee, Memorandum of the Bakweri People on the Presidential Decree to Privatize or Sell the Cameroon Development Corporation, Buea (July 27, 1994) (on file with author).

46. *Id.*

Memorandum, a second petition dated 3<sup>rd</sup> March 1999<sup>47</sup> signed by some 360 Bakweri traditional rulers, notables and elites, and a third petition by non-Bakweri bearing over 100 signatures, were sent to Cameroon's President.<sup>48</sup> The second petition was subsequently endorsed by 139 Bakweri in North America and other parts of the world, by their letter dated 1<sup>st</sup> October, 1999 addressed to the President of the Republic.<sup>49</sup> Amidst this flurry of memoranda, BLCC also contacted the International Monetary Fund and the World Bank, the main sponsors of the Privatization Program in Cameroon, advising them of the need to resolve the explosive land issue before going through with the privatization of CDC.<sup>50</sup> BLCC also sent out a *caveat emptor* to prospective buyers of CDC assets to alert them of the unresolved land problem and to invite them to convince the Government of Cameroon to fully involve the Bakweri landowners in the ongoing negotiations.<sup>51</sup>

On 4 October 2000, some three months after a written request for a meeting, the Prime Minister and Head of Government finally met with a delegation of BLCC leaders to discuss issues relating to the privatization of the CDC and other related matters. Also present at this meeting was the Assistant Secretary General of the Presidency. During their discussions, the BLCC delegation voiced Bakweri support for privatization and expressed the hope that the exercise "will be carried out in a transparent and impeccable manner and that it would result in increased productivity, profitability, poverty alleviation and greater economic and social prosperity for the nation and its people."<sup>52</sup> These leaders also reiterated the position of the Bakweri people on the land question: that the lands now occupied by the CDC are private native lands, so declared before independence by the British Colonial Administration, and contained in the German Land Register or *Grundbuch*.<sup>53</sup> The BLCC delegation left this

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47. See Bakweri Land Committee, Memorandum Dated 3<sup>rd</sup> March 1999 to H.E. Paul Biya Concerning the Privatization of the Cameroon Development Corporation (CDC), Buea (Mar. 3, 1999) (on file with author).

48. See Letter from Concerned Cameroonians Regarding the IMF Sanctioned Privatization of the Cameroon Development Corporation (CDC) (Oct. 19, 2000) (on file with author).

49. See Letter of Support for BLCC Addressed to President Paul Biya (Oct. 1, 1999) (on file with author).

50. See Letter to the Managing Director of the I.M.F. on Privatizing the CDC without the Consent and Participation of Native Landowners Carries Grave Risks Especially to Potential Investors (June 16, 2000) (on file with author).

51. See An Open Letter to All Prospective Buyers of CDC Plantations (Oct. 12, 2000) (on file with author).

52. See BLCC Letter to H.E. Peter Mafany Musonge, Prime Minister and Head of Government (Oct. 30, 2000) (on file with author).

53. This national land register contained "detailed information on all land transactions and interests in land, including but not limited to, each land parcel's location, dimensions, and name and address of the legal owner(s) and relevant cadastral information such as coordinates and bearings." Ambe Njoh, *PLANNING RULES IN POST-COLONIAL STATES* 85 (3001).

meeting guardedly optimistic that a resolution to the Bakweri land problem was on the horizon. Subsequent Government action would jolt them from this dream-like state and dash any hopes that an end was in sight because less than two years after the breakthrough meeting with the Prime Minister, Cameroon unilaterally decided, without bothering to notify the BLCC leadership, to privatize the CDC's Tole tea estates. Equally noteworthy is the fact that the Cameroon Government did not respond to Bakweri demands to be consulted over the fate of their ancestral lands, nor did it rescind Decree No. 94/125 of 1994, privatizing the CDC. It is against this backdrop that the Bakweri, through their accredited agent, BLCC, cited Cameroon before two international human rights bodies for violation of Bakweri land rights.

## PART II: THE BAKWERI FACE OFF THE STATE OF CAMEROON

### 1. Procedural History

BLCC's first petitioned the United Nations Sub-Commission on the Promotion and Protection of Human Rights (formerly the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities) (hereinafter "U.N. Sub-Commission") in August 2001 pursuant to ECOSOC Resolution 1503<sup>54</sup> citing Cameroon for violating the land rights of the Bakweri people by seeking to sell CDC plantations on those lands without involving the indigenous landowners. On the 8<sup>th</sup> of July, 2002, by a letter from the Governor of the South West province, who was writing on instructions from Cameroon's Minister of External Relations, BLCC was informed of the U.N. Sub-Commission's decision to discontinue further consideration of the matter.<sup>55</sup>

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54. See U.N. Econ. & Soc. Council [ECOSOC] Resolution 1503 Concerning the Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, E.S.C. Res. 1503, U.N. ESCOR, 48<sup>th</sup> Sess., Supp. No. 1A at 8, U.N. Doc. E/4832/Add.1 (1970).

55. BLCC would subsequently receive a letter dated 17<sup>th</sup> June 2004 from the Secretary of the African Commission. Attached to it was a copy of a "Confidential decision relating to Cameroon" adopted by the Working Group of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities ("U.N. Sub-Commission") on February 12 2002. This decision was in relation to a complaint submitted by BLCC in August 2001 to the U.N. Sub-Commission under the '1503 Procedure'. The Working Group on Situations, to which this matter was referred, concluded thus:

*"Noting* the complexity of this long standing issue,  
*Considering* that local domestic remedies have not been exhausted and that the matter should be addressed through a national judicial process,  
*Welcoming with appreciation* the exemplary reply received from the Government of Cameroon,  
 1.*Encourages* the Government of Cameroon to continue pursuing on-going efforts in this regard,  
 2.*Decides* to discontinue consideration of the matter,  
 3.*Requests* the Secretary-General to communicate this decision to the Government of Cameroon."  
 See Letter to BLCC from the Secretary of the African Human Rights Commission Ref.: ACHPR/COMM/2/NGL (June 17, 2004) (on file with author).



## 118 ANNUAL SURVEY OF INT'L &amp; COMP. LAW [Vol. XIII

The letter from the Governor gave two reasons for this decision.<sup>56</sup> These were that “petitioners did not fully exploit local avenues available to solve the problem and the Cameroon judicial system was deemed competent to handle the petition”; second, that the Commission commended government’s position on the issue and encouraged government’s efforts in her “continuous willingness to resolve once and for all, this matter of Bakweri Lands.”<sup>57</sup> The second reason given was a significant development in the BLCC struggle to reclaim expropriated Bakweri lands, as it was the first and only time Cameroon acknowledged the existence of a Bakweri Land Problem and expressed a willingness to see this matter satisfactorily resolved. Cameroon did not, however, follow through on this pledge, despite repeated reminders from BLCC.<sup>58</sup>

Left with no other choice, BLCC decided to petition the African Commission on Human and Peoples’ Rights pursuant to Articles 55, 56 and 58 of the Banjul Charter. At its 32<sup>nd</sup> Ordinary Session held from 17<sup>th</sup> to 23<sup>rd</sup> October 2002, the Commission considered the complaint and decided to be seised of it. On 4<sup>th</sup> November 2002 pursuant to Rules 113 and 117(4) of the Commission’s Rules of Procedures, the Commission fixed

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56. Since the U.N. Sub-Commission’s rules of procedure do not allow Petitioners (BLCC) to be served with a copy of the Government’s Response, nor to be present during commission deliberations, a right only extended to States Parties, BLCC surmises that the reasons contained in the Governor’s letter were actually the arguments advanced by the Cameroon Government.

57. See U.N. Sub-Commission, Confidential decision relating to Cameroon (June 17, 2004), *supra* note 54.

58. Barely six months after informing the U.N. Sub-Commission that discussions were under way with the Bakweri, Respondent quietly disposed of Tole Tea Estate in Complainants’ heartland; entered into contract with a phantom South African company (Brobon Finex Pty Ltd.) which the South African Government attests does not exist (*See* Certificate from the South African Registrar of Companies and Close Corporations of 13<sup>th</sup> November 2003) and in which, contrary to Respondent State’s assertions during the 35<sup>th</sup> Session of the African Commission, the share capital of the company formed to manage the plantations, *Cameroon Tea Estate*, has been apportioned, to the total exclusion of the landowners while *granting a lease of 70 years to the operating company with all ground rent payable to Respondent*. See Bakweri Land Claims Committee Submission on Admissibility, at 7-9, 15, n.15 (Feb. 4, 2003) (on file with author).

Respondent State also failed to acknowledge receipt of, and continued to flout, the Commission’s May 2003 Urgent Appeal to President Biya taken under Rule 113(3) of the Commission’s Rules of Procedure, to halt further alienation of Bakweri ancestral lands under lease to the CDC pending a final resolution of this dispute. It did so by openly courting foreign investors and putting up for sale the remaining CDC plantations. Furthermore, Respondent State continued to ignore BLCC’s repeated overtures to have this matter resolved amicably as evidenced in letters Complainants addressed to the Minister of State in charge of Territorial Administration and Decentralization and to the President of the Republic himself. See BLCC Correspondence with President Biya, *supra* notes 47 – 50 and accompanying text. Finally, Respondent State supported attempts by local law enforcement authorities to persecute and silence BLCC leaders, and tacitly encouraged the creation of a rival organization—the Bakweri Cooperative Union of Farmers Real Estate Corporation—to speak for the Bakweri, encouraging and financing this fake organization to tie up the BLCC leadership in the local courts through nuisance law suits in an effort to discredit BLCC before this Commission as not being the authentic and accredited voice of the dispossessed Bakweri people.

the time limits for filing written pleadings on admissibility and informed the parties and invited them to file their submissions with the Commission.<sup>59</sup> Cameroon submitted its Memorial on Admissibility on 31<sup>st</sup> January 2003 and BLCC filed its Memorial on 3<sup>rd</sup> February 2003 and on 4<sup>th</sup> March forwarded a Reply to Cameroon's Memorial on Admissibility. On 8<sup>th</sup> May, Cameroon filed Preliminary Objections claiming, among other things, that the matter was not ripe for hearing since BLCC had not exhausted all available domestic remedies. The Commission agreed to hear oral pleadings on admissibility at its 33<sup>rd</sup> Ordinary Session which held from 15<sup>th</sup> to 29<sup>th</sup> May 2003. A decision on admissibility was deferred to the next ordinary session in order to afford complainant sufficient time to file a Response to respondent State's preliminary objections.<sup>60</sup>

In the meantime, at complainant's request, and in conformity with Rule 111 of the Commission's Rules of Procedure, which authorizes the Commission to take provisional measures pending the final outcome of a dispute before it, the Chairman of the Commission sent an urgent appeal letter to the President of Cameroon urging him to direct Respondent State to cease and desist from any further alienation of the disputed land pending a final decision of the Commission.<sup>61</sup> Complainant filed its Response to respondent State's preliminary objections on 23<sup>rd</sup> August 2003. The Commission heard oral submissions from both parties at its 34<sup>th</sup> and 35<sup>th</sup> Ordinary Sessions, held in November 2003 and June 2004, respectively. A decision was rendered at the close of the Commission's 36<sup>th</sup> Ordinary Session in November-December 2004.

## 2. Bakweri Claims

In its October 2002 communication before the Commission, BLCC made three principal assertions against Cameroon. First, BLCC claimed that Cameroon, by its acts and omissions, violated Article 21 of the Banjul Charter which enjoins States Parties from impairing the inherent right of all peoples to enjoy and utilize fully and freely their wealth and natural resources, and guarantees their right to adequate compensation for lands expropriated by the State.<sup>62</sup> Second, BLCC claimed that Cameroon had breached its obligations under Article 22 of the Banjul Charter, which protects the right to economic, social and cultural development and obli-

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59. See Letter to Counsel for BLCC from the Secretary of the African Commission, Ref: ACHPR/COMM/2 (Nov. 4, 2002) (on file with author).

60. See *Bakweri Land Claims Committee v. Cameroon*, *supra* note 25.

61. African Comm'n H. & Peoples' R., Rules of Procedure, Rule 111 (Oct. 6, 1995), available at [http://www.achpr.org/english/\\_info/rules\\_en.html](http://www.achpr.org/english/_info/rules_en.html); see *Bakweri Land Claims Committee v. Cameroon*, African Commission on Human and Peoples' Rights, Communication 260/2002, ¶¶16-17 (hereinafter "Commission Decision").

