

Decision of the African Commission on Human and Peoples' Rights on the Merits

Communication 376/09 – Acleo Kalinga (represented by Rhys Davies & Ben Keith International Human Rights Advisors) v. Uganda

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 20 May 2009, submitted by Redress Trust (REDRESS), World Organization Against Torture (OMCT) and the International Rehabilitation Council for Torture Victims (IRCT) (the Complainants) on behalf of Mr. Acleo Kalinga (the Victim), against the Republic of Uganda¹ (the Respondent State or Uganda) pursuant to Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).
2. The Victim is a Rwandese citizen, who according to the Complainants was arbitrarily detained and subjected to torture and other cruel, inhuman and degrading treatment in Uganda between 7 June 2005 and 3 May 2007.
3. The Complainants aver that on 7 June 2005, while on a journey from Kigali to Mbarara in Western Uganda to pick up his friend's sick mother, the Victim stopped at a hotel for lunch. During his meal, a man informed him that he had parked his car incorrectly. The Complainants allege that upon returning to the car park, the Victim was bundled into a car by individuals who he believes to be members of the Ugandan Security Services and driven away.
4. According to the Complainants, from 7 June 2005 to 3 May 2007, though never charged with any offence, the Victim was held *incommunicado* in

¹ The Republic of Uganda became a party to the African Charter on 10 May 1986.



various detention centres including a number of safe houses and secret prisons.

5. The Complainants allege that the Victim was denied access to his family, legal representation, medical treatment, consular assistance, and the possibility to challenge his detention by way of *habeas corpus*.
6. The Complainants state that during the period of his detention, the Victim was repeatedly interrogated about his reasons for travelling to Uganda, accused of being a member of the Rwanda Defence Forces (RDF) involved in espionage and of planning to shoot senior Ugandan officials.
7. The Complainants aver that the Victim was subjected to various forms of ill-treatment and on a number of occasions he was held in solitary confinement for months; blindfolded and kept in small rooms; denied access to toilet and bathing facilities and for nine months of his detention, he was only fed three times a week.
8. The Complainants allege that the Victim was subjected to further forms of ill-treatment such as: binding and stretching of his testicles; prolonged application of extreme heat, including the 'ironing' of his back.; prolonged hanging by his wrist from the ceiling of his cell; electrocution; dousing with freezing water; repeated beatings with batons, electrical wires, wooden bars; starvation and denial of medical attention.
9. The Complainants further allege that various types of psychological torture were inflicted on the Victim such as: death threats made while guns were shoved in his mouth; guns fired while held next to his ears; confinement in small rooms where there were rotten cadaver of the other tortured detainees with threats that he would suffer the same fate if he did not co-operate; prolonged periods of isolation, sensory deprivation and humiliation.
10. The Complainants state that due to political pressure by the Parliamentary Committee on Human Rights; the Parliamentary Committee on Regional Cooperation and the media publicity about the Victim's detention, he was released on 3 May 2007. The following day, members of the Ugandan Parliament along with several journalists, escorted the Victim to the Rwandese Embassy and was taken back to Rwanda.
11. The Complainants aver that as a result of his arbitrary detention, torture and other ill treatment, the Victim now suffers from serious and life-long physical and psychological health problems such as the following: anal



bleeding, impotence; complete loss of the sense of smell and taste; partial deafness, partial loss of vision and paralysis of his torso; loss of bowel control and sensation in his back, joint immobility, frequent fainting episodes and severe headaches. In addition, he suffers from severe depression, loneliness, anger and fear.

12. The Complainants allege that as a result of his ordeal and his present physical and psychological state, he is unable to gain employment and therefore has no means of supporting himself, his children or paying for medical treatment.
13. Further to the receipt of the Complaint, the Secretariat received additional information from the Complainants illustrating the developments that took place subsequent to their filing of the initial communication in May 2009 as follows:
14. The Complainants allege that in June 2009, the Victim was transferred without due process by Rwandan Security Agents from Rwanda to Uganda and handed over to individuals of the Ugandan Security Services. He was again detained for one month in a secret detention facility in Kololo in Kampala, Uganda. The Complainants state that the Victim escaped and fled to Tanzania where he contacted the United Nations Office of the High Commissioner for Refugees in Dar es Salaam.
15. While in Tanzania, the Complainants state that the Victim was accorded Refugee Protection Status on 14 May 2010, on grounds that he should be protected from return to a country where he is at risk of torture. While the process of resettlement was ongoing, on 13 September 2010, Ugandan security operatives abducted the Victim in Dar es Salaam where he was again allegedly tortured.
16. The Complainants allege that on 14 July 2011, the Victim was forcibly removed from Nairobi, Kenya, to Uganda, where he was placed in Mbale Military Camp and was allegedly tortured. As a result, the Complainants state that the Victim has difficulties standing, walking and using his right arm.
17. The Complainants further allege that on 25 July 2011, the Victim was asked by officials of the Uganda Police Defence Forces (UPDF) to withdraw REDRESS's mandate to represent him before the African Commission on Human and Peoples' Rights (the Commission) and was then released.



18. The Complainants state that on 27 July 2011, the Victim met with representatives of the International Committee of the Red Cross (ICRC) in Kampala and following the meeting, the Victim called REDRESS, stating that he had been informed that he will be sent to a "safe House" in Moroto, Karamoja region in Northern Uganda.
19. The Complainants further state that on 28 July 2011, the Victim called REDRESS to reinstate his fears of imminent arrest.

Articles alleged to have been violated

20. The Complainants allege violations of Articles 1, 5, 6 and 7 of the African Charter.

Prayers of the Complainants

21. The Complainants pray to the Commission to:
- a. Direct the Government of Uganda to conduct, as a matter of urgency, an independent, impartial and thorough investigation capable of identifying and punishing those responsible for the alleged treatment of the Victim;
 - b. Remind the Government of Uganda that in conducting such investigation, it is under an obligation to ensure that the Victim is kept informed of the progress and outcome of the investigation and of any subsequent prosecutions;
 - c. Direct the Government of Uganda to provide the Victim with material and moral damages which must include: loss of earnings; compensation for his physical and mental pain and suffering, the uncertainty and fear brought about by his *incommunicado* detention, inability to make a *habeas corpus* petition, humiliation and damage to his reputation as a result of his disappearance from Rwanda; and provision for medical and psychological care and legal and social services required by the Victim; and
 - d. Remind the Government of Uganda to provide the Victim with just satisfaction in the form of a full and public disclosure of the truth about his arbitrary detention, torture and ill-treatment and an



official apology, acknowledging and responsibility for his ill treatment.

Request for Provisional Measures

22. The Complainants allege that the Victim has again been detained and tortured by the UPDF in July 2011 (as reflected in paragraphs 14-17 above) and is at risk of being detained and tortured further in the immediate future.
23. The Complainants request the Commission to order provisional measures against the Government of Uganda to ensure the Victim's right to liberty was enshrined in Article 6 of the African Charter and to prevent further violations of the African Charter, in particular Article 5 thereof.
24. The Complainants urge the Commission to request the Government of Uganda not to take any measures that would cause irreparable harm to the Victim and to adopt provisional measures to:
 - a) stop or refrain from arbitrarily detaining the Victim;
 - b) stop or refrain from torturing or ill-treating the Victim;
 - c) ensure the Victim's physical and psychological wellbeing; and
 - d) undertake an effective investigation to determine the identity of those allegedly responsible for the latest incidents of torture between 14 July and 25 July 2011.

Procedure

25. The Complaint dated 12 May 2009 was received at the Secretariat of the Commission on 20 May 2009.
26. At its 45th Ordinary Session held from 13 to 27 May 2009 in Banjul, The Gambia, the Commission considered the Communication and decided to be seized thereof.
27. On 3 June 2009, the Secretariat of the Commission notified the Complainants of this decision and requested them to forward their written submissions on Admissibility within three months.
28. At its 46th Ordinary Session held in Banjul, the Gambia, from 11 to 25 November 2009, the Commission deferred consideration of the



Communication to its 47th Ordinary Session scheduled to be held in Tunis, Tunisia from 12 to 26 May 2010.

29. By Note Verbale and letter dated 30 November 2009, the Secretariat informed the Respondent State of the Complaint and informed both parties of the deferment of the Communication to the 47th Ordinary Session of the Commission to allow both parties submit on Admissibility.
30. On 22 December 2009, the Secretariat received the written submissions of the Complainants on Admissibility and forwarded same to the Respondent State.
31. By Note Verbale and letter dated 4 June 2010 respectively, the Parties were informed that pending the Respondent State's submissions on Admissibility, the Communication was deferred to the 48th Ordinary Session of the Commission scheduled to be held from 10 to 24 November in Banjul, The Gambia. The Respondent State was also reminded to submit its arguments on Admissibility.
32. By Note Verbale and letter dated 4 October 2010, the Secretariat wrote to the Respondent State reminding it to forward its submission on Admissibility of the Communication and informed the Complainants of the same.
33. At its 48th Ordinary Session, the Commission deferred consideration of the Communication to its 49th Ordinary Session pending the Respondent State's submission on Admissibility.
34. On 12 November 2010, the Secretariat received the Respondent State submissions on Admissibility of the Communication and a request for an oral hearing on the Communication and forwarded same to the Complainants on 9 December 2010.
35. By letter dated 21 April 2011, the Secretariat received the Complainants additional submissions on Admissibility and forwarded same to the Respondent State on 1 May 2011.
36. By letter dated 25 July 2011, the Victim wrote to the Secretariat withdrawing representation of the Complainants (REDRESS) to represent him on the Communication. The Secretariat informed the Complainants and requested the Complainants to confirm the termination of the mandate of all the Complainants to represent the Victim, seeing that the Victim's letter only made mention of one of the Complainants, i.e. REDRESS.



37. By letter dated 28 July 2011, the Complainants requested for provisional measures pursuant to Rule 111 of the Rules of Procedure of the Commission.
38. By letter dated 24 August 2011, the Complainants informed the Secretariat and that the Victim was under duress at the time he wrote withdrawing the Complainants representation and that they were still representing the Victim.
39. By letter dated 29 September 2011, the Secretariat acknowledged receipt of the Complainants letter of 24 August 2011, informing them that the request for provisional measures has been forwarded to the Bureau of the Commission and would inform them of the outcome. In the same letter, the Secretariat sought some clarity on the alleged facts of the Communication.
40. By letter and Note Verbale dated 9 November 2011, the Secretariat wrote to the Complainants and the Respondent State informing both parties that at its 50th Ordinary Session, which took place in Banjul, The Gambia, from 24 October to 7 November 2011, the Commission deferred consideration on Admissibility of the Communication due to the pending request by the Respondent State for an oral hearing before the Commission.
41. By letter dated 29 November 2011, the Complainants wrote to the Secretariat withdrawing their representation in the Communication with immediate effect.
42. By email dated 20 February 2012, the Victim wrote to the Secretariat introducing himself and inquiring about the Communication and whether it is possible for him to represent himself or whether there are any other provisions from the Commission.
43. By letter and Note Verbale dated 6 March 2012, the Secretariat acknowledged receipt of the letter from REDRESS dated 29 November 2011, received at the Secretariat on 17 February 2012, and wrote to IRCT and OMCT informing them about the letter from REDRESS. In the same letter, the Secretariat enquired about the Victim's correct contact details and informed both Parties about the date set by the Commission for the oral hearing requested by the Respondent State.
44. By letter dated 17 April 2012, REDRESS informed the Secretariat that they do not have the contact details of the Victim and that they have been



informed by OMCT and IRCT that they have equally terminated their representation of the Victim in the Communication.

