SUBMISSION BEFORE THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, BANJUL, THE GAMBIA

In the Matter of BLCC v Cameroon

15 November 2003 (10:15 a.m.-12:28 p.m.)

Thank you, Mr. President, distinguished members of the Commission. My name is Ndiva Kofele Kale, and it is indeed an honor to appear once again before this Commission on behalf of the **Bakweri Land Claims Committee**, Complainants. Also appearing with me today, is *Maitre* Ibrahima Kane, of Interights, London, who is well known to the Commission; and Attorney Hillary Dewhirst, of the University of Tennessee Legal Clinic, who is making her first appearance before the African Commission.

Mr. President, I am accompanied by a small but powerful delegation of BLCC led by *HRH* Epupa Ekum, Chief of Dikolo, Bimbia, and *Princess* Joffi Esembe-Efange. And for company, these royal personages have brought with them two Bakweri notables: *Mola* Mbua Mofoke, of Bonjongo, BLCC Technical Adviser, and *Mola* Njoh Litumbe, BLCC's most able Secretary General.

The Domestic Remedy Rule

Mr. President, the jurisprudence of this Commission has established that petitioners must first exhaust all domestic remedies that are available, effective and sufficient before seising the Commission with a complaint. *Sir Dawda K. Jawara v The Gambia,* Communication No. 147/95, 149/96 (1999-2000), at para. 31.

Equally important, the Commission has also articulated a framework for allocating burdens of proof between petitioners and respondent states. For purposes of seizure and admissibility, Complainants need only present a *prima facie* case and satisfy the conditions laid down in Article 56 of the Charter. Once this has been done, the burden then shifts to Respondent to submit specific responses and evidence refuting each and every one of the assertions contained in Complainants' written pleadings, inclusive of those made in

connection with the domestic remedies requirement. *See* The African Commission on Human and Peoples' Rights, *INFORMATION SHEET NO. 3: COMMUNICATION PROCEDURE* 7 (undated). This approach was followed in *Rencontre Africaine pour la défense des Droits de l'Homme*, Communication 71/92.

The Commission's division of the burden of proof between contending parties parallels that adopted by the **European Human Rights Court** (*Akadivar et al. v. Turkey*, (1996) Eur.Ct.H.R., Reports 1996-IV); as well as the **Human Rights Committee**. Both also place on the complaining party the *onus* of merely setting a basis for a potential finding of admissibility. Thereafter, the State must carry forward the burden of satisfying the international tribunal that the domestic remedy was an effective one, available in theory and in practice at the relevant time. In other words, that the remedy is accessible, is capable of providing redress in respect of the petitioner's complaints, and offers reasonable prospects of success. *See e.g.*, *Mukong v Cameroon*, Communication No. 458/1991.

Argument

On the question of exhaustion of domestic remedies, Complainants submit:

First, that in the circumstances of this case, there are no available or effective and adequate domestic remedies for them to exhaust; and

Second, that Respondent has not been able to carry forward its burden of proving that, in the Cameroonian context, adequate and effective remedies are available that Complainants could but have not exhausted.

A. Availability of domestic remedies

This Commission has held that "a remedy is considered available if the petitioner can pursue it without

impediment..." *Jawara,* at para. 32.

Respondent agrees with Complainants that this matter raises legal issues. **Respondent's May 2003 Response.** Complainants submit that the attempted alienation of Bakweri ancestral lands presently under lease to Respondent's corporation, CDC, is a fundamental constitutional question which can only be thrashed in the **Constitutional Council.** But this remedy is unavailable to Complainants since they have no access to this tribunal. Complainants believe they have met their initial burden of providing the Commission with precise allegations of facts supported by relevant documents of the non-availability of domestic remedies which they can exhaust.

We submit that under the Commission's division of burden of proof between contending parties, it is for Respondent to refute Complainants' claim that the **Constitutional Council** ("CC") is the proper forum but is not accessible to them. To meet this burden, it is not enough for Respondent to merely assert, as it did in the **U.N. Sub-Commission** in February 2002, that domestic remedies exist which complainants have failed to exhaust.