62. Banjul Charter, *supra* note 12, at art. 21.

## 120 ANNUAL SURVEY OF INT'L &amp; COMP. LAW [Vol. XIII

gates States Parties to ensure the exercise of this right.<sup>63</sup> Finally, BLCC asserted that Cameroon was in breach of Article 7(1)(a) of the Banjul Charter which stipulates that “Every individual shall have the right to have his cause heard [which includes]... the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.”<sup>64</sup>

## 3. Discussion of the Bakweri Claims

## a. Article 14 Violation

This article provides that “[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”<sup>65</sup> BLCC’s complaint alleged that Bakweri peoples’ right to private property and their right not to be deprived of it arbitrarily had been violated by the Government of Cameroon. The complaint pointed out that the lands occupied by the CDC were repurchased from the Custodian of Ex-Enemy Property by the British colonial administration and declared private native lands long before Cameroon became an independent nation in 1960. Support for this position comes from a report of the supervisory authority when Cameroon was administered as a United Nations Trust Territory. On 9 June 1948, while forwarding to the U.N. Secretary General a Petition from the Bakweri people, the United Kingdom government made the following observations:

[T]hat all [the repurchased ex-enemy] lands had been declared native lands and had been placed under the control of the Governor of Nigeria to be administered for the use and common benefit of the natives; that the Nigerian government had repurchased 14, 851 acres of plantation land for the benefit of the natives, and that the Cameroon Development Corporation had been set up to administer and develop the plantations until such time as the Bakweri people were competent to manage them without assistance. . . .<sup>66</sup>

The complaint admitted that the issue of the quantum of legal rights the Bakweri retained when their lands were acquired by the British adminis-

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63. *Id.* at art. 22.

64. *Id.* at art. 7.

65. *Id.* at art. 14.

66. See *Petition of the Bakweri Land Committee, Cameroons Under British Mandate*, 18 J. of the Royal African Society 302, 307 (Oct. 1948).

tering authorities had been raised in some circles: whether title to these lands passed to the British Crown through the Governor of Nigeria or remained with the indigenous land owners. This issue, BLCC asserted, was expertly handled by Dr. C.K. Meek, the foremost authority of his time on land law in British colonial Africa, in his 1957 study on land law in colonial West Africa.<sup>67</sup> Meek opined that in situations such as this, existing titles were never extinguished. As he put it “*where the Government had itself assumed the position of landlord, it had done so only to protect native interests: the vesting of land in the Governor had not implied a transfer of ownership of the land of the territory to the Governor but had merely conferred on him a power of supreme trusteeship. Nor did it affect the existing titles, whether community or individual.*”<sup>68</sup> Meek was in no doubt that Bakweri title to these lands was never extinguished and that the Governor of Nigeria held them in trust for the indigenous landowners: “*Indeed, the United Nations at its 6<sup>th</sup> meeting of the Council in March 1950 states that increased effort should be made to explain to the Bakweris that Ex-Enemy Lands had in fact reverted to them and that ownership was now legally vested in them.*”<sup>69</sup>

Meek’s conclusion reflects the weight of legal opinion that indigenous title to land was a right predating the colonial state and not dependent for its existence upon treaty or statutory law. These antecedent rights and interests survived the change of sovereignty, in the Bakweri case, the change from the British Crown to the Cameroon State.<sup>70</sup> This position, BLCC argued, is consistent with the view that the colonial territory was not *terra nullius* (land belonging to no-one) at the time of European settlement. In the landmark case of *Mabo v. Queensland*,<sup>71</sup> and most recently in *Bennell v. State of Western Australia*<sup>72</sup>, the High Court of Australia rejected the doctrine of *terra nullius* as repugnant and inconsistent with historical reality.

According to the BLCC complaint, that the CDC-occupied lands are private lands and Bakweri title was never extinguished finds confirmation even under Cameroon’s own 1974 Land Tenure Act.<sup>73</sup> This law clas-

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67. See LAND TENURE AND ADMINISTRATION, *supra* note 36.

68. *Id.* at 355-356 (Emphasis added).

69. *Id.* at page 407 (Emphasis added).

70. See *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399, 407, 410; *Oyekan v. Adele* [1951] 2 All E.R. 785. See also T. Olawale Elias, BRITISH COLONIAL LAWS: A COMPARATIVE STUDY OF THE INTERACTION BETWEEN ENGLISH AND LOCAL LAWS IN BRITISH COLONIAL DEPENDENCIES (1962) and T. Olawale Elias, NIGERIAN LAND LAW AND CUSTOM (1951).

71. See *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 (Australia).

72. See *Bennell v. State of Western Australia* (2006) F.C.A. 1243 (Sept. 19, 2006).

73. See 1974 Land Tenure Law, *supra* note 13.

sifies lands that were entered in official German land registers, the Ground Book or *Grundbuch*, as private property. BLCC pointed out that as many as 23 German plantations met this description and were entered in the *Grundbuch*. These are the plantations that were subsequently repurchased by the British colonial administration from the Custodian of Enemy Property in 1946, declared as Native Lands, and then leased to the newly-created statutory corporation, the CDC.<sup>74</sup>

The 1974 Land Tenure Law takes great pain to distinguish between “National Lands” and Private Land. The former are lands which “are not classed into the public or private property of the State and other public bodies<sup>75</sup>. . . which the State can administer in such a way as to ensure rational use and development,”<sup>76</sup> and can be “allocated by grant, lease or assignment on conditions to be pursued by decree.”<sup>77</sup> Private Lands, on the other hand, guarantee their owners the right to freely enjoy and dispose of them. Part II, Article 2 of the Land Tenure Act identifies 5 categories of land subject to the right of private property. These are: “(a) Registered lands; (b) Freehold lands; (c) Lands acquired under the transcription system; (d) Lands covered by a final concession; (e) *Land entered in the Grundbuch*.”<sup>78</sup>

It should be noted that before land could be entered in the Ground Book it had to be mapped and demarcated. The CDC-occupied lands were surveyed before being registered in official records as private property, and all this took place prior to the entry into force of the 1974 Land Tenure Law. Since these lands were only *leased* to the CDC, only the true owners, i.e., the Bakweri, reserve the right under the Land Tenure Act to dispose of these lands. Consequently, the sale or privatization of the assets of CDC should not, in principle, include the lands on which these plantations stand. The position of the Bakweri on this point has not wavered in 50 years. In their 1999 Memorandum to Cameroon’s President, the Bakweri insisted that:

upon Cameroon attaining independence, the role of the State in continuing to act as trustee over Bakweri lands, effectively

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74. See Letter Ref. No. 020/Y.2.5/MINUH/10/B.042 from the South West Provincial Chief of Service Lands attesting to the fact that the private property contemplated in the 1974 Land Tenure Law is indeed “ex-enemy lands.” (on file with author).

75. See 1974 Land Tenure Law, Part III, §14(1), *supra* note 13.

76. *Id.* at §16(1).

77. *Id.* at §17(1).

78. *Id.* Part II, §2 (Emphasis added). In a letter Ref. 020/Y.2.5/MINUH/10/B.08 to the Secretary General of BLCC, the South West Provincial Chief of Service Lands confirmed that “*all ex-enemy lands of former West Cameroon are recorded in the Grundbuchs.*” (Emphasis added) (on file with author).

ended. Existing contracts, e.g., the original 60 years granted by the Governor General of Nigeria, should be allowed to run its full course. Any subsequent extension of that lease by a Government of Cameroon, however called, is invalid, as the trustee relationship terminated when Cameroonians assumed political independence and were not subject to control by a foreign imperial power.<sup>79</sup>

*b. Violation of Article 21*

The first paragraph of Article 21 provides that “*All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*”<sup>80</sup> BLCC’s complaint alleged that the process of extinguishment set in motion by Decree No. 94/125 severely undercut the group’s Article 21 right to exercise permanent sovereignty over their ancestral lands. They further complained that Respondent State ignored their repeated requests for a full and complete public disclosure of the terms of the sale or the lease of Bakweri lands to foreign purchasers. In this and in other respects, Decree No. 94/125 is in clear breach of a trust responsibility by the Cameroon Government (that is, of undivided loyalty to the Bakweri landowners, who are the real beneficiaries) or, at the very best, an abuse of the State’s power to control or dispose of lands held in sacred trust for an indigenous minority people relying on the authority of *Guerin v. The Queen*.<sup>81</sup> In that case, the Supreme Court of Canada held the Crown in breach of a trust or, at a minimum, fiduciary duties with respect to the manner in which the Crown disposed of reserve lands held by it for the use and benefit of an indigenous Indian tribe. *Guerin* involved the voluntary surrender by the Musqueam Indian Band to the federal Crown, “in trust,” of some of its reserve land for the purpose of lease to a private club. The Crown subsequently concluded a lease on terms that were not authorized by the Indians and were less advantageous to them. BLCC asserted in the complaint that just as the Bakweri had agreed to the British colonial government’s proposal to lease their land to the CDC on terms which clearly recognized their reversionary rights, any subsequent attempt by the successor government to lease this land to another party must be on terms acceptable to the Bakweri.

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79. See Memorandum Dated to H.E. President Paul Biya Concerning the Privatisation of the Cameroon Development Corporation (CDC), at 6 (Mar. 3, 1999) (on file with author).

80. Banjul Charter, *supra* note 12, at art. 21 (emphasis added).

81. See *Guerin v. The Queen* [1984] 2 S.C.R. 335 (Canada).

BLCC further argued that the contemplated extinguishment of Bakweri land rights equally violates the second paragraph of Article 21 (2): "*In case of spoliation, the dispossessed people shall have the right to lawful recovery of its property as well as to an adequate compensation.*"<sup>82</sup> The privatization of CDC, and with it the likelihood of transferring Bakweri private lands to third parties, was being carried out without any discussion about fair compensation to the Bakweri, the principal stakeholders. BLCC pointed to the Commission's own jurisprudence, which traces the origin of the rights contained in Article 21 of the Banjul Charter to the period when the continent was under colonial domination, a period:

*during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.*<sup>83</sup>

For the BLCC, this reminder clearly was lost on Cameroon which, faced with the opportunity to right a historical wrong—one traceable to a period when the territory was under foreign domination—chose instead to behave no differently from its German colonial predecessors!

BLCC urged the Commission to follow the jurisprudence of the Inter-American Commission and the Inter-American Court and rule that the Bakweri be indemnified in an amount sufficient to remedy the entire scope of the adverse consequences that have resulted from the century-old expropriation of their most valuable asset: land. BLCC reasoned that the award of compensation would also be upholding both the letter and spirit of the Cameroon Constitution which proudly proclaims "*the right guaranteed every person by law to use, enjoy and dispose of property. No person shall be deprived thereof, save for public purposes and subject to the payment of compensation under conditions determined by law.*"<sup>84</sup>

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82. Banjul Charter, *supra* note 12, at art. 21(2) (emphasis added).

83. See *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, African Comm'n H. & Peoples' R., Commc'n No. 155/96, ¶56 (Emphasis added).

84. See Law No. 65 of 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, preamble (Cameroon) (emphasis added).

BLCC based its demand for just compensation on several provisions relating to compensating victims of human rights abuses found in other regional human rights instruments, as well as the jurisprudence of these regional tribunals. It pointed to the 1969 American Convention on Human Rights, whose Article 21 parallels the Banjul Charter's Article 21. Article 21 of paragraph 2 of the American Convention reads: "*No one shall be deprived of his [or her] property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases according to the forms established by law.*"<sup>85</sup> BLCC also drew the Commission's attention to the case law of the Inter-American Commission on Human Rights, where the question of compensation for State violation of the right to property, a right which the Inter-American Commission has described as an "inalienable right," has been addressed. For instance, in *Haydee A. de Marin et al.*,<sup>86</sup> the Inter-American Commission found Nicaragua in breach of its duty under the Convention for "depriving the petitioners of their property without any form of compensation or for no reason of public utility"<sup>87</sup> and recommended that the Government of Nicaragua return the confiscated properties to their legitimate owners and pay the injured parties the amounts owed in damages and compensation for the time the properties in question were held in usufruct.<sup>88</sup>

The Inter-American Court of Human Rights has also tackled the issue of remedies for human rights abuses. In the landmark case of *Velásquez Rodríguez*,<sup>89</sup> the Court articulated for the first time a framework for calibrating the type of reparations and compensation that may be awarded by the Court to victims of human rights violations, and the criteria to be applied in making these assessments. In that case, the Court showed a marked preference for restitution, although it left the door open for other forms of relief, such as outright compensation in cases where restitution is not possible.<sup>90</sup> *Velásquez Rodríguez* also called for flexibility in the application of these criteria and on a case-by-case basis so as to "arrive at a prudent estimate of the damages, given the circumstances of each

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85. See American Convention on Human Rights art. 21(2), Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65 Rev. 1, Corr. 1, *entered into force* July 18, 1979 (emphasis added).

86. See *Haydee A. de Marin et al.*, Case 10.770, Inter-Am. C.H.R. 293, OEA/Ser. L/V/II.85, doc. 9 rev. (1994) (Annual Report 1993).