45. By Note Verbale dated 25 May 2012, the Secretariat informed the Respondent State that at its 51st Ordinary Session which took place in Banjul, The Gambia, from 18 April to 2 May 2012, the Commission decided to defer consideration of the Communication pending the oral hearing requested for by the Respondent State.
46. By email dated 17 July 2012, the Secretariat acknowledged receipt of the Victim's email of 20 February 2012, and informed him about the status of his Communication and possibilities of representing himself in the Communication.
47. By email dated 26 July 2012, the Complainants (IRCT and OMCT) confirmed the termination of their representation of the Victim in the Communication.
48. By letter dated 13 August 2012, the Victim also confirmed termination of the Complainants representation in the Communication and enquired as to whether the Commission can assist him to contact NGOs or Associations to represent him in the Communication.
49. By letter dated 16 August 2012, the Secretariat acknowledged receipt of the Victim's letter of 13 August 2012, and informed him that the Secretariat does not contact NGOs on behalf of Complainants. The Secretariat referred the Victim to the website of the Commission where he can access a list of NGOs with observer Status with the Commission to contact any of them for assistance. The Commission has since not heard from the Victim.
50. By letter dated 4 March 2015, the Secretariat informed the Respondent State that further to its Note Verbale of 28 October 2010, requesting for an oral hearing and the Commissions subsequent Note Verbale of March 2012, the Commission during its 17th Extra-Ordinary Session which took place from 19 to 28 February 2015, in Banjul, The Gambia, considered the Communication and decided to invite the Respondent State for the requested oral hearing during the 56th Ordinary Session of the Commission, which took place from 21 April to 7 May 2015 in Banjul, The Gambia.
51. By email dated 27 April 2015 and letter dated 13 May 2015, the Respondent State indicated that it would not be able to make the oral presentation on the scheduled date because the Ministry of Justice needs to further study



the related documents to the case and requested for a postponement of the oral hearing to the 57th Ordinary Session of the Commission from 4 to 18 November 2015 in Banjul, The Gambia.

52. By Note Verbale dated 29 April 2015 and further to the request by the Respondent State during the 56th Ordinary Session of the Commission, the Secretariat forwarded copies of the documents (Complaint, submissions and all other documents) on the Communication to the Respondent State.
53. By Note Verbale dated 16 May 2015, the Secretariat informed the Respondent State that during its 56th Ordinary Session, the Commission deferred consideration of the Communication due to the request of the delegation of Uganda for a postponement of the oral hearing to the 57th ordinary Session of the Commission.
54. By Note Verbale dated 11 August 2015, the Secretariat informed the Respondent State that during its 18th Extra- Ordinary Session which took place from 29 July to 7 August 2015, in Nairobi, Kenya, the Commission deferred consideration of the Communication due to the pending oral at the 57th ordinary Session of the Commission.
55. By Note Verbale dated 12 October 2015, the Respondent State requested the Secretariat to furnish the Ministry of Justice with all relevant documents on the Communication and a confirmation of the dates set for the oral hearing during the 57th Ordinary Session to enable the stakeholders make the necessary arrangements on time.
56. By Note Verbale dated 20 October 2015, the Secretariat acknowledged receipt of the Respondent State's Note Verbale of 12 October 2015 and informed it of the date set for the oral hearing during the 57th Ordinary Session of the Commission.
57. By email dated 26 October 2015, the Respondent State acknowledged receipt of the Secretariat's Note Verbale of 11 August 2015 and informed the Secretariat that it misplaced the Communication file and requested the Secretariat to forward all the relevant submissions filed by the Complainants to enable the Respondent State prepare to attend the oral hearing. Consequently, by Note Verbale dated 7 November 2015, the Secretariat submitted a copy of the Communication file to the Respondent State and postponed the oral hearing to the 19th Extra-Ordinary Session of the Commission scheduled to from 16 to 25 February 2016 in Banjul, The Gambia.



58. By Note Verbale dated 4 February 2016, the Secretariat informed the Respondent State of the date for the oral hearing during the 19th Extra-Ordinary Session of the Commission.
59. During the 19th Extra-Ordinary Session of the Commission held in Banjul, the Gambia from 16 to 25 February 2016, the Commission held an oral hearing which was only attended by the Respondent State.
60. The Commission differed consideration of the Communication on Admissibility between the 58th Ordinary Session to the 19th Extra-Ordinary Session of the Commission.
61. By letter and Note Verbale dated 23 June 2023, the Secretariat informed both parties that during its 20th Ordinary Session held from 9 to 18 June 2016, in Banjul, The Gambia the Commission considered the Communication and declared it Admissible, and requested them to forward their written submissions on Merits.
62. By letter and Note Verbale dated 21 November 2016, the Secretariat acknowledged receipt of the email dated 14 October 2016, forwarding a petition from the Victim and to inform both parties that during its 59th Ordinary Session, which took place from 21 October to 4 November 2016 in Banjul, The Gambia, the Commission considered Mr. Kalinga's request to contact REDRESS to restore their representation on the above-mentioned Communication, and agreed to forward the petition to REDRESS as requested.
63. The Commission deferred consideration on the Merits of the Communication from its 21st Extra-Ordinary Session to 23rd Ordinary Session, pending the Complainant's submission on the Merit, and granted 30 days extension for the Complainants to submit.
64. By Letter dated 21 November 2018, the Secretariat informed the Complainants that during its 63rd Ordinary Session, which took place from 24 October to 13 November 2018, in Banjul, The Gambia, the Commission considered the request of the Victim's letter dated 16 October 2018, and decided that, the Complainants should provide the Commission with adequate reasons why the Commission should allow them to submit on the Merits out of time.
65. By Letter and dated 21 November 2018, the Secretariat informed both parties that during its 68th Ordinary Session which took place virtually from 14 April to 4 May 2021, the Commission considered the request of



Complainants letter dated 22 February 2021, and decided to grant the Complainants an extension of one (1) month to submit on the Merits.

66. By letter dated 18 October 2021, the Secretariat acknowledged receipt of the Complainants letter dated 8 August 2021, informing the Secretariat of the new legal representative of the Victim (i.e. Rhys Davies & Ben Keith International Human Rights Advisors, in United Kingdom) and forwarding the Complainants submissions on the Merits of the Communication.
67. By Note Verbale dated 18 October 2021, the Secretariat forwarded the submissions on the Merits to the Respondent State and requested its observations on the Merits within two (2) months of the notification thereof.
68. A decision on the Merits of the Commission was deferred from the 70th to 78th Ordinary Sessions of the Commission.

The Law on Admissibility

Complainants Submission on Admissibility

69. The Complainants submit that the Communication meets the Admissibility requirements under Article 56 of the African Charter and focused its submissions exclusively on the exhaustion of local remedies under Article 56(5) of the African Charter. Accordingly, the Complainants submit that in the present Communication, domestic remedies were unavailable, ineffective and insufficient; thus, the Victim was not bound to exhaust local remedies before bringing the Communication to the Commission.
70. The Complainants aver that in *Sir Dwada K. Jawara v The Gambia*, the Commission recognized that domestic remedies must be available, effective and sufficient and further stated that: "a remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint".²
71. The Complainants submit that in *Purohit and Moore v. The Gambia*, the Commission held that a remedy which exists in theory but is only available to those who can afford to access it will not be considered effective.³ The Complainants further submit that in *Alhassan Abubakar vs. Ghana*, Sir

² Communication 147/95 and 149/96 -Sir Dawda K. Jawara v The Gambia, paras 31, 32.

³ Communication 241/2001 - Purohit and Moore v. The Gambia, paras 34 – 37.



Dawda K. Jawara v. The Gambia and Kazeem Aminu v. Nigeria, the Commission recognized that it would not be “logical” to require an individual to return to the State where he or she has allegedly suffered violations of his or her fundamental rights and from which he or she had fled, in order to bring a claim for reparation.⁴

72. The Complainants aver that while an individual alleging torture and other ill-treatment in Uganda would normally be able to lodge a Complaint before the Ugandan High Court or the Uganda Human Rights Commission (“UHRC”), neither of these options is available to the Victim as he is unable to travel to Uganda due to his serious state of health;⁵ his limited financial resources since he is unable to work as a result of his torture and other ill-treatment; and the fears he has for his safety and security given the manner in which he fled from Uganda.⁶
73. The Complainants argue that the seriousness of the Victim’s fear for his safety and security is reinforced by the absence of a law or specific programme in place in Uganda providing protection for victims and witnesses, and by the reports of harassments of complainants of torture in Uganda such as: verbal intimidation, being followed by persons in unmarked cars and attempted arrests.
74. The Complainants argue that if the Victim brought a civil claim for compensation before the Ugandan High Court, he would most likely be subjected to an order for security for costs as he is a non-resident plaintiff.⁷ To reinforce their arguments, the Complainants stipulated provisions from Order XXVIII Section 5 of the Ugandan Rules of Civil Procedure, which, states that “*where any court to which an application is made for the issue of a commission for the examination of a person residing at any place not within Uganda is satisfied that the evidence of that person is necessary, the court may issue the commission or a letter of request*”.
75. Based on the above submission the Complainants argue that if this procedure of taking evidence on commission was ordered by the Court,

⁴ Communication 103/9 - Alhassan Abubakar vs. Ghana, paragraph 6. See also, Sir Dawda K. Jawara v. The Gambia, at para. 35; Communication 205/97 Kazeem Aminu v. Nigeria, para. 11.

⁵ See, Annex 4 containing the expert medical report by Drs. Morten Ekstrøm and Önder Özkalipci, together with enclosures. According to the Complainants, further to the medical examinations, the victim has been advised to travel only for the purpose of receiving medical treatment.

⁶ See, Annex 2 containing the victim’s affidavit.

⁷ Under Order XXVI section 1 of the Ugandan Civil Procedure Rules, a defendant is entitled to security for the payment of all costs.

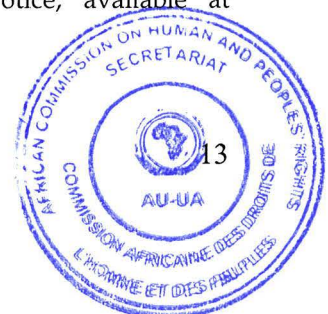


the Victim would have to meet all the costs involved, which would be very considerable and beyond his means. If a commission was not ordered, the Victim would only be able to submit evidence by deposition before a notary public in Rwanda under Order 28, Rule 4 of the Ugandan Civil Procedure Rules. It is further argued that, such evidence would have little probative value as it would not be tested by cross-examination and would therefore greatly prejudice the Victim's case. Accordingly, the Complainants submit that in these circumstances, the Ugandan High Court would not constitute an available and effective remedy for the Victim to pursue.