In *Mukong v Cameroon*, the first ever case brought before the **Human Rights Committee** against Cameroon under the *Optional Protocol to the International Covenant on Civil and Political Rights,* the petitioner, in his submission on admissibility, argued that there was no procedure under domestic law by which he could challenge a law that was incompatible with international human rights standards.

The Government of Cameroon responded much as it has done here by simply stating that petitioner Mukong had failed to exhaust domestic remedies. When subsequently challenged by the HRC, Respondent came up with a laundry list of available remedies that it recited to the committee. Unimpressed the HRC declared the communication admissible, while reminding Respondent that "merely list[ing] ***in abstracto*** *the existence of remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the case*" was not enough to meet the State's burden

under the domestic remedies rule.

Here the State has not even bothered to cite a single remedy available nor to refute Complainants' claim that only the CC can exercise jurisdiction over this matter because of the fundamental constitutional issues it raises. Since Complainants lack standing before this tribunal, this remedy for all intents and purposes is unavailable to them.

The State's burden is met if it can, for instance, show that (1) a presidential decree to convene the CC to hear this matter is a possibility; (2) the President or one-third of the members of the **National Assembly** (two-thirds of its members are from the President's party) or any of the enumerated persons who have standing before this tribunal are prepared to seise the CC on this matter; and/or (3) the *locus standi* provision in the constitution will be amended to allow for a right of individual petition, or waived in this one instance, to permit BLCC to bring this matter before the Council. Complainants submit that the State has failed to meet its burden of showing that it can provide a competent domestic forum where this matter can be heard.

B. Effectiveness and Adequacy of domestic remedies

In *Jawara v The Gambia*, this Commission held that a remedy '**is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint**." *Id.*, at para at 32.

On the effectiveness and adequacy of domestic remedies, Complainants have made submissions in three areas:

(1) Lack of an independent judiciary.

To meet their initial burden, Complainants have offered documentation on (a) observations made by the HRC in its annual review of Respondent's reports; and (b) various human rights reports prepared annually by the **US State Department**. These reports all conclude that the judiciary is under the control of, and susceptible to undue influence from, the executive branch.

Complainants have argued that there is in fact no distinction between the two branches of government. We now would like to offer as an example of presidential supremacy over the judiciary and even over the Constitution, a case that was decided less than a year ago (2 December 2002) in which the President chose to ignore a judgment from the highest court in the country, in flagrant violation of the constitution. **The facts are these:** on 27 November 2002, the **Supreme Court** *qua* Constitutional Council was seised by the President of the National Assembly, pursuant to Article 47(1) of the Constitution, for a declaration as to the constitutionality of certain provisions contained in a bill revising the standing orders of the House. The bill in question had been adopted the previous day by the National Assembly in plenary session. After reviewing the controversial legislation, the CC declared [on 28 November] the provisions dealing with the validation of parliamentary mandate unconstitutional. *See CS decision no. 001 du 28 novembre 2002,* reprinted in its entirety in *Revue de Droit et de Science politique Juridis Periodique numero 53, Janvier, Fevrier, mars* 2003.

This was the first time in Cameroon's constitutional history that an act taken by the legislative branch was declared unconstitutional by the judicial branch. Under our constitutional scheme a decision of the CC is final and binding [Art. 50(1)]. Second, any legislative act declared unconstitutional may not be enacted or implemented [Art. 50(2)]. Yet, on the 2nd of December the President of Cameroon went ahead and enacted this unconstitutional legislation into law, in clear violation of Article 50(1)!

To Complainants' claim that the judiciary is completely subordinated to the Presidency, Respondent had earlier responded by posing the following rhetorical question: "*... just because the President of the Republic of France appoints and sanctions judges, can it be said that the French judicial system is at*

his service?" See **Respondent's May 2003 Response** at p. 2. Yet, in equating presidential domination of the judiciary in Cameroon to that in France, Respondent identifies no case where a French *Procureur Général* (PG), in violation of positive law, stopped the forces of law and order from executing a high court judgment as his Cameroonian counterpart did in the *CTE/Niba Ngu* case. Nor does Respondent offer a single instance in French judicial practice where such conduct, if it were to occur, would be allowed to go unpunished as is *routinely* the case in Cameroon.