87. *Id.*

88. See also *Carlos Martínez Riguero*, Case 7788, Inter-Am. C.H.R. 89, OEA/Ser. L/V/II.76, doc. 9 rev. 1 (1987) (Annual Report 1986-1987) (recommending compensation for Nicaragua's wrongful confiscation of the dividends earned on shares owned by the complainant).

89. See *Velásquez Rodríguez Case, Compensatory Damages* (Art. 63(1) American Convention on Human Rights) Judgment of July 21, 1989, Inter-Am. Ct. H. R. (ser. C) No. 7 (1989).

90. *Id.*



case.”<sup>91</sup> Using this formula, the Court proceeded to award ‘moral damages’ to the Velásquez Rodríguez family as indemnification for the psychological harm it had suffered as a result of the disappearance of their loved one.<sup>92</sup>

*c. Violation of Article 22*

Article 22 of the Banjul Charter stipulates that:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.<sup>93</sup>

The BLCC complaint asserted that the privatization of CDC without first resolving the underlying land problem poses a serious threat to the right of Bakweri people to their economic, social and cultural development. The Bakweri, the complaint pointed out, have for close to a century been confined to a space less than one-third the size of the land they occupied prior to German colonization. The large-scale agro-industrial development that has been taking place on the other two-thirds of their lands has benefited all Cameroonians and not the Bakweri exclusively. While other minority groups in Cameroon have been able to exercise continuous dominion over their ancestral lands, the bulk of Bakweri ancestral land has always been under non-native control, first German and now the State of Cameroon. And while these other ethnic groups have been left to develop their ancestral lands without external interference, that has not been the Bakweri experience.<sup>94</sup>

It will be recalled that the total area of Fako Division where the Bakweri have traditionally lived is roughly 838 square miles. Two hundred square miles of this consist of rocky barren hilly slopes, another 30 square miles of mangrove swamps or bogs that are unsuitable for cultivation leaving approximately 588 square miles of arable land. Out of this total land area, existing settlements (towns and villages) take up no more than 100 square miles, while the CDC plantations occupy some 400 square miles, or approximately 60 per cent of the total arable land. Missions and other

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91. *Id.*

92. *Id.*

93. Banjul Charter, *supra* note 12, at art. 22.

94. BLCC Memorial, *supra* note 14.

commercial interests take up about 50 square miles, leaving barely 38 square miles of arable land for the indigenous peoples of Fako Division.<sup>95</sup>

Extending this already heavy concentration of non-natives on private Bakweri land, BLCC argued, would undermine the group's Article 22 rights in three ways. First, it would irrevocably alter existing land holding arrangements and the pattern of natural resource exploitation in Fako Division. As a result, future generations of Bakweri who have been deprived of, and denied access to, their ancestral lands, will never know or appreciate what it means to own land in close proximity to fellow culture-carriers, and on territory where their ancestors once farmed, fished and hunted. Secondly, the confinement of the total Bakweri population in Fako Division to less than 40 square miles of territory would, in the not too distant future, trigger a forced exodus of Bakweri to other parts of Cameroon in search of available land for their agricultural and other development needs. Finally, as these Bakweri begin to move in large numbers to other parts of Cameroon, this carries with it the risk of exporting the social tensions that have historically blighted settler-native relations in Fako Division.<sup>96</sup>

*d. Violation of Article 7(1)(a)*

BLCC's fourth claim against Cameroon boiled down to the process by which the respondent State chose to extinguish Bakweri land rights, which they contend violates Article 7, paragraph 1(a) of the Banjul Charter.<sup>97</sup> The approach adopted by Cameroon, BLCC argued, was discriminatory, without due process of law, and totally lacking in fundamental fairness in many respects. Although the Bakweri made representations to the highest decision-making organs of the State—the President and Head of State and the Prime Minister and Head of Government—respondent State simply refused to meet face-to-face with Bakweri leaders, to include proper representation of the Bakweri stakeholders in the negotiations on the sale or privatization of CDC despite repeated calls for their

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95. See BLCC, Communication under Articles 55, 56, and 58 of the African Charter on Human and Peoples' Rights Concerning Violation of Land Rights of an Indigenous Ethnic Minority in Cameroon 1, 16 (Oct. 4, 2002) (on file with author), *available at* [http://www.blccarchives.org/files/1\\_banjulpetition\\_october\\_2002.pdf](http://www.blccarchives.org/files/1_banjulpetition_october_2002.pdf); *see also* His Majesty's Government, REPORT BY HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON THE ADMINISTRATION OF THE CAMEROONS UNDER UNITED KINGDOM TRUSTEESHIP FOR THE YEAR 1949 304 (1950) (Placing the total area of land originally occupied by the Bakweri at 634 square miles).

96. *Id.*

97. Banjul Charter, *supra* note 12, at art. 7(1)(a).

inclusion, and to provide adequate notice and an opportunity for the accredited agents of the Bakweri people, the BLCC, to be heard.

BLCC pointed out that Respondent State's "No-Talk" policy was in stark contrast to the solicitous attitude shown the Bakweri by the British colonial authorities when the decision to create the CDC was taken in 1946. Recognizing that this decision was directly related to the petition of the Bakweri Lands Committee to the Trusteeship Council in 1946, the British Government made sure that the Bakweri were fully consulted and gave their consent before the proposal to create the CDC was put into effect.<sup>98</sup> Respondent State, according to BLCC, refused to do for its *own citizens* that which the colonial administration was only too eager to do for them when they were a *subject* people, i.e., consult and seek their approval on how best to develop *their* lands. Rather, Cameroon chose to ignore the pleas and representations from the Bakweri or treated them with indifference.

#### 4. Cameroon's Response to the Bakweri Claims

In its submission of January 31, 2003, Cameroon raised seven preliminary objections relating to admissibility, six of which were later dismissed by the Commission. Respondent State's first objection was to challenge BLCC's *locus standi* to bring a claim against the State of Cameroon. It argued that the author of the communication, i.e., Counsel for BLCC, failed to offer proof that he is the victim of a violation of the Banjul Charter or that the victims on whose behalf the communication had been submitted were unable to speak for themselves. Finally, Cameroon objected on *locus standi* grounds that since the author was not himself a victim of the alleged harm complained of and since the violations were neither serious nor excessive, the author should have but failed to marshal evidence of the alleged violations. This is what Cameroon had to say on this point:

[T]he author mentions 'the probable transfer of Bakweri private lands to a third party,' and the fact that 'the privatization of the CDC without prior resolution of the crucial land problem constitutes a serious threat to the rights of the Bakweri people...'; in other words the damage that will make the group on whose behalf the author is speaking a victim is merely probable and not

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98. This entry in U.N. Trusteeship Council Document No. 1/182 attests to this point: "*The proposal to acquire the ex-enemy owned plantations by the Nigerian government from the Custodian of Enemy Property at a cost which will be in the neighbourhood of £850,000 [Eight Hundred and Fifty Thousand pounds sterling] and their declaration to be Native Lands was welcomed by the Bakweris.*"

real. The Commission cannot entertain virtual or potential violations of the Charter but only violations that have actually occurred.<sup>99</sup>

As its second objection, Cameroon asserted that the object of the communication was vague, as it interchangeably spoke of the violation of the “right to own land in Cameroon,” “the dispossession of indigenous peoples of lands that they have historically owned and occupied,” and “the violation of the right of an indigenous ethnic minority in Cameroon to own land.”<sup>100</sup> Cameroon’s third preliminary objection was simply another version of the second, that the communication was improper as the author deliberately remained imprecise about the actual illicit act for which the State of Cameroon is blamed whether it is privatization or sale.

Cameroon’s fourth preliminary objection attacked the form of the complaint for containing language respondent State found objectionable. Respondent State took offense with references in the communication to the country’s judicial system, references which in respondent State’s view cast suspicions and aspersions on the judiciary. Respondent State was equally offended with the description of Cameroon’s Prime Minister and the Assistant Secretary General at the Presidency as unelected and appointed officials who constitutionally owe their respective offices to the President of the Republic and who therefore serve at his pleasure. Cameroon found these statements to have “strip[ped] them of any legitimacy to represent the Bakweri...” warranting the application of the rarely used<sup>101</sup> Article 56(3) of the Banjul Charter to declare the communication inadmissible. In mistaken reliance on *Mpaka-Nsusu Andre Alphonse v. Zaire*,<sup>102</sup> Cameroon advanced as its fifth objection that the matter was *res judicata* and could not be entertained by the Commission

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99. See Respondent’s Reply Memorial on Admissibility, ¶1 (on file with author).

100. *Id.*

101. See *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, African Comm’n H. & Peoples’ R., Commc’n No. 65/92 (not dated), which is perhaps the only communication the Commission has declared inadmissible for offending the letter and spirit of Article 56, paragraph 3 of the Banjul Charter which provides, in pertinent part, that communications relating to human and peoples’ rights filed with the Commission will not be considered if “written in disparaging or insulting language directed against the State concerned and its institutions. . . .” In declaring *Ligue Camerounaise* inadmissible, the Commission focused on four statements it found to offend paragraph 3 of Article 56. These were: “Paul Biya must respond to crimes against humanity;” “30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya;” “regime of torturers;” and “government barbarisms.”

102. See *Mpaka-Nsusu Andre Alphonse v. Zaire*, African Comm’n H. & Peoples’ R., Commc’n 15/88 (not dated).

## 130 ANNUAL SURVEY OF INT'L &amp; COMP. LAW [Vol. XIII

since a sister international tribunal (the U.N. Sub-Commission) had already heard the matter on its merits.<sup>103</sup>

Cameroon's most substantial preliminary objection was the failure of complainant to exhaust local remedies since all the actions taken by BLCC did not correspond to the remedies mentioned in the Banjul Charter. More importantly, complainant had not even bothered to seise the local courts. BLCC, Respondent State insisted, "must give the Cameroonian courts the opportunity to examine the BAKWERI (sic) case instead of hiding behind the total suspicion cast on the entire judicial system in order to evade it and transform the Banjul Commission into a court of first instance."<sup>104</sup> Cameroon objected to the admissibility of the communication on the ground that there is no provision under Cameroonian law that excludes any form of appeal against acts of the executive branch.<sup>105</sup> Relying on the *Velasquez Rodriguez* case,<sup>106</sup> Cameroon argued that "it must not hastily be concluded that a State Party to the convention has neglected to act in compliance with its obligation to provide effective local remedies."<sup>107</sup> Accordingly, BLCC, Cameroon reasoned, should not be allowed to transform the Commission into a court of first instance, as this would be tantamount to rewarding complainant for its failure to respect the rule of exhaustion of local remedies; a rule which "implies legal action brought before the courts and not just political actions."<sup>108</sup> Admitting the BLCC complaint would, in respondent State's view, amount to affording complainant uncalled-for favoritism since it had made no effort between the time the privatization decree was announced and the commencement of this action to take any action against the State of Cameroon before local courts. Domestic courts "cannot be avoided on the basis of subjective suspicions or because of allegations that it is a politically charged case or a politically sensitive case," Cameroon insisted.<sup>109</sup>

##### 5. The Commission's Decision on Admissibility

In its decision on admissibility taken at its 36<sup>th</sup> Ordinary Session in November-December 2004, the Commission rejected all but one of Respondent State's preliminary objections. It, however, upheld the Cameroon's objection concerning BLCC's failure to exhaust all available domestic remedies before seising the Commission. In rejecting Respondent State's

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103. See Respondent's Reply Memorial, *supra* note 99.

104. See Respondent's Rejoinder Memorial, at 3 (May 5, 2003) (on file with author).

105. *Id.* at 2.

106. *Velasquez Rodriguez*, *supra* note 89.

107. Reply Memorial, *supra* note 99.

108. *Id.*

109. *Id.*

*locus standi* objection that BLCC does not have standing to bring the matter before the Commission, it was noted that the complainants (including the counsel representing them) are all Bakweri, and hence victims of the violation.<sup>110</sup> Furthermore, BLCC was the accredited representative of the Bakweri with authority to speak for them as backed by a resolution adopted by the custodians of the Bakweri lands, i.e., the traditional rulers and notables.<sup>111</sup>

These factual considerations aside, the Commission went further to reject Respondent State's restrictive interpretation of the *locus standi* requirement noting that it was never meant "to imply that only victims may seize the African Commission. In fact, all that Article 56 (1) demands is a disclosure of the identity of the author of the communication, irrespective of him/her being the actual victim of the alleged violation." The *locus standi* requirement, the Commission took pains to point out:

is conveniently broad to allow submissions not only from aggrieved individuals but also from other individuals or organisations (like NGOs) that can author such complaints and seize the Commission of a human rights violation. The existence of direct interest (like being a victim) to bring the matter before the Commission is not a requirement under the African Charter. The clear rationale here for allowing a broad gateway for complaints under the Charter is the practical understanding, in Africa, that victims may face various difficulties impairing them from approaching the African Commission.<sup>112</sup>

All these factors, the Commission noted, were present in the case at bar:

the complainants are themselves Bakweri, who allege violation of their ownership of historical lands, and their counsel himself and the BLCC have been duly authorized, by a resolution of chiefs, to further the interests of the Bakweri, which fact has not been denied by the Respondent State.<sup>113</sup>

Without straying from the drafters intent behind Article 56(1) of the Banjul Charter, the Commission drove home the point that any complainant before the Commission "may be represented, through express consent or by the self-initiative of the author who speaks for him/her, irrespective of

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110. See Commission Decision, *supra* note 61, at ¶46.