76. The Complainants also argue that, while the Victim could theoretically make a complaint to the UHRC, without his presence in Uganda, the UHRC would not constitute an effective remedy. According to the Complainants, the UHRC would be unable to carry out its investigations into the Complaint unless it traveled to Rwanda, most probably on a number of occasions, to interview the Victim and other potential witnesses. The Complainants state that in light of the UHRC's limited resources, this is unlikely to be a possibility.⁸
77. The Complainants aver that according to the norms set forth under the Ugandan Constitution (Uganda Human Rights Commission Procedure Rules) S.I. Constitution 8, Rule 17, a Complainant is requested to be present, once the case reaches the Tribunal stage, otherwise the hearing may proceed in his or her absence. Taking into consideration the above-mentioned provisions, the Complainants state that the Victim would not be able to be present in Uganda. Accordingly, the Victim could therefore only provide evidence by deposition which would greatly prejudice his case as no opportunity for cross-examination would exist and he would be unable to appear in person to demonstrate to the Tribunal Commissioners the treatment he received and the consequences thereof. In addition, the Complainants note that at the time, the UHRC was not fully functional from 21 November 2008, when the term of office of its Commissioners expired and therefore was not, until an undetermined date, in a position to hold Tribunal hearings.⁹

⁸ See, Uganda Human Rights Commission, *supra* note 2, Annex 3 at 124 (setting out the "inadequate funding. The Commission is not facilitated sufficiently to carry out its constitutional mandate").

⁹ See Uganda Human Rights Commission, Press Release, Public Notice, available at http://www.uhrc.ug/press_release.php?item 9.



78. The Complainants state that there is no criminal offence of torture in Uganda, and for that reason, there can be no criminal investigations or prosecutions for the crime of torture as such. Hence, the Complainants assert that even if those responsible for the alleged violations committed against the Victim were prosecuted by ordinary offences, these fail to capture the specific nature of torture. The Complainants submit that for these reasons, the Victim was unable to file a criminal complaint in Uganda.
79. The Complainants argue that even if the Victim had a prospect of filing a civil complaint and obtaining reparation in civil proceedings, such proceedings would not be a sufficient remedy for the Victim as the complaint is alleging serious violations of human rights, such as torture and seeking an investigation into these violations.
80. Accordingly, the Complainants submit that both the Ugandan Courts and the UHRC do not present available and effective fora in which the Victim could seek a remedy and reparation. The Complainants indicate that on 1 August 2008, the Victim submitted a formal request to the Rwandan Minister of Foreign Affairs and Cooperation to provide him with diplomatic protection by espousing his claim with the Government of Uganda and the Victim's representatives received no response to this request. In addition, they claim that on 18 December 2008, the Victim's representatives wrote to the Minister of Foreign Affairs and Cooperation repeating the request to formally espouse the Victim's claim and requesting a response by 10 January 2009; and they have received no response. For the abovementioned reasons, the Complainants assert that no available and effective remedies exist by which the Victim could pursue his claim against the Respondent State.

Respondent State's Submission on Admissibility

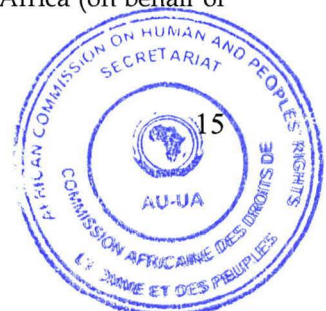
81. The Respondent State challenges the Admissibility of the Complainants submission. The Respondent State submits that the Communication does not fulfill the requirements set out in Article 56(5) of the African Charter, which requires that local remedies should have been exhausted before a complaint is brought to the Commission, and thus should be declared inadmissible.
82. The Respondent State submits that there are sufficient and effective legal and institutional mechanisms (the UHRC, the Constitutional Court and the Ugandan High Court) where the Victim could have pursued and can



still pursue his Complaint and have his cause heard. The Respondent State went further to cite the Commission's decision in *Institute for Human Rights and Development in Africa (on behalf of Jean Simbarikiye) v. DRC*¹⁰, where the Commission held that a Complainant must prove that attempts were made to exhaust local remedies and provide evidence that he or she is undergoing physical and financial constraints that prevent him or her from exhausting local remedies. The Respondent State argues there is no proof that the Victim has made any attempt to exhaust local remedies and furthermore he does not provide evidence proving that he is undergoing physical and financial constraints that prevent him from exhausting local remedies.

83. The Respondent State cited Ugandan human rights legislation, specifically the Ugandan Human Rights Act Cap.24 in Section 25 which provides that *'where a person entitled to bring a complaint before the Commission against any violation of a human right is incapacitated from doing so by reason of age, infirmity of body or mind, detention or just cause, whether similar to the foregoing or not, then the Complaint may be brought at any time within five(5) years after the incapacity ceased or the person entitled to bring the complaint dies whichever event first occurs'*. The Respondent State argues that the Victim still has the opportunity to lodge his complaint with the UHRC after he has recovered physically and financially.
84. The Respondent State contends the Complainants argument that the Victim fears for his safety and security given the way he left Uganda and that this fear is reinforced by the absence of a law or specific programme in place in Uganda providing protection for victims and witnesses and reports of harassment of complaints of torture and other ill-treatment.
85. According to the Respondent State, the Victim's safety is guaranteed because Uganda is a party to all relevant international conventions against torture and the Robben Island Guidelines for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment. Furthermore, the Constitution of the Republic of Uganda 1995 under Article 24, guarantees protection from torture or cruel, inhuman or degrading treatment or punishment. Accordingly, the enactment of a Bill on the prohibition and prevention of torture is also in its advanced stage. The Respondent State, therefore, submits that all these laws and efforts demonstrate that the Victim's safety is guaranteed once he enters into Ugandan territory to institute his suit.

¹⁰ Communication 247/02 - Institute for Human Rights and Development in Africa (on behalf of Jean Simbarikiye) v. DRC.



86. On the Complainants argument that if he lodged a case in the High Court, as a non-resident he would be required to pay for security costs, the Respondent State argues that the Victim could have lodged a complaint in the High Court as the Courts in Uganda have decided in various cases, such as in *East African Holdings Ltd vs. Madavan HCCS 1181 of 1988*, that the payment of security for costs is not mandatory but at the discretion of a judge.
87. The Respondent State submits that the UHRC's funding has greatly improved¹¹ and is fully constituted with six full time Commissioners sworn in, in May 2009. Therefore, the Victim can notify the UHRC of his case to enable it initiate investigations in line with Article 52 (1) of the Constitution 1995(which permits the UHRC to instate *suo moto* investigations) and the decision of the UHRC in its Complaints Handling Procedure Manual 2008, that any person may bring an issue to the attention of the Director of Complaints and Investigations that they believe requires a Commission initiated investigation.

Complainants Response to the Respondent State's Submission on Admissibility

88. The Complainants submit that the remedies referred to by the Respondent State are not available to the Victim because to effectively access the remedies would require the presence of the Victim in Uganda. The Complainants refer to the case of *Anuak Justice Council v Ethiopia*¹², where the Commission held that a remedy may only be available if the petitioner can pursue it without impediments or if he can make use of it in the circumstances of his case. The Complainants submit that the Victim therefore is not required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective.
89. The Complainants further submit that contrary to the Respondent State's assertion that his safety "is guaranteed once he enters into Ugandan territory to institute his suit", he could not and still cannot return to Uganda due to well-founded fears for his safety which existed at the time the initial communication was filed in May 2009, and which continue to exist today.

¹¹ UHRC in its 2008 Annual Report acknowledged that there has been improvement in funding as reflected in the financial year 2008/2009 budget allocations.

¹² Communication 299/205- Anuak Justice Council v Ethiopia, para. 51.



90. The Complainants aver that the Commission has established that the mere fact that a Complainant is located outside the Respondent State does not provide an exception to the requirement to exhaust local remedies¹³. However, the Commission has also consistently held that Complainants who escape for fear of their life could not be expected to return to the Respondent State to exhaust local remedies. Accordingly the Complainants make reference to *Rights International v Nigeria*, where the Commission held that the Complainant was "unable to pursue any domestic remedy following his flight for fear of his life"¹⁴, *Alhassen Abubakar v Ghana*, where the Commission held that it would not be logical to require an individual to return to the State where he or she has allegedly suffered violations of their fundamental rights and from which he or she had fled, in order to bring a claim for reparation"¹⁵ and particularly, in *Gabriel Shumba v Zimbabwe*, where the Complainant fled Zimbabwe for fear of his life after having been tortured by the Zimbabwe Republic Police, the Commission established that no attempts need to be made to exhaust local remedies¹⁶.

91. The Complainants submit that the above facts are similar to those in the present Communication because the Victim was arbitrarily arrested, detained incommunicado and systematically tortured for almost two years by individuals belonging to Ugandan Security Services, the Ugandan Army and Ugandan Police¹⁷. The length of the arbitrary detention and the severity of his torture over a long period of time naturally instilled a high level of fear in the Victim and left him physically impaired and traumatized¹⁸. The Complainants referred to the Commission's decision in *Jawara v The Gambia*, where the Commission held that "it would be reversing the clock of justice to request the Complainant to attempt local remedies".¹⁹

92. The Complainants argue that the Victim's fear for his life if he returned to Uganda is reinforced by the absence of any legislation and any programme that would provide protection against reprisals and threats, should he plan to file a Complaint against the State Agencies that allegedly were responsible for the violations forming the subject matter of the

¹³ Communication 219/1998-Legal Defence Centre v The Gambia, para 17.

¹⁴ Communication 215/98- Rights International v Nigeria, para 24.

¹⁵ Communication 103/1993-Alhassen Abubakar v Ghana, para 6.

¹⁶ Gabriel Schumba v Zimbabwe- paras 89, 90.

¹⁷ See initial Communication, Annex 2- the Applicants affidavit.

¹⁸ See initial Communication, Annex 4- Medical Report.

¹⁹ Communication 147/95- Sir Dawda K Jawara v The Gambia, para 40.