Since Respondent is the one who has offered France as the paradigm State, would Respondent be willing to cite one example— just one *not* two or three– in contemporary French constitutional jurisprudence where a French President, in defiance of the supreme law of France, enacts into law a parliamentary bill that the Council of State had declared unconstitutional?

Mr. President, we submit that the State has failed to carry forward its burden with regard to judicial independence and we invite the Commission to share this view.

Complainants have also offered case law that graphically captures the subordination of our judiciary to the will of the executive branch:

- The Commission has been referred to the *CTE/Niba Ngu* and *Ncho/Itoe* cases to support Complainants' claim that when a judge dares to rule against the Government, on a matter in which the Government's interests are implicated, that ruling is swiftly set aside by the executive branch (the President himself, the minister of Justice or any of the provincial attorneys general) AND/OR the judge is then subject to punitive sanctions (e.g., *Ncho/Itoe– a distinguished panel of appeals court judges;* or the case of Justice Abenego and SCNC activists in Bamenda).

In attempting to meet its burden on this issue (i.e., executive branch interference with the judiciary), the State has attempted, on the one hand, (a) to distinguish the *CTE/Niba Ngu* case which directly implicates the

action at bar, and on the other hand, (b) to rely on the *Ncho/Itoe* case to support its contention that any perceived executive branch interference or undue influence on courts and judges to ensure that they conform to the 'party line' is actually an excess of zeal by these subordinate executive branch officers; and that these *rogue* legal officers are the exception rather than the rule.

Unfortunately for Respondent (a) the cases it relies on clearly show that this habit of executive branch interference with the work of high court judges has not improved with time; 20 years separate *Ncho/Itoe* from *CTE/Niba Ngu* yet the conduct in both is similar (b) the cases also confirm the contrary to the point Respondent is struggling to make! For instance, the PG of the South West Province who categorically refused *in writing* to execute a high court order is still in office. Secondly, curiously enough, in the *Ncho/Itoe* case, the State conveniently forgot to mention that the provincial PG who was found guilty, by two respected provincial common law courts, for abusing and misusing his judicial authority, was not long thereafter rewarded with a plum ministerial appointment (first as Minister of Transport and later as Minister of Justice, no less. Next only to the President of the Republic, it is the Justice Minister who is directly responsible for all the judicial officers in the country (that is, from Supreme Court judges down to court registrars).

Finally, Respondent again chose not to disclose the fact that even before his appointment as a government minister, the disgraced PG in that case, methodically went after the distinguished panel of judges that had earlier found him guilty of abuse of office! All of this is public knowledge.

(2) ***A corrupt court system***

Next Complainants have demonstrated that the judicial system *qua* system-- not all judges mind you-- is corrupt; and that justice tends to favor the well-connected. In support of this assertion, Complainants have offered the following as evidence:

- The public acknowledgments by the President of the Republic (2000), the **Supreme Magistrate**, and the Minister of Justice (2003), on separate occasions, to this effect. These public confessions have NOT, Mr. President, been refuted by Respondent. Add to them, the remarks attributed to one of the counsel for Respondent, who incidentally is appearing before this Commission this morning, questioning the independence of the judiciary. *See* Special Edition: Judiciary in Search of Independence, **The Post**, No. 0519 of Friday, Nov. 7, 2003, p. 9, col. 5. These uncoerced statements by Counsel for the State suggest he does not even believe in the case for which he is holding brief!

- The recent report (2003) by the Berlin-based international anti-corruption NGO, **Transparency International**, whose President, Peter Eigen, was, in the not to distant past, an honored guest of the head of state and his prime minister– a clear indication that his organization and the work it does are taken seriously by Respondent. The results of the survey conducted by Transparency International have not been contested by Respondent.