111. *Id.*

112. *Id.*

113. *Id.*

## 132 ANNUAL SURVEY OF INT'L &amp; COMP. LAW [Vol. XIII

the fact that it is known to the Commission that one is soundly capable of representing oneself."<sup>114</sup> While BLCC had *locus standi* and was entitled to bring this communication before the Commission because of a direct interest in the matter, that need not always be case.

Having disposed of the *locus standi* problem, the Commission next turned its attention to Respondent State's objection that BLCC failed to present a *prima facie* case because the "communication is unclear, interchangeably spoke of various matters, and is improper as it remained deliberately imprecise about the illicit acts."<sup>115</sup> Having meticulously examined the original complaint and its supporting documents, the Commission observed that "contrary to the Respondent State's objections, it is evident in the file that the Complainant is indeed clearly alleging the alienation of the Bakweri Lands, which was triggered by the Presidential Decree No. 94/125 of 14<sup>th</sup> July 1994 where the Government of Cameroon listed the Cameroon Development Corporation (CDC) which is situate on Bakweri lands."<sup>116</sup> The Commission then concluded that BLCC's allegations were sufficiently clear to be taken up by the Commission.

The Commission summarily rejected Respondent State's objection that the BLCC complaint describes Cameroon's judicial system in language that could be considered insulting within the meaning of Article 56(3) of the Banjul Charter. The Commission found nothing in the various submissions of the complainant to warrant the invocation of Article 56(3) of the Charter to justify declaring the complaint inadmissible on the grounds that it was written in disparaging or insulting language:

The Complainant can allege, among others, and as it did with a view to be exempted from exhausting local remedies, that the president of the Republic wielded extraordinary powers so as to influence the judiciary and that the judiciary is impartial and lacked independence. This would be nothing but a mere allegation depicting, as it perceives it, the complainants comprehension of the offices that it thought would not provide it with any remedies as the African Commission would demand. Whether the allegations are true is another matter. At best, the Respondent State may, if it so wishes, employ other means to acquaint the African Commission that the situation is indeed otherwise. The African

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114. *Id.*

115. *See* Reply Memorial, *supra* note 99.

116. *See* Commission Decision, *supra* note 61, at ¶47.

Commission notes, however, that such a rebuttal is not necessary for purposes of examination under Article 56 (3).<sup>117</sup>

To Cameroon's objection that the U.N. Sub-Commission had settled the matter and the Commission should not therefore be barred under Article 56(7) of the Banjul Charter to re-litigate it, the Commission disagreed with both Cameroon's assessment of the facts as well as its interpretation of the Commission's jurisprudence on this issue.<sup>118</sup> In rejecting this objection, the Commission agreed with complainant's submission that the U.N. Sub-Commission did not decide on the merits of the case so as to warrant the discontinuance of the consideration of this matter by the Commission as Article 56(7) commands.<sup>119</sup> The Commission went on to shed light on the principle behind the requirement under this provision of the Charter and to educate future litigants as to the meaning of two principles embraced in Article 57(7), i.e., *non bis in idem* and *res judicata*. The goal of Article 57(7), the Commission noted, "is to desist from faulting Member States twice for the same alleged violations of human rights."<sup>120</sup> The *non bis in idem* rule or the Principle or Prohibition of Double Jeopardy, deriving from criminal law:

ensures that, in this context, no state may be sued or condemned for the same alleged violation of human rights. In effect, this principle is tied up with the recognition of the fundamental *res judicata* status of judgements issued by international and regional tribunals and/or institutions such as the African Commission.

The parties before the African Commission have not disputed the fact that they were the very same parties at loggerheads before the UN Sub-Commission disputing the same issues as before the African Commission. They both, however, admit that there has been no final judgment on the merits of their dispute by the UN Sub-Commission. The contents of the excerpts of the letter reproduced in paragraph 47 above have not been contested either, thereby buttressing the fact that the matter was not conclusively dealt with by the UN Sub-Commission. This means that the provision of Article 56(7) incorporating the principle of *ne bis in*

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117. *Id.* at ¶48.

118. *Id.* at ¶¶49-53.

119. *Id.* at ¶52.

120. *Id.*



134 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XIII

*idem* does not apply in the present case as there has been no final settlement of the matter by the UN Sub-Commission.<sup>121</sup>

It is against this backdrop that the Commission ruled that Cameroon's request to have the BLCC communication declared inadmissible under the provisions of Article 56(7) was untenable.

The Commission, however, agreed with the arguments put forward by respondent State on the issue of the nonobservance of local remedies. The Commission took note of the fact that the exhaustion of local remedies requirement under Article 56(5) of the Banjul Charter should be interpreted liberally so as not to close the door on those who have made at least a modest attempt to exhaust local remedies.<sup>122</sup> That said, it then took on BLCC for not even attempting to submit the matter before respondent State's courts:

as can be seen from the set of facts adduced before the African Commission by both parties in writing and orally, the complainant, not even once, has seized any local or national court. For this, it explained that the courts are not independent and are likely to decide in favour of the Respondent State whose President has a say on their appointment."<sup>123</sup>

The fact that a complainant "strongly feels that it could not obtain justice from the local courts does not amount to saying that the case has been tried" in those courts, the Commission held.<sup>124</sup> Such assertions are no more than subjective assessments, which cannot form the basis of a finding by the Commission that there are no effective domestic remedies that complainant can take advantage of to resolve the dispute.<sup>125</sup> The exhaus-

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121. *Id.* at ¶¶52-53.

122. *Id.* at ¶55.

123. *Id.*

124. *Id.*

125. Clearly, complainant's subjective judgments could have been subjected to an empirical investigation which is provided for in Article 58 of the Banjul Charter. The Commission was naturally reluctant to embark on this exercise, which would have entailed a thorough investigation of the Cameroonian judicial system, since it did not judge the allegations of judicial incompetence as violations as requiring an in-depth study. *But see, e.g., Finnish Ships Case (Finland v. United Kingdom)* 3 R. Int'l Arb. Awards 1484 (1934) arbitration, where the arbitrator, Judge Bagge of Sweden, undertook a thorough survey of British sources of authority before applying a strict test of the local remedies rule. British legislation provided that certain claims for compensation should be referred to an Admiralty Transport Arbitration Board, whose decision could be appealed on questions of law to the ordinary courts. Finnish shipowners, confronted with an adverse Board decision, took no appeal to the courts but requested their government to espouse their claim and proceed against the British government on the ground that Britain had incurred responsibility in international law by requisitioning the ships without subsequently paying compensation. At issue was whether the shipowners'

tion rule imposes on the complainant an affirmative duty “to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies”<sup>126</sup> and her doubts about the effectiveness of those remedies are not enough to absolve the complainant from this duty.

The Commission warned that a dangerous precedent would be set if a complainant appearing before it was allowed to end run the exhaustion rule solely on the basis of its subjective assessment of “the perceived lack of independence of a country’s judicial system.”<sup>127</sup> This would have the effect of forcing the Commission to take over the role of the domestic courts and transforming itself into a court of first instance, a “court of convenience when in fact local remedies remain to be approached.”<sup>128</sup> In taking this position, the Commission appeared to have strayed somewhat from its own jurisprudence, which frowns on a rigid mechanistic application of the rule.<sup>129</sup> The Commission did not, however, break any new ground, and would appear to have shied away from taking on the role of a court of first instance that many scholars and observers of the human rights situation in Africa have hoped it would do.<sup>130</sup>

### PART III: REVISITING THE EXHAUSTION OF DOMESTIC REMEDIES DOCTRINE

It is well-established in international law that before resorting to an international tribunal to redress a grievance against a state for injury on its national, that person must first exhaust all available domestic remedies, unless, of course, such remedies are clearly inadequate or their application is unreasonably prolonged.<sup>131</sup> Support for this rule was provided by the Permanent Court of International Justice in the *Interhandel Case (Switzerland v. United States)*, where the Court noted that the “rule that

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failure to appeal the points of law amounted to a nonobservance of the local remedies rule. *Id.* at 1498-1505.

126. Commission Decision, *supra* note 61, at ¶55.

127. *Id.* at ¶56.

128. *Id.*

129. In its jurisprudence, the Commission has always cautioned against a mechanical application of the domestic remedies rule, particularly in “cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation.” *See, e.g.,* Free Legal Assistance Group et al. v. Zaire, African Comm’n H. & Peoples’ R., Commc’n No. 25/89, 49/90, 56/91, 100/93, ¶3 (not dated); *but see* International Pen v. Sudan, African Comm’n H. & Peoples’ R., Commc’n No. 92/93; Kenya Human Rights Commission v. Kenya, African Comm’n H. & Peoples’ R., Commc’n No. 135/94; Alfred B. Cudjoe v. Ghana, African Comm’n H. & Peoples’ R., Commc’n No. 221/98. *See also* U.N. H. R. Comm., Commc’n No. 192/85, *S.H.B. v. Canada*, U.N. Doc. CCPR/C/OP/2 at 64 (1990).

130. *See, e.g.,* Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AM. J. INT’L L. 1, 16 (2003).

131. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §713, Comment and Reporters’ Notes (1987).

local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."<sup>132</sup> Both the Banjul Charter and the jurisprudence of the African Commission recognize this rule. Article 56(5) of the Banjul Charter requires the pursuit and exhaustion of domestic remedies before Commission proceedings may be instituted.<sup>133</sup> The Commission has also articulated three pragmatic reasons why the requirement to exhaust domestic remedies is a necessary first step before international proceedings are engaged.<sup>134</sup> The first of these is the need to "give 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 level."<sup>135</sup> Secondly, that a government against whom a complaint has been brought "should have notice of a human rights violation in order to have an 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."<sup>136</sup> Finally, the requirement of prior exhaustion of domestic remedies before seising the Commission is intended to ensure that the Commission does not become a "tribunal of first instance for cases which an effective domestic remedy exists."<sup>137</sup>

For a point which was an essential element in BLCC's case for the admissibility of the complaint before the Commission, it is important to enquire why<sup>138</sup> complainant did not even "attempt the exhaustion of local remedies"<sup>139</sup> before seising the Commission. BLCC instead tried to dis-

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132. See *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. Rep. 6, 26-27 (March 21). For a recent discussion by the World Court of the local remedies rule, see *Elettronica Sicula, S.p.A (ELSI) (United States v. Italy)*, 1989 I.C.J. 15, 28 I.L.M. 1111 (July 20).

133. Banjul Charter, *supra* note 12, art. 56(5).

134. See *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, African Comm'n H. & Peoples' R., Commc'n No. 155/96, ¶¶37-39.

135. *Id.*

136. *Id.*

137. *Id.*

138. This enquiry is warranted even though the Commission did not find any of the reasons advanced by complainants sufficiently convincing to declare the communication admissible.

139. Based on discussions the author had with BLCC's Secretary General at the early stages of this litigation, it would appear that there was some concern within the leadership of BLCC on the effect of a negative judgment on the morale of the Bakweri people and whether such a decision would not weaken their resolve to continue with the land reclamation fight. The announcement of the privatization of the CDC had galvanized the Bakweri and re-energized BLCC as never before, and the group's leadership did not want to lose this momentum. They were of the view that submitting to the local courts was far too risky, convinced that the courts were already biased against their cause. The Government was also doing everything possible to buy-off Bakweri Traditional Rulers, almost all of whom but for a few dissidents, like Chief Moka Endeley of Buea, were members of the BLCC Board of Trustees. A split in their ranks, it was felt would send a bad signal to the rank-and-

charge this burden by claiming to fall within one or more of the admitted exceptions to the exhaustion rule. BLCC justification for the nonobservance of the exhaustion rule hinged on this threshold question: where it is clear that the local courts are totally subservient to the executive, who has taken the decision being challenged, is complainant required to exhaust domestic remedies? In response, BLCC offered three reasons why, under these circumstances, it should be excused from complying with the requirements of this rule. First, that the Cameroonian courts are notoriously lacking in independence, as there is no real separation between the executive and judicial branches of government. The second reason was the inadequacy of the system of judicial protection, given that the courts are over-burdened and corrupt. And the third, complainant's expressed fears that justice would not be done in this case because of judicial bias.