Communication. The Complainants state that while Respondent State argues that it ratified international conventions that would ensure the Victim's safety and security once he enters Ugandan territory to institute his suit, it does not provide any evidence as to how these international treaties are implemented by the State in practice. The Complainants refer to the UHRC's Twelfth Annual Report of 2009 that stated that it faces a number of challenges in particular in relation to Complaints initiated by victims of torture against the Uganda Police Force and that there are reprisals against victims and witnesses by security operatives.²⁰

93. The Complainants argue that developments subsequent to the filing of the initial complaint in May 2009, illustrate the risks the Victim would be exposed to should he return to Uganda, namely continued arbitrary detention and further torture illustrated by the facts as stated in para. 15-19 above. The Complainants cited the Commission's decision in *John D. Ouko v Kenya*, where the Commission held that where the Complainant is unable to pursue any domestic remedy following his flight to the DRC for fear of his life, and his subsequent recognition as a refugee by the Office of the UNHCR, the Complainant is unable to pursue any domestic remedy, and therefore declared the Communication admissible, based on the principle of constructive exhaustion of local remedies.²¹
94. For the above reasons, the Complainants submit that the Victim was not and still is not able to return to Uganda to lodge a complaint due to fear of his life and the remedies referred to by the Respondent State were and are not readily accessible and hence not available to the Victim.
95. Regarding the Victim's health, the Complainants note that their initial submission included a detailed expert medical and psychological report setting out the constraints preventing the Victim from travelling to Uganda to attempt to exhaust local remedies. The reports are based on a comprehensive two months treatment of the Victim in a rehabilitation centre specialised for rehabilitating victims of torture. This report confirmed that the Victim is suffering from severe depression and post-traumatic stress disorder concluding that the Victim was massively traumatized.
96. The Complainants further note that the Victim's release in May 2007 was widely reported in the media and the Annual Report of the UHRC of 2006,

²⁰ Annual Report of 2009, confirming that almost one third of all complaints received related to a violation of the right to be free from torture and cruel, inhuman or degrading treatment or punishment, Executive Summary, p.xvii.

²¹ Communication 232/1999- John D. Ouko v Kenya, para.19.



also referred to the Victim's detention without charge in 2006. Therefore, the Respondent State knew of the case in May 2007, if not earlier, yet no investigations appear to have been carried out by the time the Complaint was filed before the Commission in May 2009, almost two years after the Victim's release. Instead the Respondent State submits that the UHRC by its mandate can *suo moto* initiate investigations yet fails to adduce any evidence that such an investigation has been launched in regards to the Victim's case.

97. The Complainants therefore submit that it is inconceivable to expect the Victim to return to Uganda in light of the psychological report findings to the Victim's health as a result of the torture he allegedly suffered in Uganda, and in light of the foregoing, request the Commission to find the Communication Admissible.

Oral Submissions of the Respondent State

98. The Respondent State during the oral hearing held on 17 February 2016, submitted the following:

- i. the request for oral hearing was made to amplify its written submissions on Admissibility in particular, the domestic remedies available to the Complainants.
- ii. this Communication should be declared Inadmissible as domestic remedies are available which the Complainants are bound to exhaust before coming to the Commission in accordance with Article 56(5) of the African Charter.
- iii. the following remedies are available in Uganda to redress the claims of the Complainants under the Constitution of Uganda: *Article 24* provides that no person shall be subjected to torture and *Article 44(2)* provides for the non-derogability from torture. *Article 50* provides that where any person claims that a fundamental right has been infringed, that person can apply to any court for redress, noting that there have been several cases filed in this regard. *Article 52* gives any person or organization a right to bring an action on his/her own behalf or on behalf of another person including indigents. The Respondent State cited the case of *Greenwich v. AG of Uganda 2002*, where the courts held that another person has the right to bring an action against any other person.



- iv. the Constitution of Uganda in *Article 137* allows any person who wants to challenge a violation of their rights in Uganda to petition the Constitutional Court²².
- v. there are also other avenues available for the Victim to lodge a complaint particularly through the UHRC, whose core function is to investigate any complaint in accordance with *Article 53* of the Constitution.
- vi. the UHRC is independent, fully constituted, hears and grants appropriate remedies such as rehabilitation, medical care and psycho-social remedies.
- vii. the UHRC has been handling many complaints of this nature since its establishment and accordingly, the Complainants have not bothered to lodge a single complaint in the Respondent State before bringing the Communication to the Commission.
- viii. the Complainants allegation that by bringing the case before the Courts in Uganda, the Victim will be required to pay for security for is baseless as the Courts in Uganda have refused to award costs in matters of human rights.
- ix. Uganda has enacted the Prevention of Torture Act of 2012, which criminalizes torture and affirms its non-derogable nature including a sentence of life imprisonment. The Act also provides for strong investigations to be carried out and confers a duty to anyone who has reasonable grounds to report such acts and provides remedies/compensation where torture has been properly proved. Furthermore, under the Constitution of Uganda, where a person is incapacitated to bring a case, a complaint can be brought anytime within 5 years of the time he is incapacitated and the Victim is still within time to bring a case in Uganda, which he has failed to do.
- x. as such, there is no proof that the Victim filed a case in any Court in Uganda or the UHRC. The Complainants have thus made no attempt to file any case through the above-mentioned avenues and have also failed to proof the Victim's indigence.
- xi. local remedies have not been exhausted and the Communication should be declared Inadmissible.

²² See Justice Malenga in the case of Ismael Serugo v. Kampala City



The Commission's Analysis on Admissibility

99. Article 56 of the African Charter governs the Admissibility of Communications and provides seven requirements based on which the Commission assesses the Admissibility of Communications submitted before it.
100. The Complainants in this Communication claim that all the requirements of Admissibility under Article 56 of the African Charter have been met. The Respondent State argues that the Complainants have not exhausted local remedies as required by Article 56(5) of the African Charter.
101. The Commission therefore notes that the sole contentious Article between the Parties is with respect to the requirement under Article 56(5) of the African Charter. After carefully examining the Communication and the submissions of both Parties, the Commission notes that the authors have indicated that the Communication is compatible with the provisions of the Charter and the Constitutive Act of the AU as it outlines a *prima facie* case of the violations of Articles 1, 5, 6, and 7 of the African Charter; it is not written in disparaging or insulting language; it is not exclusively based on news disseminated through the mass media; it was submitted within a reasonable time; and has not been settled through other international procedures.
102. Further, since the Respondent State did not make any submissions to the contrary, the Commission is convinced that the Communication meets six of the Admissibility requirements under Article 56 of the African Charter which has been adequately substantiated by the Complainants, raise no contentious issues and require no further examination. To this end, the analysis on Admissibility of this Communication will focus on the requirements contained in Article 56(5) of the African Charter.
103. Article 56(5) of the African Charter stipulates that Communications should be '*sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged*'. The principle of exhaustion of local remedies is a well-recognized principle of international law. The *rationale* behind this principle is that States should be given the opportunity to address the issue before the matter is brought before international treaty bodies. Besides, the international adjudicatory bodies are not meant to function as first instance jurisdictions, especially where effective and available local remedies exist.



104. The Commission has addressed the rule of exhaustion of local remedies in several of its decisions. In *Free Legal Assistance Group and Others v Zaire*²³ and *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia*²⁴ the Commission held that the requirement on exhaustion of local remedies is founded on the principle that a government should have notice of human rights violations in order to have the opportunity to remedy such violations before approaching an international body.

105. Accordingly, the submissions of the Parties in this case will be assessed in light of the above.

106. The Complainants submit that while an individual alleging torture and other ill-treatment in Uganda would normally be able to lodge a Complaint before the Ugandan High Court or the UHRC, neither of these options is available to the Victim as he is unable to travel to Uganda due to his serious state of health ; his limited financial resources (since he is unable to work as a result of his torture and other ill-treatment); and the fears he has for his safety and security given the manner in which he fled from Uganda. The Complainants further submit that the Ugandan Courts and the UHRC do not present available, effective and sufficient fora in which the Victim could seek a remedy and reparation. The Complainants are therefore of the view that the requirement to exhaust local remedies must be dispensed with in the present Communication as domestic remedies are unavailable, ineffective and insufficient. As a result, the Victim is not required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective.

107. The Respondent State in response argues that the Complainants have not attempted to exhaust local remedies and still have both administrative and judicial remedies left to pursue. According to the Respondent State, the petitioners could approach both the UHRC and the Ugandan Courts. The Respondent State thus argue that there is no proof that the Victim has made any attempt to exhaust local remedies or provide evidence proving that he is undergoing physical and financial constraints that prevent him from exhausting local remedies.

108. The real question before the Commission is, in assessing this particular situation, are the existing remedies available and capable of effectively remedying the alleged violations suffered by the Victim? Therefore, a

²³ Communication 25/89, 47/90, 56/91, 100/93 – Free Legal Assistance Group and Others v Zaire (1995) para. 36.

²⁴ Communication 71/92 – Recontre Africaine pour la Defense des Droits de l'Homme v Zambia (1997) para. 10.



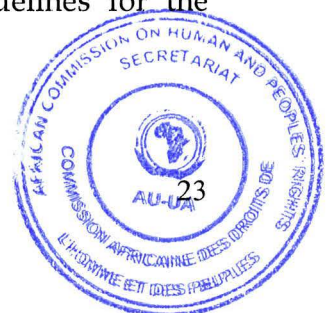
critical analysis of the circumstances of the case is helpful to determine whether the Complainants have fulfilled the requirements under Article 56(5).

109. In *Sir Dawda K. Jawara v The Gambia*,²⁵ the Commission held that, 'in evaluating the rule of exhaustion of local remedies, three major criteria shall be taken into consideration, namely the remedy must be available, effective and sufficient. The Commission's approach to such criteria involves three basic enquiries: first, whether the petitioner can pursue the existing local remedies without impediment (the rule of availability of local remedies). If the remedies are found to be available, whether it offers a prospect of success (the effectiveness of local remedies), and finally whether it is capable of redressing the complaint (the sufficiency of local remedies). However, if the petitioner cannot pursue the existing local remedies without impediment, i.e., if the remedies are not available, the enquiry ends there as it would not be logical to analyse the effectiveness of remedies that are deemed unavailable to address a complaint.

110. In the present Communication, the Victim was allegedly never charged with any offence from 7 June 2005 to 3 May 2007. Although never charged, he was held *incommunicado* in various detentions centres including a number of safe houses and secret prisons; denied access to his family, legal representation, medical treatment, consular assistance, and the possibility to challenge his detention by way of *habeas corpus*. Hence, the Complainants claim that the Victim could not pursue the existing local remedies due to his financial inability to travel consecutively to Uganda, his health problems as consequence of the alleged torture suffered, and his fear for his life, safety and security.

111. The Respondent State on the other hand, contests the Complainants arguments and argues that there are sufficient and effective legal and institutional mechanisms (the UHRC, the Constitutional Court and the Ugandan High Court) where the Victim could have pursued and can still pursue his complaint and have his cause heard. The Respondent State further argues that there is no proof that the Victim has made any attempt to exhaust local remedies and the Complainants did not provide evidence proving that the Victim is undergoing physical and financial constraints that prevent him from exhausting local remedies. According to the Respondent State, in as far as safety is concerned, the Victim's safety is guaranteed because Uganda is a party to all relevant international conventions against torture and the Robben Island Guidelines for the

²⁵ Communication 147/95 -149/96 *Sir Dawda K. Jawara vs. The Gambia*, para.



Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment and furthermore the Constitution of the Republic of Uganda 1995.