- Perhaps the most shocking example of judicial corruption in Cameroon is the recent parody of a judicial proceeding that took place in the Fako High Court less than two months ago. The occasion was a lawsuit brought by a real estate and housing association against *Mola* **Njoh Litumbe**, who happens to be the Secretary General of BLCC. Simultaneously with the filing of this action in August 2003, 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, etc., for carrying out activities in Cameroon without benefit of a certificate of registration. 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.

  In the September 2003 action, plaintiff was asking for a declaratory judgment to the effect that

BLCC cannot validly claim to speak for the indigenous population of Fako Division as it has not been vested with the requisite legitimacy by said population. Although BLCC was not named as a defendant in the suit, its Secretary General, *Mola* **Njoh Litumbe**, 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 his absence, to hold an *ex parte* hearing on plaintiff's motion for a declaratory ruling on 24 September.

Despite these procedural defects and in complete disregard of the *non ultra petita* rule, the learned trial judge delivered a default judgment (26 September) 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 !

Within minutes after the order "disbanding" BLCC was read in open court, counsel for plaintiff was observed distributing copies of the *unsigned* order to the press and the general public. It would take another three days, i.e., 29 October, before the *signed* and *official* opinion was ready for release! [Here are the two versions of this judgment, the unsigned and the signed, both of which are identical in every respect!!] How is it possible that BLCC, who was not the defendant in this action, would suddenly find itself disbanded by a local court, one month before its representatives were due to travel to Banjul to attend this session? Where did counsel who represented one of the parties in a law suit stumble on a copy of a high court judgment minutes after it was delivered? Who could have granted him access to this privileged court document that had not yet been deposited in the court's registry for the Chief Registrar's counter-signature? And what was his haste in rushing to the media with this order?

Mr. President, Complainants believe that the criminal investigation of BLCC officials, the nuisance lawsuit and the order disbanding BLCC were all part of a sinister 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 this venerable organization; one that has been a part of Bakweri history for 57 years, recognized and dealt with by the British colonial administration and the United Nations Trusteeship Council. And the plan was to disable BLCC before this session of the African Commission. Regrettably, all this agitation was based on a flawed understanding of the 'victim' requirement under the African Charter, the mistaken belief that by 'disbanding' BLCC, this Commission would have no other choice but to dismiss Communication 260/2002 submitted by BLCC!

Strong support for this conclusion comes from two sources. First, the presence of the lawyer who claimed to be acting on firm instructions from the presidency in Banjul as a member of Government's delegation confirms his instructions were indeed from the Presidency. Second, Complainants point to subsequent disclosure that plaintiff, the "Bakweri Cooperative Union of Farmers, BCUF", is in fact an imposter organization that had misappropriated the name, identity and assets of another organization. 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 PG of the South West Province 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 24 *cooperative societies* representing thousands of small-scale farmers in Fako Division, created 53 years ago. The imposter BCUF, on the other hand, is a real estate and housing association owned by 31 *individual s* and was registered barely two years ago to engage in speculative real estate ventures. When the PG of 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 on 30 October. The Minister then dispatched a delegation to Buea to ensure that his Order was being followed to the letter while instructions were given to the Registrar of Cooperatives to remove the name of the imposter association from the register of cooperative societies.

(3) An overburdened court system

Complainants have also argued that our courts are overburdened with a backlog of cases that will take years to clear. For support, they have offered as evidence:

- A 1996 **World Bank Report** that put the number of cases pending before the Supreme Court at 3,000 in 1996 [*unofficially* the number is 4,343 as of June 2003]. Incidentally, it is the same year that a representative of the Government of Cameroon appeared before this Commission, at its 20th session that held in Mauritius in October 1996, urging the Commission to overturn its decision on admissibility in the case of *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* on the ground that Mazou had not exhausted his domestic remedies! The Mazou case, you will recall Mr. President, had been pending in the Supreme Court for 4 years when this incredulous appeal was made in Mauritius. YET (a) In entering this plea, counsel, who was the one possessing superior knowledge about the court's case load, should have known about the huge backlog; (b) in addition, as a party to the African Charter, counsel was duty bound to disclose to this Commission how overburdened the Cameroon courts were at that time.