Article 15 of the International Law Commission's Draft Articles on Diplomatic Protection,<sup>140</sup> which deals with the exceptions to the local remedies rule, identifies five different circumstances in which local courts offer no prospect of redress, only one of which, Article 15(a), concerns us here. Article 15(a) provides that "local remedies do not need to be exhausted where (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such remedies."<sup>141</sup> In the Commentary to this article, the draftsman offers the following, *inter alia*, as instances when the requirement of exhaustion of local remedies may be dispensed with: (a) local courts are notoriously lacking in independence; (b) there is consistent and well-established line of precedents adverse to the claimant; and (c) the respondent State does not have an adequate system of judicial protection.<sup>142</sup>

#### 1. The Subordination of the Judiciary to the will of the Executive

Support can be found in judicial decisions for the view that where the local courts have proved to be notoriously lacking in independence, a complainant can be excused from seeking redress in that court system.<sup>143</sup> This is one of the grounds BLCC invoked for justifying the non-

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file and put paid to the Bakweri struggle. *See Editorial: Biya Appeases Bakweri Chiefs*, THE HERALD, Jan. 22, 2003, at 2 (Cameroon).

140. *See* I.L.C., Draft Articles On Diplomatic Protection, Report Of The I.L.C., 55<sup>th</sup> Sess. GAOR, 58<sup>th</sup> Sess., Supp. 10, U.N. Doc. A/58/10,, at76 (May 5-9, 2003).

141. *Id.*

142. *Id.* at 79.

143. *See Robert E. Brown Claim* 2 I.L.R. 66, 6 R. Int'l Arb. Awards 120 (1923) (describing how the country's President threatened to suspend Chief Justice from office in the event of his failure to uphold the right of the executive and legislative branches of government to override the Constitution); *Velasquez Rodriguez*, *supra* note 89, at 304-309.

exhaustion of local remedies. BLCC explained that the legal and political context in which justice is administered in Cameroon allows the President to wield extraordinary powers at the expense of the judiciary. This subordination of the judicial branch to the will of the presidency goes back to the origins of the origin of the Republic. In stitching together the basic law of the land, the constitutional draftsman set out to create an “*imperial presidency*”<sup>144</sup> by making this institution the font of a vast array of judicial and non-judicial powers. As a result of this deliberate constitutional engineering, appointment to and removal from high office under this scheme is by Presidential decree. The President appoints the Prime Minister and other members of Government (Article 10).<sup>145</sup> However, none of these executive officers exercise any independent authority since their authority is merely delegated. The prime minister, who is the head of government, has been described by one publicist as someone who functions only as a “subordinate to assist the President in the exercise of *his* executive power. He is not a co-beneficiary with the President and his appointment in charge of any departments does not imply an abdication by the President of his power over those departments.”<sup>146</sup> In this system of a single unified Executive, arguably, the last word on domestic remedies, whether of an administrative or legal nature, in the Cameroonian

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144. See e.g., Mbu Etonga, *An Imperial Presidency: A Study of Presidential Power in Cameroon*, in AN AFRICAN EXPERIMENT IN NATION BUILDING: THE BILINGUAL CAMEROON REPUBLIC SINCE REUNIFICATION 133-158 (Ndiva Kofele-Kale, ed., 1980).

145. Article 10, paragraph 1 provides: “The President of the Republic shall appoint the Prime Minister and, on the proposal of the latter, the other members of Government. He shall define their duties. He shall terminate their appointment. He shall preside over the Council of Ministers.” Article 27 delegates to the President the power to legislate texts outside a range of subjects that fall within the legislature’s competence. Outside this range of activities, the President virtually has *carte blanche* to enact legislation on just about anything. Interestingly, this delegation of legislative competence to the Executive is unaccompanied by any built-in safeguards to check against presidential excesses. See Law No. 06 of 18 January 1996 to amend the Constitution of 2 June, 1972 (“1996 Constitution”); see also Ndiva Kofele-Kale, LEGISLATIVE POWER IN CAMEROON’S SECOND REPUBLIC: ITS NATURE AND LIMITS 65-66 (1999).

146. See Etonga, *supra* note 144, at 136 (Emphasis in original).

context, is with the President of the Republic.<sup>147</sup> Presidential decisions carry a kind of *res judicata* effect on other state institutions and organs.<sup>148</sup>

Building on this first argument, BLCC submitted that the lack of an independent or impartial judiciary severely compromises the competence of any domestic court in handling the case at bar. Pointing out that the one striking feature about Cameroon's judiciary is its total lack of independence, since it is under the firm control of the President of the Republic.<sup>149</sup> Judicial officers owe their appointments to the President (Article 37(3))<sup>150</sup> and serve at his pleasure. This power of appointment and removal is like a sword of Damocles dangling over the heads of judges, ready to descend the moment one of them steps out of line. In theory though, the President is assisted by a Higher Judicial Council in the appointment of members of the bench and officials of the legal department. It is this body, sitting-in-council, that decides the fate of all judicial officers from judges, magistrates, procureurs of the Republic, down to senior court registrars. However, this organ, which is responsible for all ap-

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147. Although the Constitution provides for a separation of powers among the three branches of government, in reality the Executive overshadows the other two branches. This is how the U.S. State Department describes Executive power in Cameroon: "The 1972 constitution as modified by 1996 reforms provides for a strong central government dominated by the executive. The president is empowered to name and dismiss cabinet members, judges, generals, provincial governors, prefects, sub-prefects, and heads of Cameroon's parastatal (about 100 state-controlled) firms, obligate or disburse expenditures, approve or veto regulations, declare states of emergency, and appropriate and spend profits of parastatal firms. The president is not required to consult the National Assembly. *The judiciary is subordinate to the executive branch's Ministry of Justice.* The Supreme Court may review the constitutionality of a law only at the president's request." U.S. Dep't of State, *Background Notes: Cameroon* (Oct. 2006), available at <http://www.state.gov/r/pa/ei/bgn/26431.htm> (emphasis added).

148. It is at this level that some nine years ago the Bakweri victims of uncompensated land expropriation lodged their petition for presidential relief.

149. The Human Rights Committee (hereinafter "HRC") was among the first international human rights tribunals to observe that Cameroon's judiciary fails to meet internationally-accepted norms of independence. After reviewing Cameroon's 1994 periodic report on the state of human rights in the country, the HRC questioned "*the independence of the judiciary; in particular, the composition of the Supreme Council of Justice does not seem such as to guarantee respect for this principle.*" U.N. H.R. Comm., Concluding Observations of the Human Rights Committee: Cameroon. 18/04/94, U.N. Doc. CCPR/C/79/Add.33, at ¶14 (Apr. 18, 1994) (emphasis added). Note that the members of this council are appointed by the President who presides over its deliberations! The HRC then recommended that "*measures should be taken, if necessary in the form of a constitutional reform, to guarantee the independence and impartiality of the judiciary, in accordance with article 14, paragraph 1, of the Covenant.*" *Id.* at ¶24 (emphasis added). Five years later, when considering Cameroon's third periodic report, the HRC again observed that Respondent still had not addressed all the concerns it expressed in its previous concluding observations on the second report of 1994. See U.N. H.R. Comm., Concluding Observations of the Human Rights Committee: Cameroon. 04/11/99., U.N. Doc. CCPR.C.79.Add.116, at ¶2 (Nov. 4, 1999) (Emphasis added); see also discussion *supra* note 22.

150. "The President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and of the legal department. He shall be assisted in this task by the Higher Judicial Council which shall give him its opinion on all nominations for the bench and on disciplinary action against judicial and legal officers...." See Law No. 65 of 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, Article 37(3) (Cameroon).

pointments, promotions and dismissals in the judiciary, is completely under the control of the President, who appoints the majority of its members and presides over all its meetings.

The supremacy of the Presidency and its dominance over the judiciary, BLCC argued, has given rise to a peculiar form of *de facto* Executive 'preemption' of decision-making by subordinate state organs, regardless of whether there is an actual conflict between them or not.<sup>151</sup> Presidential 'preemption' of decision-making at all levels and in all areas, judicial as well as non-judicial, operates in much the same way as an ouster clause which bars "the ordinary courts from taking up cases placed before the special tribunals or entertaining any appeals from the decisions of the special tribunals."<sup>152</sup> After examining the legal effect of "ouster" decrees in *Ken Saro-Wiwa et al.*, the Commission concluded that they tend to "render local remedies non-existent, ineffective or illusory" because they create a "legal situation in which the judiciary can provide no check on the executive branch of government."<sup>153</sup> The involvement of Executive branch officials in the Bakweri land matter is not entirely dissimilar to that described in *Ken Saro-Wiwa*, but in the former, as a result of *de facto* presidential override of the functions of the courts, the judiciary has been reduced to impotence, incapable of playing its traditional role of providing a check on the executive branch. In practice, presidential preemption ousts the jurisdiction of the ordinary courts thus depriving complainants of effective domestic relief. It should be noted that complainants were seeking a declaration from the Government of Cameroon that lands registered in the Imperial German land registers (*Grundbuch*), occupied by CDC since 1947, and defined as Private Property under Cameroon's 1974 Land Law belong to the Bakweri. However, such an acknowledgment that would bind Respondent State could only come from the authority that issued the 1994 CDC Privatization Decree in the first place, or given on its instructions. That authority being none other than the President and Head of State. Although the President chose not to make such a declaration between 1994 and the filing of the complaint before the Commission, he could have, in theory, been compelled by

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151. This *de facto* preemptive authority is peculiar for two reasons. First, it is *implied* since the Constitution is noticeably silent on the exercise of such authority. Second, because the underlying constitutional objective of the preemption doctrine is to avoid conflicting regulation of conduct by various official bodies that might have some authority over the same subject matter. In the Cameroon scheme, however, presidential 'occupation' of the judiciary and the legislature has nothing to do with jurisdictional conflicts. Rather, it reflects the wide range of powers – legislative as well as judicial – that the Constitution confers on the President.

152. See International Pen, Constitutional Rights Project Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria, African Comm'n H. & Peoples' R., Commc'n No. 137/94, 139/94, 154/96 and 161/97 (not dated).

153. *Id.*

court order to do so. But such an order, BLCC submitted, was not likely to come from a court system that is under the President's total control and whose judges are personally appointed, promoted or removed, by him.

## 2. The Inadequacy and Unpredictability of Judicial Protection

Local remedies need not be exhausted where the respondent State does not have an adequate system of judicial protection. BLCC argued that there is, in Cameroon, an implied power of discretion built into the judicial system. As a consequence, justice is exercised in a discretionary manner through a process of *de facto* ousting of the jurisdiction of courts. This procedure manifests itself through legal decisions made by ministers and law officials completely by-passing the courts.<sup>154</sup> In theory as in practice, the President is the Supreme Magistrate with the power to delegate some of his executive and, by extension, his judicial powers to subordinate officials who act in his name.<sup>155</sup> Where justice has been found to be discretionary, the African Commission has not hesitated to declare a Communication admissible in order to give Complainant a forum denied

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154. Hardly a week goes by that the popular press fails to report on this "annoying interference." In an article entitled *Criminal Law: A conflict of systems*, Asong Ndifor, senior editor of *The Herald*, offers these examples: "During the trial of SCNC activists in Bamenda in 2001 the legal department wrote to magistrate Abenego Bea instructing him on how to handle the case. He repudiated the instruction and passed his judgement according to the evidence he had. He was later given a punitive transfer to the legal department in Buea. There is also the recent case where a Buea high court ruled that John Niba Ngu should be reinstated as general manager of the Cameroon Tea Estate but the South West legal department rejected the ruling and refused to order execution of the judgement." Asong Ndifor, *Criminal Law: A Conflict of Systems*, THE HERALD, June 16-17 2003, at 8 (Cameroon). In the Monday, August 11, 2003 edition of *The Post* newspaper, the Minister of Justice and Keeper of the Seals is reported to have "ordered that all pending matters concerning Beneficial Life Insurance Company be withdrawn from court. This order is contained in a submission filed by the Southwest Attorney General.... The Attorney-General stated in his submission that 'we have instructions from the Hon. Minister of State in Charge of Justice and Keeper of the Seals, that all pending matters in court, whether criminal or civil, touching and concerning the parties in this case be withdrawn from court.'" See *Minister Orders Withdrawal of All Beneficial Life Cases*, THE POST, No. 0495, Aug. 11, 2003, at 2 (Cameroon).