112. The Commission has pointed out in *Institute for Human Rights and Development in Africa (on behalf of Jean Simbarkiyé) v DRC* and previous decisions that, there is a need for a Complainant to provide evidence showing the moral and material constraints alleged to have prevented him from exhausting local remedies.²⁶

113. The Complainants, in setting out the constraints preventing the Victim from travelling to Uganda to attempt to exhaust local remedies indicated that, the Victim could not return to Uganda to file a Complaint due to the serious state of his health and the risk of re-traumatization. Furthermore, the Complainants argue that due to the Victim's poor health conditions, he is now unable to perform work, gain employment and financially support himself. This allegation is confirmed by a Medical Report attached to the Complaint (Annex 4 - Preliminary Medical Report) which is clear in asserting that the Victim now suffers from serious life-long physical and psychological health problems such as anal bleeding; complete loss of olfactory sensation; partial deafness, loss of vision and paralysis of his torso; loss of bowel control and sensation in his back, amongst others.

114. The Complainants also indicate that contrary to the Respondent States' assertion that the Victim's safety and security is guaranteed once he enters into Ugandan territory to institute his suit, the Victim cannot return to Uganda due to well-founded fears for his safety which existed at the time the initial Communication was filed in May 2009, and which continues to exist today. The length of the arbitrary detention and the severity of his torture over a long period of time naturally instilled a high level of fear in the Victim and left him physically impaired and traumatized. The Complainants argue that the remedies referred to by the Respondent State are therefore not available to the Victim because to effectively access the remedies would require the presence of the Victim in Uganda. For these reasons, the Complainants assert that the Victim cannot return to Uganda to institute his claim and therefore the remedies are not available.

115. Accordingly, as illustrated above, the Commission is convinced that the medical report thus confirms the Victim's poor health conditions, inability to travel to Uganda and also to perform work and financially support

²⁶ Communication 47/02- Institute for Human Rights and Development in Africa (on behalf of Jean Simbarkiyé) v DRC, para. 33.



himself. It is true that the High Courts and UHRC could have been approached as available means to address the situation, however, as pointed out above, a remedy is considered available if the petitioner can pursue it without impediment, failing which it will lack the requisite of accessibility. Even if the Commission was to consider these remedies as available to the Victim, questions would arise on whether they could offer prospects of success or whether they could properly remedy the situation? The answer to these questions would be negative as the Commission has set out in *Purohit and Moore v The Gambia*²⁷ that a remedy which exists in theory but is only available to those who can afford to access it will not be considered effective. The Commission is therefore of the view that under such particular circumstances, local remedies, although available in theory, cannot be said to be available to the Victim in practice, under this *sui generis* situation.

116. Furthermore, the Commission in assessing both Parties' submissions on the issue of the Victim's fear for his safety and security, would like to reiterate its decisions in *Michael Majuru v. Zimbabwe, Alhassen Abubakar v Ghana and Rights International v. Nigeria*²⁸ where it held that Complainants who escape for fear of their lives could not be expected to return to the Respondent State to exhaust local remedies. The Commission would also like to cite its decision in *Gabriel Shumba v Zimbabwe*, where the Complainant fled Zimbabwe for fear of his life after having been tortured by the Zimbabwe Republic Police, it established that no attempts need to be made to exhaust local remedies²⁹. The Commission is therefore of the view that under the present circumstance of this Communication, due to fear for his life and safety, the Victim cannot be required to return to the Respondent State where he has allegedly suffered a series of violations of his rights and from which he has fled, in order to exhaust local remedies.

117. The Commission for these reasons, is satisfied that the Complainants have provided sufficient evidence showing the moral and material constraints preventing the Victim from exhausting local remedies, as the Complainants have sufficiently proved the Victim's health, financial constraints and fear for his life and security that prevent him from exhausting local remedies.

²⁷ Communication 241/01- *Purohit and More v The Gambia*, para. 38.

²⁸ Communication 308/05- *Micheal Majuru v. Zimbabwe*, Communication 103/93- *Alhassen Abubakar v Ghana* and Communication 215/98- *Rights International V Nigeria*.

²⁹ *Gabriel Schumba v Zimbabwe*, paras 89,90.



118. At this juncture, the Commission would also like to allude to the Complainants argument that the Victim's release in May 2007 was widely reported in the media, and the Annual Report of the UHRC of 2006 also referred to the Victim's detention without charge in 2006. Therefore, the Respondent State was aware of the matter since May 2007, if not earlier, and yet no investigations were carried out, before the Complaint was filed before the Commission in May 2009, almost two years after the Victim's release. The Complainants therefore contend the Respondent State's argument that the UHRC by its mandate can *suo moto* initiate investigations yet fails to adduce any evidence that such an investigation has been initiated in the Victim's case.

119. The Commission has held in *Article 19 v. Eritrea* that whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion, furthermore, where the State has had ample notice of the violations, it should take steps to remedy them.³⁰ The Commission is therefore of the view that the Respondent State did have ample notice of the Victims case from 2006 and as such should have initiated investigations on the allegations made by the Victim in line with Article 52(1) of the Constitution of Uganda, which it did not do.

120. For the aforementioned reasons, it is the view of the Commission that local remedies though theoretically available, are not effective and/ or sufficient. Therefore, the requirement to exhaust local remedies must be dispensed with in the present Communication and thus holds that the Complainants have complied with the requirements of Article 56(5) of the African Charter.

121. **For these reasons, the Commission declares this Communication Admissible.**



³⁰ Communication 275/03 - Article 19 v. Eritrea. Para. 72,78.

MERITS

The Complainants submission on the Merits

Alleged Violation of Article 5 of the African Charter

122. The Complainants submit that the acts of torture and ill-treatment perpetrated upon the Victim, violates Article 5 of the African Charter, which prohibits “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment”.

123. The Complainants submit that the Commission in interpreting Article 5 of the African Charter, referred to Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),³¹ and has drawn on the jurisprudence of the European Court of Human Rights on Article 3 of the European Convention on Human Rights³².

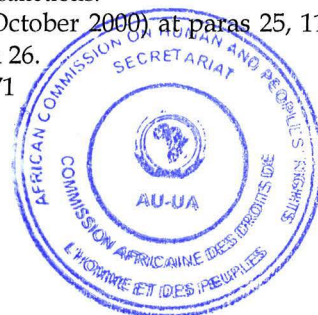
124. The Complainants argue that as recognized by Article 1 of the UNCAT, the European Court of Human Rights³³ and the jurisprudence of the Commission, psychological treatment – such as death threats, instilling fear, solitary confinement, and humiliation – may constitute torture or cruel, inhuman or degrading treatment or punishment. As the Commission has recognized, the term ‘cruel, inhuman or degrading punishment or treatment’ “is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental”³⁴. Moreover, the Complainants argue that the Commission held that ‘inhuman or degrading treatment’ “includes not only action which

³¹ Comm. No.245/2002, Zimbabwe Human Rights NGO Forum v. Zimbabwe, at para. 180.

³² Article 1 of the UNCAT defines torture as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

³³ See *Akkoc v Turjey*, European Court of Human Rights (10 October 2000), at paras 25, 116 and 117; and *Campbell and Cosans v. UK* (25 February 1982) at para 26.

³⁴ See Comm 244/98- Media Rights Agenda v. Nigeria, at para 71



cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.”³⁵

125. The Complainants submit that the arbitrary detention of the Victim was characterized by gross and inhuman acts of cruelty and torture, including; the binding and stretching of his testicles, wherein the Victim’s testicles were tied with plastic string and attached to a car and he was told to ‘pull the car’ with beatings administered if he refused; prolonged application of extreme heat, including the ‘ironing’ of his back, wherein ghee and a shirt was applied to the Victims’ back and his back was ‘ironed’ causing extreme pain and internal bleeding; and prolonged hanging by his wrists from the ceiling of his cell, during which time beatings were administered.

126. According to the Complainants, the Victim was further subjected to electrocution; dousing with freezing water; repeated beatings with batons, electrical wires, wooden bars, sticks and military boots; squeezing of his eyes; starvation; the refusal of medical attention; death threats made while guns were shoved into his mouth; guns fired while held next to his ears; confinement to a small room with the rotting cadavers of other tortured detainees, including one occasion where he was forced to eat his food out of the mouth of a dead detainee, with threats of a similar fate if he did not cooperate; prolonged periods of isolation; sensory deprivation; and humiliation.

127. The Complainants further submit that the Victim was held incommunicado for over 23 months, during which period he was denied contact with a legal representative and with his family members. The incommunicado detention of the Victim was particularly acute given its prolonged duration. The Complainants state that the Commission has recognized that prolonged incommunicado detention in itself may give rise to a violation of Article 5 of the African Charter³⁶.

128. According to the Complainants, for nine (9) months of the Victim’s detention, he was fed only three times a week; refused access to toilet and bathing facilities and was often deprived of clothing other than shorts or underwear. Furthermore, the Complainants state that throughout the Victim’s detention he did not know the reasons for, or the duration of his detention. This caused him severe psychological suffering, amounting to inhumane or degrading treatment. The Complainants argue that the

³⁵ See *C v. Australia*, Human Rights Committee, para 8.4, *Dougoz v. Greece*, 6 March 2001) para 48; *Alver v. Estonia* (at para 56) European Court of Human Rights

³⁶ See Comm 250/2002(2003) *Zegveld and Ephrem v Eritrea*, at para 55.



Commission has held that being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma³⁷.

129. The Complainants submit that the Victim now suffers from serious and life-long physical and psychological health problems as a result of his arbitrary detention, torture and other ill-treatment. His physical injuries include but are not limited to anal bleeding, loss of bowel control, urination of blood, impotence, complete loss of the sense of smell and taste, partial deafness, partial loss of vision, partial paralysis of the torso, loss of sensation in the back, joint immobility, frequent fainting episodes, severe headaches, widespread pain and permanent scarring. According to the Complainants, the physical consequences of the torture is serious, significant and ongoing. In addition, the Victim suffers from extreme psychological problems including Post Traumatic Stress Disorder, as well as severe depression, loneliness, anger and fear³⁸.

130. The Complainants state that the Victim was assessed by medical doctors namely, Dr. Morten Ekstrøm and Dr. Önder Özkalıpci who concluded, inter alia, that; "his mental symptomatology and clinical evaluation indicate that he has been massively traumatized; and physical marks on his body are highly consistent with the allegations of torture during his detention period³⁹."

131. The Complainants submit that all the acts inflicted on the Victim, as described above, would satisfy the criteria for any sensible definition of torture. According to the Complainants, in any event, the acts were intentionally carried out to inflict severe pain or suffering upon the Victim during his arbitrary detention, constitute torture or cruel, inhuman, and degrading treatment, in violation of Article 5 of the African Charter.

Alleged Violation of Article 6 of the African Charter

132. The Complainants submit that the Victim was denied his right to liberty and security of the person and subjected to arbitrary arrest and detention in violation of Article 6 of the African Charter.