- Aside from *Annette Pagnoulle* which this Honorable Commission declared admissible, after having concluded that Mazou's remedy was unreasonably prolonged; Complainants have also, in their written pleadings, referred this Commission to a case currently before it. *See Victims of Post-Electoral Violence in the North West Province v Cameroon*, Communication No. 272/2003, a case that had languished in the Supreme Court for 8 years with no relief in sight. Not even a document in the registry to show that the case was indeed filed!

- Complainants would like to also cite the case of *Mukong v Cameroon*, which was declared admissible by the HRC after the Cameroon Supreme Court failed to take any action for 2 years.

The State relies on this Commission's decision in *Alfred B. Cudjoe v Ghana*, Communication 221/98, for

the proposition that domestic remedies, within the meaning of Article 56 (5) of the African Charter, refer only to remedies provided by the courts. Assuming *arguendo* that the Supreme Court is the domestic tribunal with jurisdiction over this matter (we say it is not but the CC), following this Commission's allocation of burdens of proof, it is for State to now go forward with the burden of demonstrating what steps Complainants must take to exhaust their domestic legal remedies, in a court with this heavy backlog of cases.

Questions: Are they expected to queue behind the other 4,000 (four thousand) odd cases and wait their turn? OR Will they be allowed to queue-jump to the front of the line? If so, under what rule of the Supreme Court's rules of procedure will Complainants be able to take advantage of this safe harbor?

Furthermore, in light of the 9 (nine) years Complainants have already spent waiting for the President of the Republic to take a decision on this matter,[1] how much longer would they have to wait before they are allowed to plead that the domestic remedy is unreasonably prolonged?

In these circumstances, we say Mr. President, that the State's insistence that Complainants submit their cause to the domestic courts before seising this Commission is the same thing as asking them to comply with an empty formality or to go through the motions when the outcome is already known. We think that the rule of *Cudjoe v Ghana*, which Respondent cites approvingly, assumes a truly normal, functioning judiciary; a judiciary where justice delayed is justice denied. That Mr. President is not the reality in Cameroon.

Cudjoe, as construed by Respondent, makes absolutely no sense in a judicial system where Complainants commence their pursuit of exhausting domestic remedies with so many strikes arrayed against them not the least of which is the imponderable factor of a court calendar over which they have no control. Only Respondent is in a position to save Complainants from marking time on the same spot until it is their turn,

[1]In an August 2003 opinion, the Human Rights Committee declared admissible a communication that is *ad idem* with BLCC v Cameroon. *See S. Jegetheeswara Sarma v Sri Lanka,* Communication No. 950/2000.

whenever that comes up.

This Commission has held that "a remedy that has no prospect of success does not constitute an effective remedy," *Jawara*, at para. 38. This, we submit, is what looms in the horizon for Complainants. THEREFORE,

Mr. President, for the foregoing reasons, Complainants submit that domestic remedies are unavailable for them to exhaust. That the ones they have sought have proved, and that any others they may seek are likely to prove, ineffective. They respectfully pray this Honorable Commission:

- To declare admissible Communication 260/2002 Bakweri Land Claims Committee/Cameroon;

- Pending a decision to this effect, to continue to maintain in place the provisional measures under Rule 111(3) of the Commission's Rules of Procedure, taken last May in Niamey, appealing to the President of Cameroon to suspend any further alienation of Bakweri ancestral lands in Fako Division;

- To direct Respondent to instruct its agents in the South West province in general and Fako Division in particular to respect the right to life of the leadership of the Bakweri Land Claims Committee (more specifically, its secretary general, lead counsel and representatives here present) and to desist from any acts, either of commission or omission, that might imperil their life and/or their personal security.

MR. PRESIDENT, SIR, DISTINGUISHED MEMBERS OF THE COMMISSION, IF THERE ARE NO QUESTIONS FOR COUNSEL, THIS THEN CONCLUDES MY SUBM ISSION. THANK YOU FOR YOUR TIME.