155. Article 10(2) of the 1996 Constitution provides: "The President of the Republic may delegate some of his powers to the Prime Minister, other members of Government and any senior administrative officials of the State, within the framework of their respective duties." See Law No. 65 of 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, Article 10(2) (Cameroon). For instance, sometime in February 2002, the Minister of External Relations represented before another international body that the Government was favorably disposed towards a friendly settlement of the Bakweri matter. This undertaking was clearly meant to signal the Government's preference for a non-judicial resolution. Complainants in good faith relied on this stated preference for a resolution through dialogue to their own detriment. The Minister of External Relations Foreign Minister, an official with no independent authority and whose authority is merely delegated, could not have taken such a binding obligation without explicit directives from the presidency. However, the effect of this executive branch official's decision was to preempt other organs of government, including the courts, from looking into the Bakweri land question.



them in the home state to be heard.<sup>156</sup> The issue in *Constitutional Rights Project* was a provision in the Robbery and Firearms (Special Provisions) Act, which conferred on the State Governor the power to confirm or disallow a conviction for violations of this law by a Special Tribunal. The Commission described the Governor's power as "discretionary extraordinary remedy of a nonjudicial nature" and ruled that "it would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles."<sup>157</sup> As a consequence, any remedy provided through this source would be neither adequate nor effective.

It is well-documented that the domestic courts are overburdened with a backlog of cases that will take years to clear. For instance, a 1996 World Bank Report put the number of cases pending before the Cameroon Supreme Court at 3,000 in 1996<sup>158</sup> (*unofficially* the number is 4,343 as of June 2003). Incidentally, it is the same year that a representative of Cameroon appeared before the African Commission, at its 20<sup>th</sup> session in October 1996, urging the Commission to overturn its decision on admissibility in the case of *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*<sup>159</sup> on the ground that Mazou had not exhausted his domestic remedies! The Mazou case had been pending in Cameroon's Supreme Court for four years when this incredulous appeal was made in 1996.<sup>160</sup>

Aside from *Annette Pagnouille*, which the Commission declared admissible, after having concluded that Mazou's remedy was unreasonably prolonged, BLCC also referred the Commission to a case currently before it, *Victims of Post-Electoral Violence in the North West Province v. Cameroon*.<sup>161</sup> This case had languished in the Supreme Court for five years with

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156. See *Constitutional Rights Project v. Nigeria*, African Comm'n H. & Peoples' R., Commc'n No.60/91 (not dated).

157. *Id.*

158. See World Bank, *Technical Annex To The Memorandum And Recommendation (Report No. P-6928-CM) On A Proposed Credit In The Amount Equivalent To Sdr 8.8 Million To The Republic Of Cameroon For A Privatization And Private Sector Technical Assistance Project*, World Bank Rpt No. T-6928-CM, at 6, ¶ 25 (May 22, 1996) (commenting on the slowness of the judicial process and observed that in 1996 3000 cases were pending at the Supreme Court). The Bank, it will be recalled, is the main underwriter of Respondent's privatization program which directly affects the disputed Bakweri lands.

159. See *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, African Comm'n H. Peoples' R., Commc'n 39/90.

160. Yet in entering this plea, Cameroon's agent, who was the one possessing superior knowledge about the court's case load, should have known about its huge backlog; and, as an officer of the court, was duty bound to disclose to the Commission how overburdened the Cameroon courts were at that time.

161. See *Victims of Post-Electoral Violence in the North West Province v Cameroon*, African Comm'n H. & Peoples' R., Commc'n No. 272/2003.

no relief in sight before the complainants decided to seise the African Human Rights Commission.<sup>162</sup>

Corruption also contributes to the inadequacy and unpredictability of judicial protection offered by the local courts.<sup>163</sup> Cameroonian courts have been routinely dismissed by expert observers as well as the general public<sup>164</sup> as corrupt, where justice is for sale, usually to the highest bidder and to barons of the regime. These observations have been made by the highest ranking state official responsible for the judicial, none other than Minister of Justice and Keeper of the Seals.<sup>165</sup> Even the President of the Republic has weighed in on this debate, in his 1999 New Year's Address to the Nation. After lamenting the scourge of corruption which has now spread to all sectors of Cameroonian society, the President next turned his attention to "judicial and legal officers whose task is precisely to ensure respect for the rules governing our society." As regards this branch of government, the President observed that "[t]here are still many cases where justice is not rendered as it should. That is to say with dispatch and impartiality, in strict conformity with the laws and procedures in force. This should not be tolerated. Even though I would want to believe

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162. Then there was the case of *Mukong v. Cameroon*, which was declared admissible by the HRC after the Cameroon Supreme Court failed to take any action for two years. See U.N. H.R. Comm., *Mukong v. Cameroon*, Commc'n No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (Aug. 10, 1994).(a)

163. A 1996 World Bank Report called attention to problems with the administration of justice in Cameroon which it described as "manifold. . . Judgements are often rendered in contradiction to the law; parties adopt dilatory *measures*; delays in dealing with cases are long (e.g., there are 3,000 cases pending at the Supreme Court); the Office of the Clerk of the Court operates in a very rudimentary fashion and is the source of substantial delays; the bailiff system operates haphazardly and there is much interference with the work of bailiffs; registering a mortgage is a difficult proposition." World Bank, *supra* note 158, at 6, ¶25.

164. For instance, three out of ten Cameroonians polled by Gallup International for Transparency International's 2003 Global Corruption Barometer, singled out the judiciary as the institution from which they would like to eliminate corruption if they were given the opportunity. The July 2002 Gallup survey polled 30,487 people in 44 countries on the following question: "If you had a magic wand and could eliminate corruption from one of the following institutions, what would your first choice be?" The institutions enumerated including among others, the courts, the customs, educational system, medical services, police, etc. Thirty-one percent of the Cameroonian respondents picked out the courts as their first choice with the police coming in a distant second being singled out by only 13.7 per cent of the respondents. In only two other countries did the majority of the respondents single out the court system: Indonesia (32.8%) and Peru (35%). Transparency International, *The Transparency International Global Corruption Barometer: A 2002 Pilot Survey of International Attitudes, Expectations and Priorities on Corruption*, at 29 (July 2003), available at <http://www.transparency.org/content/download/1566/8095/file/barometer2003.en.pdf>.

165. While admitting that the Cameroon judiciary is corrupt, Justice Minister Amadou Ali tries to place the blame elsewhere: "*la corruption existe parce qu'elle est entretenue par des corrupteurs, dont beaucoup se recrutent, malheureusement, dans le monde de l'entreprise (...) Parce qu'ils veulent a tout prix gagner leurs procès, des chefs d'entreprises approchent des magistrats et leur font des offres alléchantes, les amenant ainsi a rendre des décisions qui, si elles arrangent leurs commanditaires, donnent de la justice camerounaise, l'image d'une justice inapte à soutenir le développement de l'entreprise et insécurisante pour les investissements.*" LE MESSAGER, no. 1519/vendredi, 06 juin 2003, at 5 (Emphasis added).

so, the majority of our judicial and legal officers are upright, the deviant practices observed may lay the institution open to suspicion....”(Emphasis added).<sup>166</sup>

### 3. Presence of Bias

Faced with a consistent and well-established line of precedents adverse to a complainant, the requirement of exhaustion of local remedies may be dispensed with.<sup>167</sup> In the *Robert E. Brown* case, an international arbitral tribunal held that local remedies were ineffective because the domestic courts had been “reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of the constitutional guarantees and inhibitions.”<sup>168</sup> At least one publicist expressed the view that the *Robert E. Brown* case “illustrates the well-established principle that where the executive branch dominates the courts, judicial remedies against executive action need not be pursued.”<sup>169</sup>

In its written pleadings and oral submissions, BLCC drew the Commission’s attention to a pair of judicial decisions directly related to the Bakweri land claims that convinced complainant that it was not likely to receive fair treatment in the local courts. The first was a court judgment intended to resolve a management crisis which had embroiled one of the recently private CDC estates and which the provincial attorney general summarily overturned. The second was the local court’s treatment of a nuisance law suit brought by an organization which had the backing of prominent Bakweri politicians and high ranking State officials that claimed to be the authentic representative of the Bakweri on the land question and not BLCC.

#### a. *The Cameroon Teas Estate Management Crisis*

Secret negotiations between the Cameroon Government and a phantom South African outfit, Brobon Finex Pty Ltd.<sup>170</sup> and its Cameroonian sub-

166. Address by President Paul Biya, The Head of State’s New Year Message to the Nation, (Dec. 31, 1999) (Cameroon).

167. See *Panevyzys-Saldutiskis Railway*, *supra* note 26; S.S. “Lisman,” 3 R. Int’l Arb. Awards 1769, 1773; S.S. “Seguranca,” 3 R. Int’l Arb. Awards 1861, 1868; *Finnish Ships Case*, *supra* note 125, at 1495; X. v. Federal Republic of Germany, 1 Yearbook of the European Convention on Human Rights 138 (1956); X. v. Federal Republic of Germany, 2 Yearbook of the European Convention on Human Rights 342, 344; X. v. Austria, 3 Yearbook of the European Convention on Human Rights 196, 202.

168. See *Robert E. Brown*, *supra* note 143, at 198.

169. See David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT’L L. 389, 403 (1964).

170. An investigation ordered by the Secretary General of the Bakweri Land Claims Committee to establish the true identity of Brobon Finex failed to come up with any evidence that this company was registered in South Africa or anywhere else in the world. See BLCC, *Without a Trace: On the*

sidiary, Cameroon Tea Estates (CTE), to dispose of the Tole tea estates, which sit on 454 acres of prime Bakweri land, occurred months before the BLCC action was filed.<sup>171</sup> As a matter of fact, the sale was consummated<sup>172</sup> the very month BLCC seised the African Commission. However, legal developments in the aftermath of this sale gave BLCC reason to believe that any action taken before a Cameroonian court would likely produce an unfavorable result. Briefly, Mr. John Niba Ngu, a former General Manager of CDC, former Minister of Agriculture, and the man who had brokered the CTE deal with the Government, was appointed General Manager of the company in October 2002. Barely three months later, Ngu was relieved of his position by the board of directors of Brobon Finex, the majority shareholder of CTE, and replaced by his deputy. On January 8<sup>th</sup>, 2003, John Ngu sought and obtained injunctive relief from the Fako High Court in the South West Province by way of an *ex parte* order temporarily suspending his dismissal and reinstating him as the “legally appointed General Manager” of CTE.<sup>173</sup> Two days later, the Procureur General of the South West Province (“SW Procureur General”), the judicial officer charged in the High Court Order to lend support to bailiffs and process servers executing the order, issued countermanding instructions *overturning* the ruling!<sup>174</sup> Because this highly unorthodox conduct by a judicial officer failed to draw a rebuke from the Minister of Justice and Keeper of the Seal, BLCC concluded that there by the grace of God goes the Bakweri land case.

The management feud in CTE was a simple commercial dispute, a purely civil matter pitting two private litigants that could have been, and was temporarily resolved by a properly constituted court, pending a full hearing on the merits. Yet, the State found it necessary to step in to block its execution. The dismissed general manager was not asking anything extraordinary from the court, only that his business associates should be

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*Trail of the Elusive Brobon Finex, A BLCC-USA Investigative Report* (Oct. 2003) (on file with author).

171. See Statement by the Bakweri Land Claims Committee (BLCC) following the announcement on the Privatization of the Tea Estates of the Cameroon Development Corporation (June 5, 2002) (on file with author).

172. See Without a Trace, *supra* note 170. The Brobon Finex/Cameroon convention was touted as the very model of privatization. It would later turn out to be nothing more than a sweetheart deal designed to enrich a few high-ranking, well-connected barons of the regime, who conveniently chose to hide behind a South African corporate shield.

173. *In re* John Niba Ngu, Fako High Court (Jan. 8, 2003). Like all court rulings in Cameroon, the High Court order carried the following instructions to law enforcement officials: “WHEREFORE the President of the Republic of Cameroon commands and enjoins all Bailiffs and Process Servers to enforce this Ruling, the Procureur General and the State Counsel to lend them support and all Commanders and Officers of the Armed Forces and Police Forces to lend them assistance when so required by Law.” *Id.* (Emphasis added).

174. Judgment No. HCF/25/P/2002-2003/1M/03 (Jan. 10, 2003) (Cameroon).

compelled to respect the internal law of their company: that as an appointee of the CTE Board of Directors, only that board and not the Board of Directors of Brobon Finex, even though it holds the majority shares in CTE, can lawfully dismiss him as the general manager.