133. The Complainants state that the Victim's arrest was arbitrary as he was seized suddenly without explanation, without any lawful basis and was not

³⁷ See Comm 225/98(2000) *Huri Laws v. Nigeria*, at para 40 and Comm 250/2002(2003) *Zegveld and Ehrem v. Eritrea*, at para 55.

³⁸ See, Annex 2 containing the expert medical report by Drs. Morten Ekstrøm and Önder Özkalıpci together with enclosures.

³⁹ Ibid 38



informed of the reasons for his arrest. The Complainants further state that the Victim was detained for over 23 months without being informed of the reasons of his arrest and detention, and without ever being charged with an offence. This according to the Complainants, constitutes an arbitrary arrest and detention in violation of Article 6 of the African Charter and the Constitution of Uganda which established that " a person arrested or detained...upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible, but in any case not later than 48 hrs from the time of his or either arrest". The Complainants also referred to the decision of the European Court which held that an arrest must be based on "reasonable suspicion"⁴⁰.

134. The Complainants in interpreting the notion of arbitrarily arrest, referred to the decision of the Commission where it clarified that arbitrariness is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law"⁴¹. The Complainants also referred to the Commission's jurisprudence where it recognised the right of individuals to be informed of reasons for their arrest⁴² and where individuals have been detained without charges being brought, constitutes an arbitrary deprivation of their liberty in violation of article 6 of the African Charter⁴³. The Complainants therefore submit that the detention of the Victim from 7 June 2005 to 3 May 2007, constitutes a breach of the Victim's rights⁴⁴.

135. Furthermore, the Complainants aver that the Victim's rights in Article 6 and 7 of the African Charter were violated in that he was held incommunicado for over 23 months, during which period he was denied contact with a lawyer and with his family. The Complainants state that the Commission has held that "Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. ...There

⁴⁰ See Application 70279/01, *Gusinkiy v Russia*, European Court on Human Rights, at para 53

⁴¹ Communication 275.2003, *Article 19 v Eritrea*, at para 93.

⁴² Communication 224/98, *Media Rights Agenda v. Nigeria*, at para 83-86.

⁴³ Communication 143/95 and 150/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, at para 55.

⁴⁴ The Complainants request the Commission to note that those additional detention periods detailed above do not form part of the index application and will form the basis of a fresh Communication to the Commission in due course. Nonetheless those periods of additional detention highly relevant to the indexed circumstances, tending to suggest a sustained course of conduct in targeting the Victim, as well as a pattern of failures to respect the Victim's fundamental rights.



should be no secret detentions and States must disclose the fact that someone is being detained as well as the place of detention. Every detained person must have prompt access to a lawyer and to their families"⁴⁵

136. The Complainants also submit that during the period of his arbitrary detention, the Victim was also denied access to consular assistance in contravention of Article 36 (1) of the Vienna Convention on Consular Relations 1963 which has been interpreted to confer rights on both the national to access his or her consulate and the state to access his or her national.

Alleged Violation of Article 7 of the African Charter

137. The Complainants submit that the Victim was denied the right to have his cause heard in violation of Article 7 of the African Charter.

138. The Complainants state that Article 7 of the African Charter is violated in that the Victim was denied the right to challenge his detention by way of a *habeas corpus* application before a judicial authority; and the right to have his detention reviewed on a periodic basis by a court of law or other appropriate judicial authority. The Complainants state that the Commission has held that even in cases in which the period of detention before being brought before a judge is expanded marginally, the individual detained must still have the right to make a *habeas corpus* application to challenge the detention and access to a lawyer⁴⁶.

139. The Complainants further state that the Victim's Article 6 and 7 of the African Charter rights were violated in that he was denied the right to be brought promptly before a judicial authority and the right to have his cause heard. The Complainants submit that not only was the Victim detained for 23 months without being brought promptly before a judicial authority, he was also not tried. The Complainants refer to Resolution on the Right to Recourse and Fair Trial, in which the Commission recognized that Article 7 (1) of the African Charter entails that "[p]ersons arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released⁴⁷. The Complainants also refer to the Commission's decision where it held that refusal and/or negligence" of the

⁴⁵ Comm 250/2002(2003) Zegveld and Ephrem v. Eritrea, at para 55.

⁴⁶ Ibid 44, at para 56.

⁴⁷ Resolution on the Right to Recourse and Fair Trial, adopted by the African Commission on Human and Peoples' Rights in Tunis, Tunisia, 1992, at para 2(c).



respondent state to bring the applicant "promptly before a judge or other judicial officer for trial" constitute a violation of Article 7 (1) (d) of the African Charter⁴⁸.

140. The Complainants accordingly submit that throughout the entire period of the Victim's detention, he was denied access to a lawyer, in contravention of Article 7 (1) (c) of the African Charter, which sets out the "right to defence, including the right to be defended by counsel of his choice. The Complainants argue that the authorities of the respondent state were under the obligation to provide the Victim with prompt access to a legal representative within a few days of detention, as recognized by the Commission.⁴⁹

Alleged Violation of Article 1 of the African Charter

141. The Complainants submit that the failure to conduct a prompt, independent, effective and thorough investigation into the Victim's treatment and the failure to conduct an effective remedy to the Victim for the breaches of his rights, violates Article 1 of the African Charter, in conjunction with Articles 5, 6 and 7 of the African Charter.

142. The Complainants state that the Ugandan authorities were aware of the Victim's detention, torture and other ill-treatment, and that it was only after the Victim's return to Rwanda and substantial media coverage of his treatment, that reports of an investigation emerged in the Ugandan and Rwandan press, however no investigations have been forthcoming⁵⁰.

143. According to the Complainant, the failure of the Respondent State to conduct a prompt, impartial, thorough and effective investigation into the allegations of arbitrary detention, torture and other ill-treatment made to the Victim, constitutes a violation of Article 1 read in conjunction with Articles 5, 6 and 7 of the African Charter.

144. The Complainants further argue that as a result of his arbitrary detention, torture and other ill-treatment, the Victim has the right to a satisfactory

⁴⁸ Communication 225.98(2000) Huri Laws v. Nigeria, at para 46.

⁴⁹ Communication 250/2002 (2003) Zegveld and Ephrem v. Eritrea, at para. 55.

⁵⁰ Tortured Kalinga was a Soldier "New Times (21 September 2007). According to the Complainant, the Ugandan Minister for Internal Affairs, Maj. Felix Kulayigye, was also reported in the media to have stated that *"I am not aware of the matter but I can assure you we are going to investigate it and whoever is responsible will face the consequences. We as government cannot let someone be tortured and be incommunicado for all that long. For sure that is not our policy. Probably he could have had a problem with a security person but we are going to find out"*.



remedy and adequate and effective reparation. The right to an effective remedy and reparation is widely recognised in international law with particular reference given to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and serious violations of International Humanitarian Law⁵¹.

145. The Complainants submit that the Respondent State has not provided the Victim with an adequate and effective remedy and reparation for the terrible violations he has suffered. The Complainants reiterated that the Victim does not have access to judicial remedies in Uganda which he could pursue, thus, for the above reasons, the Respondent State has failed to meet its obligation under Article 1 of the African Charter, read in conjunction with Article 5, 6 and 7 of the African Charter.

Prayers

146. The Complainants pray that in the present Communication, the Victim seeks the following remedies:

- 1) A finding and/or declaration by the Commission that the Victim was subject to violations of Articles 1, 5, 6 and 7 of the African Charter;
- 2) A finding and/or declaration by the Commission that the Victim was subject arbitrarily detained and tortured by individuals and/or organisations for whom the Respondent State is responsible
- 3) That the Commission direct the Respondent State to conduct an independent, impartial and thorough investigation capable of identifying and punishing those responsible for the alleged treatment of the Victim as a matter of urgency;
- 4) That the Commission remind the Respondent State that in conducting such an investigation, it is under an obligation to ensure that the Victim is kept informed of the progress and result of the investigations as well as any subsequent prosecutions;
- 5) That the Commission directs the Respondent State to provide material and moral damages to the Victim. Such damages must include, but may not be limited to:

⁵¹ Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, approved by the General Assembly Resolution 60/147 (UN Doc. No. A/Res/60/147 (2006)).



- a. Loss of earnings (including both past and future earnings and earning potential given that the Victim is now unable to work as a result of the torture and cruel, inhuman and degrading treatment);
 - b. Compensation for his physical and mental pain and suffering, and damage to his reputation;
 - c. Provision for the necessary medical and psychological care and legal; and
 - d. social services required by the Victim.
- 6) That the Commission remind the Respondent State of its duty to provide the Applicant with just satisfaction, in particular in the form of a full and public disclosure of the truth about his arbitrary detention, torture and ill-treatment and an official apology, acknowledging and accepting responsibility for his treatment.

Submission of the Respondent State on Merits

147. In accordance with the provisions of Rule 105(1) of its Rules of Procedure (2010), the Parties shall each have sixty (60) days to make their submissions on the Merits to the Commission. They shall also have at their express request, an additional period of time not exceeding thirty (30) days per party at each stage of the proceedings, to make their submissions. The Secretariat ensures the exchange of written submissions and compliance with these various deadlines.

148. In the present case, the Commission notes that the above procedural requirements have been complied with. In addition, due to time constraints, the Commission deferred the examination of the Communication to its successive sessions. Despite this, the Respondent State did not submit on the Merits nor did it provide any justification for its failure to do so.

149. As such, the Commission decides to examine the Communication on the basis of the information in its possession, and make a default decision in accordance with its own practice⁵². The Commission will therefore

⁵² See Communication 59/91, Embga Mekongo Louis v/ Cameroon; Communication 60/91, Constitutional Rights Project (with regard to Wahab Akamu, G. Adegba and others) v/ Nigeria; 64/91, Communication 74/92, Commission nationale des droits de l'homme et des libertés v/ Tchad, para 25; Communication 87/93, The Constitutional Rights Project (with regard to Zamani Lakwot and 6 others) v/ Nigeria and Communication 101/93, Civil Liberties Organization (with regard to the Nigerian Bar Association) v/ Nigeria.



determine whether the actions of the Respondent State as described by the Complainants, constitute a violation of Articles 1, 5, 6 and 7 of the African Charter.

Analysis of the Commission on the Merits

Alleged Violation of Article 5

150. Article 5 of the African Charter provides that:

“every individual to have the right to the respect of the dignity inherent in a human being. It further provides that all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”

151. The Commission has held that Article 5 of the African Charter is aimed at the protection of both human dignity and the physical and mental integrity of the individual.⁵³ The African Charter does not define the meaning of the words or the phrase “torture or degrading treatment or punishment.” However, the Commission in its interpretation of Article 5 of the African Charter, adopted the definition of torture contained in Article 1 of United Nations Convention against Torture (UNCAT) which states that⁵⁴:

[T]he term “torture” means any act by “is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.



⁵³ Communication 279/03-296/05 para 155.

⁵⁴ Ibid.

152. The Commission also adopted the interpretation of the United Nations Committee against Torture⁵⁵ in its General Comment No. 2, which states that *"for torture to have occurred, the incriminated acts must intentionally cause severe suffering, be intended to obtain information or a confession, punish the victim for real or alleged acts, and be attributable to a public official or person acting in that capacity"*.