What court observers had expected of the SW Procureur General was that, as Government's lead lawyer, faced with an *interlocutory* ruling the execution of which, in his judgment, could have serious immediate and irreparable consequences on the public order, was to do one of three things. He could have asked the same trial court that issued the offending order to lift it. Or, to the extent he was convinced that there was trial court error with respect to the manner in which the *ex parte* order was made or that the order completely ignored a compelling public interest that had to be protected, then he had the option of appealing the ruling in the Court of Appeals. Given the *provisional* nature of the high court order, the SW Procureur General was still left with a third option—from a procedural standpoint, this would have been his first option—to ask to be joined as a necessary party so that when the matter eventually came up for hearing on the merits he would then be able to argue the State's interest (after all, his client, the State, is a 35 percent shareholder of CTE). The SW Procureur General decided not to pursue any of these options. The option the provincial attorney chose was the one option that was *not* available to him, that of *disobeying* a High Court order regardless of how repugnant he may have found it to be! The SW Procureur General's attempt to subvert the judicial process was a wake-up call for BLCC that the local courts would not be able to protect their interests.

It is important and necessary to situate the SW Procureur General's action of overturning a court order in the CTE management crisis, to understand how Complainants' confidence in the domestic court was badly shaken. First, the feud within CTE management was directly related to the CDC privatization exercise. This exercise cannot be separated from the Bakweri land question because the two are linked symbiotically. First, BLCC had publicly registered its opposition to the CTE deal and called on the Cameroonian parties to renounce it and denounce their phantom South African partners. Second, the land in dispute is in Fako Division, in the jurisdiction of the SW Procureur General. Complainants' action for a declaratory judgment declaring the lands as private Bakweri property would have required the filing of a writ in the Fako High Court. This is the same court whose order temporarily staying the dismissal of the general manager of CTE was unilaterally set aside by the SW Procureur General. Finally, the SW Procureur, as Respondent's lawyer, would have been expected to appear before this court to defend Respondent's interest in this matter. This would have set the stage for a lawsuit

in which the highest ranking judicial officer in the province, standing in for the Minister of Justice and Keeper of the Seal, would have been the defendant, prosecutor and judge in its own cause. If the court ruled in a manner displeasing to the SW Procureur General, he would as he did in the CTE case, simply instruct law enforcement officers not to enforce the judgment.

*b. The Bakweri Cooperative Union of Farmers Law Suit*

In September 2003, the Bakweri Cooperative Union of Farmers (BCUF), a real estate and housing association,<sup>175</sup> brought a law suit in the Fako High Court against *Mola Njoh Litumbe*, the Secretary General of BLCC. Simultaneously with the filing of this action, counsel for plaintiff submitted a written complaint to the provincial attorney general, claiming that he had received, in his words, “*firm instructions from the Presidency of the Republic*,” to lodge a report, requesting that BLCC officials be investigated and charged with perjury, impersonation, among other things, for carrying out activities in Cameroon without benefit of a certificate of registration.<sup>176</sup> Acting on this complaint, the provincial attorney general authorized the judicial police to commence a criminal investigation of BLCC officials, beginning with its Secretary General.<sup>177</sup>

In the September 2003 action, plaintiff was asking for a declaratory judgment to the effect that BCUF, and no other corporate group, was the only legitimate organization to hold brief for the indigenous Bakweri people on all matters pertaining to their ancestral lands. Although BLCC was not named as a defendant in the suit, its Secretary General was. And although he was never served with notice of the pending action (he was out of the country when it was filed), the Fako High Court went ahead, in

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175. The “Bakweri Cooperative Union of Farmers” (hereinafter “BCUF”), it was later alleged before the Commission, was in fact an imposter organization that had misappropriated the name, identity and assets of the original BCUF. This information became public when the real BCUF, upon discovering that it was a plaintiff in a lawsuit that its board of directors had not authorized, petitioned the SW Procureur General to investigate the misappropriation and illegal use of its corporate identity by this group. The real BCUF, it is worth pointing out, is a union of twenty-six *cooperative societies* representing thousands of small-scale farmers in Fako Division, created fifty-three years ago. The imposter BCUF, on the other hand, is a real estate and housing association owned by thirty-one *individuals* and was registered barely two years ago to engage in speculative real estate ventures. When the attorney general for the South West province failed to take any action, the owners of the real BCUF then petitioned the Minister of State for Agriculture. Following a ministerial inquiry, the registration certificate of the imposter association was revoked and firm instructions were given to ensure that the order revoking its status receive the widest publicity possible. See *In the Matter of BLCC v. Cameroon* Submission Before the African Commission on Human and Peoples’ Rights, at 10 (Nov. 15, 2003), available at [http://www.blccarchives.org/files/2003\\_kalesubmissionachpr.pdf](http://www.blccarchives.org/files/2003_kalesubmissionachpr.pdf).

176. See Letter from BCUF to the Procureur General for the South West Province of 25<sup>th</sup> October 2003 (on file with author).

177. *Id.*

his absence, and held an *ex parte* hearing on plaintiff's motion for a declaratory ruling. These procedural defects notwithstanding, the trial judge delivered a default judgment in which he declared BLCC—a party that was not before the court and that was not named as a defendant in the original complaint—an illegal organization and then ordered it disbanded!<sup>178</sup>

Less than two hours after the order “disbanding” BLCC was read in open court, counsel for plaintiff was observed distributing copies of the *unsigned* bench order to the press and the general public. It would take another week before the *signed* and *official* opinion was ready for release!<sup>179</sup> The judgment raised many questions. First, how was it possible that BLCC, who was not named as a defendant in the action, would suddenly find itself disbanded by a local court, one month before its Counsel was due to appear before the African Human Rights Commission? Second, where and how did Counsel for plaintiff BCUF stumble on a copy of a high court judgment minutes after it was delivered? Who could have given him access to this privileged court document that had not yet been deposited in the court's registry? And what was Counsel's haste in rushing to the media with this order? Complainants believed that the criminal investigation of BLCC officials, the nuisance lawsuit, and the order disbanding BLCC, were all part of a plan hatched by agents of Respondent (either acting on instructions or *sua sponte*) to use the local judicial authorities to discredit the *bona fides* of their organization.

#### PART IV: REPRISE

The exhaustion of domestic remedies was never intended as a “rule of public police which States must treat as sacrosanct,” as Judge Eysinga noted in his dissent in the *Railway Case*.<sup>180</sup> The African Commission on Human and Peoples' Rights has also ruled against a too literal and mechanical application of the exhaustion rule, stressing that where it proves impractical or undesirable for a complainant to seise the domestic courts, then resort to the rule is unnecessary. This flexible approach in the application of this rule was very much evident in the Commission's decision to admit the complaint in *Association Pour la Sauvegarde de la Paix*.<sup>181</sup> Despite the complainant's failure to exhaust domestic remedies,

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178. See Judgment of the Fako High Court (signed version) (2003) (Cameroon) (on file with author).

179. See Judgment of the Fako High Court (unsigned version) (2003) (Cameroon) (on file with author).

180. See *Panevezys-Saldutiskis Railway Case*, *supra* note 26, at 37 (dissenting opinion).

181. See *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, African Comm'n H. & Peoples' R., Commc'n 157/96.

but given the number of States against whom the complaint was lodged, the Commission proceeded to waive this procedural bar in the higher interest of protecting human rights.

In a similar vein, the European Human Rights Court has also recognized the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism.<sup>182</sup> These cautionary words are intended to ensure that the exhaustion rule does not become an unjustified impediment to access to international remedies, itself a right under international human rights law as the Inter-American Court acknowledged:

the rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective. This is why Article 46.2 of the [American] Convention sets out exceptions to the requirement of recourse to domestic remedies prior to seeking international protection, precisely in situations in which such remedies are, for a variety of reasons, ineffective.<sup>183</sup>

While one has no doctrinal quarrel with the conceptual basis of the local remedies rule, it is the linear focus on its application that is cause for concern. This rigid focus on going through the domestic courts ignores other equally important aspects of the exhaustion rule.<sup>184</sup> Because the right to individual petition, captured in Article 58(7) of the Banjul Charter, holds such a prominent place in international human rights law, any restrictive interpretation of the exhaustion rule would end up not protecting this right.<sup>185</sup> The insistence that individuals seeking to assert their rights as global citizens, by appealing *directly* to this Commission, *must* first go through the national court system, even when it has been demonstrated that that system lacks independence, amounts to a preference for a formalistic approach that is totally at odds with the protection of the human rights enshrined in the Banjul Charter. Putting form over substance also leaves victims of human rights abuses in Africa defenseless against the all-powerful States. Any procedural system must be viewed as noth-

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182. See Akdivar et al. v. Turkey, (1996) Eur.Ct.H.R., Reports 1996-IV.

183. See Velásquez Rodríguez, Preliminary Objections, *supra* note 89, at ¶93.

184. The rule also talks of providing respondent government with notice of a human rights violation in order that it can remedy the violation prior to being haled before the Commission. The fear of contradictory judgments of law at the national and international levels is obviated in this case because Complainants, after waiting nine years for presidential action to no avail, are now before an international tribunal whose decision the Cameroon Constitution guarantees will be respected. Since the Constitution recognizes the supremacy of international law over domestic laws, there is no reason to fear that the Commission's decision will not be given *res judicata* effect by the national courts.

185. Banjul Charter, *supra* note 12, at art. 58(7).



ing but a means of attaining justice; and justice cannot be sacrificed for the sake of mere technicalities.<sup>186</sup>

A one-dimensional approach to the exhaustion rule creates an imbalance between individual complainants and respondent States, in favor of the latter. It makes it possible for the respondent State to avoid addressing the merits of a complaint alleging human rights violations through a well-timed objection to the nonobservance of *domestic legal remedies*. Thus, outside the well-known exceptions to this rule, such an objection is enough to deny an individual complainant, who alleges State violations of Charter guaranteed rights, from having his complaint heard on the merits. The right to individual petition includes the principle of procedural equality of the parties. This procedural equality of arms (*égalité des armes*) is essential to any jurisdictional system of protection of human rights. It is for international rights tribunals like the African Commission to redress this imbalance in order to preserve the principle of procedural equality. Since the case law of the African Commission is in a constant process of progressive development, a jurisprudential construction of Article 56(5) that would have the effect of putting the parties on an equal footing, and not create the appearance of protecting only respondent states to the clear detriment of individual, is necessary.

To assist in this process of reconstructing the Banjul Charter's exhaustion rule and rethinking its application in the African context, where judicial independence is more in theory than practice, we suggest that a narrow or restrictive interpretation of the rule should be avoided for three reasons. First, such an interpretation does violence to the plain language of the rule; second, a restrictive interpretation does not accord with international law; third, because a broad construction of the rule is favored by jurists and publicists. We suggest also that in applying the exhaustion rule, courts should weigh and balance the relative harms to the parties if the rule is waived. Human rights tribunals should not allow themselves to be stampeded by powerful States into treating the exhaustion of domestic remedies as an unbendable rule out of fear that relaxing it will transform these tribunals into courts of first instance. This specter of international human rights tribunals being 'flooded' with untold number of 'frivolous' complaints overstates the case. As one publicist noted, the effect, if not the intent, of States haled before these tribunals is to make access to them all but impossible for defenseless victims of human rights abuses whose "domestic courts are not able to serve as defenders of human rights," and

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186. See *Dismissed Congressional Employees v. Peru*, Cases 11.830 and 12.038, Inter-Am. C.H.R. Report No. 52/00, OEA/Ser.L/V/II.111 Doc. 20 rev. at 335 (June 15, 2000).

who “cannot afford to ‘oil the palm’ of the judge” in order to get their case “heard on time or at all.”<sup>187</sup> A little more flexibility in the application of the exhaustion rule is not likely to add to a court’s workload, nor will it have the apocalyptic effect on its procedural architecture that State parties claim to dread.

1. A Narrow Interpretation does Violence to the Plain Language of Article 56(5)

A quick perusal of the published decisions of the African Commission will reveal that in the majority of cases, the Respondent State’s first line of attack is to raise the exhaustion rule to deny admissibility.<sup>188</sup> The usual reason given is the need to avoid transforming the Commission into a tribunal of first instance.<sup>189</sup> Latching on to this rationale, Respondent States frequently interpret the domestic remedy, to which Article 56(5) of the Banjul Charter refers, to mean only remedies sought from courts of a *judicial nature*. It is submitted that this rigid interpretation of the exhaustion of local remedies rule does violence to the plain language of Article 56(5).<sup>190</sup> Under international law, the appropriate starting place in treaty interpretation is the text of the treaty. This textual approach to treaty interpretation is mandated by the rules of interpretation prescribed by the 1969 Vienna Convention on the Law of Treaties. Article 31 of the Convention provides that “a *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*”<sup>191</sup> What then is the plain and ordinary meaning to be given to the language of Article 56(5) of the Banjul Charter?

Article 56(5) states: “Communications relating to Human and Peoples’ rights referred to in Article 55 received by the Commission, shall be considered if they: .... 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”<sup>192</sup> There is

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187. See Udombana, *supra* note 130, at 16.

188. See Reply Memorial of the State of Cameroon in the BLCC v. Cameroon communication (“[T]he Government of Cameroon will concentrate on the question of the exhausting of local remedies, which has been discussed at length by the Complainants.”) (emphasis added).