153. In the present Communication, the Commission notes the Complainants allegations that all the acts inflicted on the Victim as described above in paragraphs 123 to 128 above, satisfy the criteria for torture and that the acts were intentionally carried out by state officials, to inflict severe pain or suffering on the Victim, during his arbitrary detention. The Commission further notes the Complainants submission that the treatment the Victim was subjected to include the infliction of not only severe physical but also psychological pain and suffering resulting in serious and life-long physical and psychological health problems, as a result of his alleged arbitrary detention, torture and other ill-treatment, his physical injuries.

154. Consequently, the Commission would proceed to assess whether the alleged acts stipulated in paragraph 123 to 128 above, do constitute acts of torture or cruel, inhuman or degrading treatment and punishment, in violation of Article 5 of the African Charter?

155. The Commission recalls its decision in *Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan*⁵⁶ in which it set out the principal elements that constitute torture under the African Charter, namely that, severe pain or suffering has to have been inflicted for a specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination, by or at the instigation of or with the consent or acquiescence of state authorities. Furthermore, the Commission in *Egyptian Initiative for Personal Rights and Interights v Egypt*⁵⁷ held that 'when a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment.

⁵⁵ Ibid 19 & See Article 4 of the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) adopted by the Commission in October 2002.

⁵⁶ Communication 279/03 - 296/05 *Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan* (2009) ACHPR para 255 [sic] & 156.

⁵⁷ Communication 334/06 - *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* para 168.



156. The Commission in determining acts that constitute torture also held in *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*⁵⁸, that where the detainees were beaten and forced to make statements; denied the opportunity of sleeping and being held in solitary confinement, were acts that details instances of torture, and cruel, inhuman and degrading treatments.

157. Based on the jurisprudence of the Commission above, the Commission in the present Communication is of the view that the acts inflicted on the Victim as illustrated in paragraphs 123 to 128 above⁵⁹, details such a serious, cruel and inhumane nature that it attains the threshold of severity to constitute torture.

158. Regarding the Complainants submission that the Victim was denied medical attention during his detention, the Commission in *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*⁶⁰, held that aspects of the treatment of Vera and Orton Chirwa such as excessive solitary confinement, shackling within a cell, extremely poor-quality food and denial of access to adequate medical care, were in contravention of Article 5 of the African Charter. The Commission's *Guidelines on Arrest, Policy Custody and Pre-Trial Detention (Luanda Guidelines)* also provides for "the right to urgent medical assistance, to request and receive a medical examination and to obtain access to existing medical facilities"⁶¹. Based on the same reasoning, the Commission finds that, the denial of the Victim to access medical care while in detention, constitutes a violation of Article 5 of the African Charter.

⁵⁸ Communications 54/91-61/91-96/93-98/93-164/97 196/97-210/98 Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania.

⁵⁹ See Annex 2- containing the affidavit of the Victim (including being held in solitary confinement for a period of months; being held incommunicado in various detention centres including a number of safe houses and secret prisons, the binding and stretching of his testicles, prolonged application of extreme heat, including the 'ironing' of his back, electrocution, dousing with freezing water, dousing with freezing water, starvation and denied medical attention amongst others).

⁶⁰ Communication 64/92-68/92-78/92 8AR- Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi- para

⁶¹ See Guidelines on Arrest, Policy Custody and Pre-Trial Detention



159. It is also the practice of the Commission to rely on sworn testimonies and a medical certificate as proof of torture⁶². In the present Communication, the Complainants submit sworn testimony of the Victim and medical report provided by Medical Experts and Forensic Physician in 2007 following the Victim's release⁶³. The Medical Report also containing pictorial evidence found that *"the Victim's mental symptomatology and the clinical evaluation indicates that he has been massively traumatised and the physical marks on his body are highly consistent with the allegation of torture during his detention period"*⁶⁴. The Commission in relying on the sworn testimony of the Victim, backed by the medical report, satisfies itself that torture occurred.

160. On the issue of the Complainants allegations that the Victim was held incommunicado for over 23 months, during which period he was denied contact with a legal representative and with his family members, the Commission in its Principles and Guidelines on Fair Trial provide States an obligation *"to ensure that any arrested or detained person is provided with the necessary facilities to communicate with his lawyer, doctor, family and friends"*⁶⁵. The Luanda Guidelines also provides for *"the right of all persons arrested to contact and access a family member or another person of their choice, and if relevant consular authorities or embassy"*⁶⁶.

161. Moreover, the Commission recalls its decision in *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights and the Association of Members of the Episcopal Conference of East African Bishops' Conference v. Sudan* and *Law Office of Ghazi Suleiman v. Sudan*, where it held that detaining persons without allowing them any contact with their families and refusing to inform the families of the fact and place of their detention, constitutes inhuman treatment of both the detainees and their families.

⁶² Communication 379/09, Monim Elgak. Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan para 100

⁶³ See Annex 2- containing the affidavit of the Victim (describing the places in which he was held). This affidavit also sets out in detail the torture and other ill treatment inflicted.

See Annex 3- 9th Annual Report to the Parliament of the Uganda Human Rights Commission (page 31-32) containing a scanned copy of the Makindye Military Barracks 'violent Crime Unit Register containing the Victim's name, date of arrest but no charge against him.

See Annex 4-Medical/psychiatric Report of Danish Medical Group, Amnesty International and International Rehabilitation Council for Torture Victims in Denmark.

⁶⁴ See Annex 4 containing the Expert Medical Report by Drs. Mortem Ekstrom and Onder Ozkalipci together with enclosures.

⁶⁵ Ibid Principle M (2) (e)

⁶⁶ Principle 4(d), (f) of the Guidelines on Arrest, Policy Custody and Pre-Trial Detention



162. In line with the same reasoning, the Commission is of the view that the prolonged incommunicado detention of the Victim and denial of contact with his family while in detention, constitutes inhumane and degrading treatment.

163. Regarding the Complainants argument that more than 14 years after the Victim's release and despite the media reports on his alleged torture and arbitrary detention⁶⁷, the Respondent State did not take measures to investigate the acts of torture, the Commission refers to the Robben Island Guidelines which provides that "*states parties are under an obligation to establish fully independent mechanisms to which allegations of torture are brought; ensure that where claims of torture or ill-treatment are brought before the competent authorities, an investigation shall be initiated; investigations shall be conducted promptly, impartially and effectively and reparations are offered to victims irrespective of whether a successful criminal prosecution can or has been brought*⁶⁸. These provisions are also reinforced in the Commission's Luanda Guidelines, which provides "*that states shall ensure prompt investigations into allegations of torture*⁶⁹. Similarly, the European Court of Human Rights in *Alpar v Turkey*⁷⁰ also held that States are obligated to conduct an effective investigation into the claims of the victim on torture, and having not done so, they violated Article 3 prohibiting torture.

164. The Commission therefore finds that the failure of the Respondent State to carry out investigations on the acts of torture meted on the Victim, constitutes a violation of Article 5 of the African Charter.

165. For the above reasons therefore, the Commission finds that the Respondent State violated Article 5 of the African Charter.

Alleged Violation of Article 6

166. Article 6 of the African Charter provides that:

⁶⁷ See Press articles in Annex 5: What secrets Does Acleo Kalinga Have for Rwanda? 'New Times (31 August 2007) Uganda, Rwanda Newspapers Trade Accusations on Secret Prisons 'Rwanda News Agency (5 July 2007); Uganda Envoy Denies Abuse of Rwanda's" Rwanda News Agency (25 June 2007)" East Africa: Will the New East African Court Guarantee Human Rights "Daily Monitor (21 June 2007)" Africa: Human Rights Abuse; Is American Competing with Africa? New Times (17 June 2007); Uganda: Detained and Tortured for 2 Years "Daily Monitor (14 June 2007);" Rwanda: President Kagame Orders Probe into Torture in Uganda Jails: Daily Monitor (30 May 2007).

⁶⁸ Article 17, 18, 19 and 50 of the Robben Island Guidelines

⁶⁹ See Article 22 of the Luanda Guidelines

⁷⁰ Case of *Alpar vs. Turkey* (22643/07) before the European Court of Human Rights



"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

167. The Commission observes that not all actions that constrain an individual's physical freedom can amount to a deprivation of liberty in terms of Article 6 of the African Charter. However, a deprivation of liberty that falls outside the strict confines of the law, or for reasons that are not acceptable or simply arbitrary, will amount to a violation of Article 6 of the African Charter. In its General Comment No. 35, the United Nations Human Rights Committee emphasized that a person's liberty and security of person are precious in themselves, but also because the deprivation of liberty and the denial of the right to security of person have always been means of hindering the enjoyment of other rights. Both rights are therefore fundamental, because they condition the enjoyment of other rights⁷¹.

168. In the present Communication, the Complainants submit that the Victim was denied his right to liberty and security of the person and subjected to arbitrary arrest and detention. The Complainants also submit that the Victim's arrest was arbitrary as he was arrested without being informed the reasons of his arrest and detained for 23 months (from 7 June 2005 to 3 May 2007) without ever being charged with an offence and without any lawful basis⁷².

169. The Commission has established in its *Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa* and *Robben Island Guidelines* that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his/her arrest and shall be promptly informed, in a language he/she understands, of any charges against him/her; and ensure that all persons deprived of their liberty are brought promptly before a judicial authority⁷³. Furthermore, the Commission's *Luanda Guidelines* also provides that "arrested persons shall have the right to be informed of the reasons for their arrest and any charges against them."⁷⁴

⁷¹ General Comment No. 35 of the United Nations Human Rights Committee, para 2.

⁷² See Annex 3- 9th Annual Report to the Parliament of the Uganda Human Rights Commission (page 31-32) containing a scanned copy of the Makindye Military Barracks 'violent Crime Unit Register containing the Victim's name, date of arrest but no charge against him.

⁷³ Article 25, 26 & 27 of the Robben Island Guidelines

⁷⁴ Principle 4(g) of Guidelines on Arrest, Policy Custody and Pre-Trial Detention (Luanda Guidelines)



170. In general, the Commission has considered arbitrary detention, to mean a prolonged detention without trial. This position was held in *Ouko v Kenya*⁷⁵, where the Complainant was detained for ten (10) months without trial. The same position was held in *Free Legal Assistance Group and Others v. Zaire*⁷⁶, where the Commission held that a detention for an indefinite period of time was in violation of Article 6 of the African Charter. Furthermore, the UN Human Rights Committee has also held a similar position in *Chambala v. Zambia*⁷⁷, where it considered as arbitrary, a detention for a period of twenty-two (22) months without any grounds of detention.