189. *Id.* (“In addressing this question, and contrary to the Complainants’ claims, the Government of Cameroon is not in any way trying to use *technicalities* to prevent the Commission from examining the case submitted to it. It is simply trying to preserve the integrity of the Charter’s procedural system, by ensuring that its “flexible” interpretation does not encourage the Complainants to undertake subjective and abusive proceedings.”)[Emphasis in original].

190. Banjul Charter, *supra* note 12, at art. 56(5).

191. See Vienna Convention On The Law Of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27 (1969), entered into force on Jan. 27, 1980, in accordance with Article 81(1) (emphasis added).

192. Banjul Charter, *supra* note 12, art. 56(5).

nothing ambiguous in the language of Article 56(5) that would warrant dispensing with the plain language rule. Article 56, paragraph 5 makes no mention of limitations to the local remedies that must be exhausted. While it is commonly understood that local remedies would include recourse to the courts, however, on the face of it Article 56(5) does not limit domestic remedies to only those that can be obtained in the court system. Nor does it expressly exclude from local remedies those provided by legislative or executive authorities. Accordingly, the plain and ordinary meaning of this provision should be given effect as it expresses the intention of the framers of the Banjul Charter.

Following the textual approach to treaty interpretation favored by the Vienna Convention, when a tribunal is called upon to interpret a treaty, such as the Banjul Charter, it must proceed on the assumption that the intention of the framers of this instrument is expressed in the words of the document which it has to interpret. In the instant case, it must be presumed that the intention of the framers with respect to the exhaustion of local remedies rule is clearly expressed in Article 56(5).<sup>193</sup> Therefore, any attempt to restrict the meaning of "local remedies" to only those "*sought from courts of a judicial nature*" must be rejected because such is not the expressed intention of those who drafted Article 56(5) of the Charter.

Furthermore, the Vienna Convention's rules of interpretation prefer an interpretation that conforms to the object and purpose of the instrument. A narrow reading of Article 56(5) clearly jeopardizes the objectives of the Charter. In this wise, provisions of human rights law should be liberally construed to accomplish the purposes of the international bill of rights in general and the Banjul Charter in particular. The phrase "*after exhausting local remedies*" has little inherent meaning and can be construed narrowly or broadly, therefore only a broad construction will ensure the effective protection of the guaranteed human rights under the Banjul Charter.

## 2. A Restrictive Interpretation not in Accord with International Law

A narrow reading of Article 56(5) does not accord with generally accepted rules of international law, which recognize not only judicial remedies, but also any *administrative* domestic remedy that may provide redress in the circumstances of the case.<sup>194</sup> As was stated in the *Am-*

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193. See Sir Eric Beckett, Comments on the Report of M. H. Lauterpacht (of the Second Commission of the Institute of International Law) on the Interpretation of Treaties, 43-1 Ann. Inst. D. Int'l 437-38 (1950).

194. See *Interhandel (Switz. v. U.S.)*, Preliminary Objections, 1959 I.C.J. Rep. 6, 27 (Mar. 21).

*batielos Case*,<sup>195</sup> the phrase “local remedies” should be interpreted broadly, including “the whole system of legal protection, as provided by municipal law,” not only the courts and tribunals but also “the use of procedural facilities which municipal law makes available to litigants.”<sup>196</sup>

### 3. Broad Construction Favored by Other Tribunals and Scholarly Writings

The less restrictive interpretation of the exhaustion rule is favored by the European Court of Human Rights<sup>197</sup> as well as the Inter-American Court of Human Rights, particularly in its judgments in the so-called *Honduran cases*.<sup>198</sup> Leading publicists have also embraced a broad construction of the local remedies rule. The Brazilian jurist and President of the Inter-American Court, Antonio A. C. Trindade, who has written extensively on the exhaustion doctrine, takes the view that a rule created and applied in matters of diplomatic protection should not apply *mutatis mutandis* to human rights cases:

to claim that the local remedies rule should be applied in human rights protection exactly as diplomatic protection, to claim that the content or scope of the rule is not affected by contextual values or *ordre public* in respect of the protection of the rights of the human person and not of the state, is to close one’s eyes to reality. Generally recognized rules of international law, besides undergoing an evolution of their own within the contexts in which they are applied, necessarily undergo, when enshrined in human rights treaties, some adjustment, dictated by the special character of the object and purpose of those treaties and by the generally recognized specificity of the international protection of human rights.

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195. See *Ambatielos (Greece v. U.K.)*, 1951, 12 R. Int’l Arb. Awards 91, 120, 122.

196. *Id.*; see also *Finnish Ships Case*, *supra* note 125, at 1498-1505.

197. See *Klaas v. Germany*, 18 Eur. H.R. Rep. 305 (1994) (stating that the “national authority” referred to in Article 13 of the European Convention may not necessarily be a judicial authority).

198. Beginning with its eleventh Advisory Opinion of 1990 and Judgments in the *Velasquez-Rodriguez*, the *Godínez Cruz* case, and the *Fairen Garbi and Solís Corrales* case, the Inter-American Court began expanding the interpretation of the local remedies rule as a condition of admissibility of international petitions or communications under the American Convention. It did so by going beyond the generally recognized exceptions of undue delays and denial of justice and by tackling the issues of distribution or shifting (between complainants and respondent states) of the burden of proof with regard to the exhaustion and the express or tacit waiver of the local remedies rule. See Antonio Augusto Cançado Trindade, *Thoughts on Recent Developments in the Case-Law of the Inter-American Court of Human Rights: Selected Aspects*, PROC. OF THE 92<sup>ND</sup> ANN. MEETING OF THE AM. SOC. OF INT’L L., 192, 193 (April 1-4, 1998).

## 154 ANNUAL SURVEY OF INT'L &amp; COMP. LAW [Vol. XIII]

This is the lesson drawn from the experience accumulated in this domain; progress in the international protection of human rights has been made possible in the last decades, as well as in relation to the operation of the local remedies rule, by an awareness of the specificity of this *droit de protection* (which calls for an interpretation of its own), by a proper understanding of the basic premises underlying the mechanisms of protection and by faithful pursuit of their object and purpose.<sup>199</sup>

A faithful pursuit of the object and purpose of the Banjul Charter calls for an interpretation of the exhaustion of domestic remedies rule in such a way that would not allow the State to prevent its' citizens from enjoying their fundamental human rights. It is in this light that one publicist has criticized the rule in *Cudjoe v. Ghana* for being "too dogmatic,"<sup>200</sup> and, as a renowned publicist notes, "remedies may be available whatever the constitutional status of the agency taking the measure concerned. The test remains that of the reasonable possibility of an effective remedy."<sup>201</sup> A student of this Commission's jurisprudence has observed that despite its wish not to be transformed into a tribunal of first instance, the Commission has increasingly found itself replacing national mechanisms for judicial remedies. This role has been imposed on the Commission by the "lack of independent national judiciaries, and massive human rights violations that overwhelm domestic remedies."<sup>202</sup> The Commission has thus become the last hope for the defenseless victims of human rights violations in Africa.

#### 4. A Weighing and Balancing of the Relative Harms to Both Parties if Rule is Waived

The application of the local remedies rule requires a balancing of the relative merits and burdens the rule places on the parties. This much is implied in a flexibility approach to the exhaustion rule.<sup>203</sup> Since the Commission's own jurisprudence lays much emphasis on a contextual analysis, the application of the exhaustion rule in a given case must take cognizance of the nature of that country's system of providing judicial protection, including situations where the Head of State exercises both executive and *de facto* judicial powers. The Commission should probe the extent to which presidential powers are far more extensive than those

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199. See A.A. Cancado Trindade, *Book Review: C.F. Amerasinghe, Local Remedies in International Law (1990)*, 86 AM. J. INT'L L. 626, 636 (1992).

200. See Udombana, *supra* note 130, at 27.

201. See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 500 (5th ed. 1998).

202. See Udombana, *supra* note 130, at 16 (emphasis added).

203. See Mummery, *supra* note 169, at 401-401.

enjoyed by even the higher judicial bench. It is within the context of each country's specificity or peculiarity that the Commission should interpret and apply the local remedies rule in determining the admissibility of a communication.

The goal of this weighing and balancing exercise is to determine which party stands to lose the most from the application of the rule. For this exercise to be fruitful, the Commission must ascertain whether: (a) complainant has provided the respondent State with adequate notice of a human rights violation in order that it can cure the problem prior to being haled before the Commission;<sup>204</sup> (b) respondent State's insistence on the exhaustion of domestic remedies is pled in bad faith<sup>205</sup> as a ploy to buy time; (c) respondent State operates a court system that is notoriously slow and overburdened where cases are tied up for years before being called up;<sup>206</sup> (d) the judiciary is structurally separate and independent from the executive branch or whether the latter exercises inordinate control over the former.<sup>207</sup>

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204. As Judge Hudson pointed out in his dissent in the *Railway Case*, the requirement to exhaust domestic remedies is "not a rule of procedure" nor "merely a matter of orderly conduct...[rather] it is a part of the substantive law as to international responsibility, i.e. State-to-State responsibility." It follows, therefore, that "if adequate redress for the injury is available to the person who suffered it, if such a person has only to reach out to avail himself of such redress, there is no basis for a claim to be espoused by the State of which such a person is a nation. Until the available means of local redress have been exhausted, no international responsibility can arise." *Panevezys-Saldutiskis Railway Case*, *supra* note 26, at 45 (dissenting opinion).

205. The harm to a complainant when the demand for exhaustion of local remedies is not done in good faith is three-fold. First, it risks wrecking irreparable damage to the complainant's Charter protected rights. Second, it forces a complainant with a well-founded claim to go through the motion for the sake of satisfying this technicality. Third, complainant is forced to spend time and scarce financial resources. A complainant may end up marking time at the same judicial spot especially where there are long delays in the disposing of cases in Respondent State's courts. A most instructive example is *Victims of Post-Electoral Violence in the North West Province v. Cameroon* filed by Interights of London in July 2003 on behalf of a group of Cameroonians whose property was destroyed in Bamenda in 1992 in the wake of a presidential election whose results were contested by supporters of the opposition candidate. The original case had been languishing in the Supreme Court for almost five years until it was mercifully rescued by the African Commission. During this time the written pleadings were misplaced or mysteriously disappeared at least six times. See *Victims of Post-Electoral Violence in the North West Province v. Cameroon*, African Comm'n H. & Peoples' R. Comm'n 272/2003.

206. It would be a real mockery of the exhaustion rule to require a complainant to work her way through a notoriously slow judicial system just to give respondent State the satisfaction of having complied with what it believes is the local remedies requirement.

207. The purpose of the exhaustion of domestic remedies requirement is to give national courts an opportunity to decide upon cases before they are brought to an international forum. This would avoid contradictory judgments of law at the national and international levels. But the rule also speaks to the need to provide the State with adequate notice of a human rights violation in order that it can remedy the violation prior to being haled before this Commission. This notice can be presumed when the alleged violation is open and notorious. Clearly when a Government has knowledge, actual or constructive, of a complained violation and fails to remedy it, it cannot retreat to the position that because the alleged victims did not submit themselves before the law courts, access to

## CONCLUSION

Although the African Commission on Human and Peoples' Rights never got to the merits of *BLCC v. Cameroon*, having declared it inadmissible for nonobservance of the domestic remedies rule, it is still necessary not to lose sight of the wider significance of the case. It raised an interesting doctrinal issue with respect to the exhaustion of domestic remedies rule. It posed the question whether remedies that call for observance by a complainant must be only those provided by courts? But if it is clear that the local courts are totally subservient to the executive, who has taken the decision being challenged, is complainant required to exhaust domestic remedies? The first question has been answered in the affirmative by the Commission's decision in *Alfred B. Cudjoe v. Ghana*,<sup>208</sup> but it is not at all clear from the Commission's own jurisprudence that the second question has been resolved. Under *Cudjoe*, domestic remedies, within the meaning of Article 56(6) of the African Charter, refer only to remedies provided by courts. For the rule of *Cudjoe* to work it must assume a truly normal functioning judiciary not one where justice is dispensed in a discretionary fashion and where bias has already been shown toward the complainant. Where that assumption cannot be sustained then the exhaustion of local remedies requirement should be waived in order to allow victims of human rights abuse to seek redress for those wrongs in a neutral and, arguably, impartial international tribunal.

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an international tribunal should be denied them. See *Social & Econ. Rights Action Center for Econ. & Soc. Rights v. Nigeria*, African Comm'n H. & Peoples' R., Commc'n 156/96 (2001).

208. See *Alfred B. Cudjoe v. Ghana*, African Comm'n H. & Peoples' R., Commc'n 221/98 (1999).