171. In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*⁷⁸, the Commission held that where individuals have been detained without charges being brought against them, constitutes an arbitrary deprivation of their liberty and thus a violation of Article 6 of the African Charter. The European Court of Human Rights has also considered that the unacknowledged detention of an individual constitutes a total negation of the fundamental guarantees enshrined in Article 5 of the Convention and an extremely serious violation of this provision⁷⁹. Moreover, failure to record information such as the date and time of arrest, the place of detention and the reasons for detention must be deemed incompatible, inter alia, with the very purpose of Article 5 of the Convention⁸⁰, as well as with the requirement that detention be lawful within the meaning of the Convention⁸¹.

172. In line with the above reasoning, it is the Commission's view that arresting the Victim without giving him any reasons for his arrest and detaining him for a period of 23 months without charge, constitutes arbitrary arrest and detention in contravention to the above-mentioned standards and principles laid down by the Commission, and thus, in violation of Article 6 of the African Charter.

Alleged Violation of Article 7

⁷⁵ Communication 232/99 -Ouko v. Kenya, para 20-21

⁷⁶ Communication 25/89,47/90,56/91,100/93- Free Legal Assistance Group and Others v. Zaire, para 42

⁷⁷ Communication 865/1999, ARLHR 27(2003) (HRC 2003) Para 7.2

⁷⁸ Ibid 42

⁷⁹ El-Masri v. the former Yugoslav Republic of Macedonia [GC], 2012, § 233; Al Nashiri v. Poland, 2014, § 529; Belozorov v. Russia and Ukraine, 2015, § 113

⁸⁰ Kurt v. Turkey, § 125

⁸¹ Anguelova v. Bulgaria, 2002, § 154



173. Article 7 of the African Charter guarantees for everyone the right to have his/her cause heard. This includes the right to:

1.

(a) *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;*

(b) *The right to be presumed innocent until proved guilty by a competent court or tribunal;*

(c) *The right to defence, including the right to be defended by Counsel of his choice;*

(d) *The right to be tried within a reasonable time by an impartial court or tribunal."*

174. The Commission notes the submission of the Complainants that the Victim was denied the right to be brought promptly before a judicial authority to have his cause heard and to challenge his detention by way of a *habeas corpus* application. The Commission further notes the submission of the Complainants that during the arbitrary detention of the Victim, he was denied his right to legal representation; consular assistance; and to contact his family⁸².

175. Pursuant to the right of the Victim under Article 7 of the African Charter, the Commission will assess the argument of the Complainants that the Victim was detained for 23 months without being brought promptly before a judicial authority and have his cause heard.

176. The Commission has established in the Luanda Guidelines that "*all persons in police custody and pre-trial detention shall have the right, either personally or through their representative, to take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed*"⁸³. In its Principles and Guidelines on Fair Trial and the Robben Island Guidelines, the Commission also established that "*States should ensure all persons*

⁸² See Annex 2 containing the affidavit of the Applicant. Also See "Uganda Investigate Kalinga Torture Claims" New Times (7 August 2007) (originally reported in "Uganda: Kidnapped Rwanda Rots in Uganda Jail", New Times (26 April 2007)). The Uganda Minister of Internal Affairs, Maj. Felix Kulayigye was also reported to have stated that: "*I am not aware of the matter but I can assure you we are going to investigate it and whoever is responsible will face the consequences. We as government cannot let someone be tortured and be incommunicado for all that long. For sure that is not our policy. Probably he could have had a problem with the security person but we are going to find out*".

⁸³ Principle 35 of Guidelines on Arrest, Policy Custody and Pre-Trial Detention (Luanda Guidelines)



deprived of their liberty are brought promptly before a judicial authority"⁸⁴. The same principle was held in *Abdel Hadi & Others v Republic of Sudan* and in *Huri-Laws v. Nigeria*, where the Commission found that the "refusal and/or negligence" of the respondent state to bring the applicant "promptly before a judge or other judicial officer for trial" constituted a violation of Article 7 (1) (d) of the African Charter.

177. While courts and international human rights bodies have determined the meaning of 'promptness' based on the facts and circumstances of the individual case, they have set clear upper time limits. General Comment No. 8 of the UN Human Rights Committee on Article 9 of the International Covenant on Civil and Political Rights sets out that, "[m]ore precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days"⁸⁵. The Commission in the same spirit has held in *Annette Pagnouille v. Cameroon*⁸⁶, that two (2) years without any hearing or projected trial date, constitutes a violation of article 7 (1)(d) of the African Charter.

178. Additionally, the Commission notes that the Constitution of Uganda⁸⁷ establishes that "*a person arrested or detained ... upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible but in any case, not later than 48 hours from the time of his or her arrest*"⁸⁸.

179. The Commission is therefore of the view that, the length of detention of the Victim of 23 months in custody without charges being filed and not brought before a judicial authority⁸⁹, not only constitutes an undue delay in contravention to the guarantees laid by the Commission and international standards, but also exceeds the prescribed duration underlined in the Constitution of Uganda⁹⁰.

⁸⁴ See M2 (a)(b) and 3 (A) of the Principles and Guidelines on Fair Trial & Article 25, 26 & 27 of the Robben Island Guidelines

⁸⁵ UN Human Rights Committee, "General Comment No.8 Right to Liberty and Security of Persons (30 June 1982) at para 2

⁸⁶ Communication 39/90, *Annette Pagnouille* (on behalf of Abdoulaye Mezou) v Cameroon

⁸⁸ Constitution of the Republic of Uganda 1995, Chapter 4, para 23(4)(b).

⁸⁹ See 2 & Annex 3- Sworn Affidavit of the Victim and 9th Annual Report to the Parliament of the Uganda Human Rights Commission (page 31-32) containing a scanned copy of the Makindye Military Barracks 'violent Crime Unit Register containing the Victim's name, date of arrest but no charge against him.

⁹⁰ Section 79(3) of the Sudanese Criminal Procedure Act 1991



180. Turning to the argument of the Complainants that the Victim was denied the right to challenge his detention by way of a *habeas corpus* application before a judicial authority and the right to have his detention reviewed on a periodic basis by a court of law or other appropriate judicial authority, the Commission in the spirit to guarantee expeditious access to justice for persons in detention, would like to refer to its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which provides that *"judicial bodies shall at all times hear and act upon petitions for habeas corpus...or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus..."*⁹¹

181. The Commission therefore finds that the detention of the Victim for 23 months without being brought promptly before a judicial authority and have his cause heard and the denial of his right to challenge his detention by way of a *habeas corpus* application before a judicial authority, is a violation of article 7(1)(d) of the African Charter.

182. Regarding the Complainants submission that the Victim was denied contact with a lawyer, consular assistance and his family, the Commission refers to the Luanda Guidelines and Principles and Guidelines on Fair Trial which states that *"all persons under arrest shall have the right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions including the right of all persons arrested to contact and access a family member or another person of their choice, and if relevant consular authorities or embassy"*⁹².

183. Similarly, the UN Basic Human Rights reference Guide on Right to a Fair Trail and Due Process in the context of Countering Terrorism provides that *all persons have the right to representation by component and independent legal counsel of their choosing or to self-representation at all stages of the proceedings, and to the right to adequate time and facilities to prepare his or her case*⁹³.

184. Turning to its jurisprudence, the Commission recalls its decision in *Malawi African Association and Others v. Mauritania*⁹⁴ and in *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chinua), Amnesty International (on behalf of Orton and Vera Chinua) v Malawi*

⁹¹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa principle 5 (e).

⁹² Principle 4(d), (f) of the Guidelines on Arrest, Policy Custody and Pre-Trial Detention and Principle N2(a) and M(2)(e) of the Principles and Guidelines on Right o Fair Trial;

⁹³ Article 8 and 9 of the UN Basic Human Rights reference Guide on Right to a Fair Trail and Due Process in the context of Countering Terrorism.

⁹⁴ Communications No 54/91,61/91,98/93,164-196/97, 210/98 - *Malawi African Association and Others v. Mauritania*



⁹⁵ in which it held that where the accused either had no access or only restricted or delayed access to a lawyer, the Respondent State violated article 7(1) (c) of the African Charter. This is also the position of the European Court of Human Rights, which held that the right of every accused person to be effectively defended by a lawyer is one of the fundamental elements of a fair trial: "Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, offers essential protection against the coercion and ill-treatment to which they may be subjected by the police, and contributes to the prevention of miscarriages of justice and to the achievement of the aims pursued by Article 6, in particular equality of arms between the accused and the investigating or prosecuting authorities⁹⁶".

185. In line with the its above, the Commission finds that the denial of the Victim to have access to a lawyer and his family, violates Article 7(1)(c) of the African Charter.

186. The Commission therefore holds that the Respondent State violated Article 7(1) (c) and ((d) of the African Charter.

Alleged Violation of Article 1

187. Article 1 of the African Charter provides that:

'The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'

188. The Complainants submit that the failure of the Respondent State to conduct a prompt, independent, effective and thorough investigation into the Victim's treatment as well as, to provide adequate and effective remedy and reparation for the violations the Victim has suffered, violates Article 1 of the African Charter, in conjunction with Articles 5, 6 and 7 of the African Charter. The Complainants further submit that the Victim does not have access to judicial remedies in the Respondent State which he could pursue, thus, the Respondent State has failed to meet its obligations under

⁹⁵ Communication 64/92-68/92-78/92 Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chinua), Amnesty International (on behalf of Orton and Vera Chinua) v Malawi



Article 1 of the African Charter, read in conjunction with Articles 5, 6 and 7 of the African Charter.

189. The Commission held in *Abdel Hadi, Ali Radi & Others v Republic of Sudan*⁹⁷ that "if a State Party fails to respect, protect, promote or fulfil any of the rights guaranteed in the African Charter, this constitutes a violation of Article 1 of the African Charter." The African Court on Human and Peoples' Rights also reached the same conclusion in the *Thomas v. Tanzania* where it held that the obligation under Article 1 of the African Charter is not complied with or is violated when any of the rights, duties or freedoms set out in the African Charter have been restricted, violated or not applied.

190. The Commission therefore finds that the failure of the Respondent State to protect the Victim from being subjected to torture and other ill-treatments; as well as the failure to respect the Victim's right to liberty, access to justice and medical care, is in violation of Article 1 of the African Charter.

191. This is in line with practice of the Commission in which it held in several Communications that the violation of any of the provisions of the African Charter automatically means a violation Article 1 of the African Charter. In light of the above and having found that the Respondent State in this Communication violated Articles 5, 6 and 7 of the African Charter, the Commission finds that the Respondent State has violated Article 1 of the African Charter.

192. In view of the above reasoning, the Commission:

- i. Finds the Respondent State is in violation of Articles 1, 5, 6 and 7 (1)(c) and (d) of the African Charter;
- ii. Requests the Respondent State to:
 - (a) conduct prompt, independent and impartial investigations into the allegations of unlawful detention, torture and inhumane, degrading treatment/punishment of the Victim and to prosecute and punish all the perpetrators;
 - (b) pay adequate compensation to the Victim in accordance with the domestic law of the Respondent State, for the prejudices suffered including loss of earnings, medical expenses, physical and psychological torture, in relation to the violations found;

⁹⁷ Communication 368/09- Abdel Hadi, Ali Radi & Others v Republic of Sudan



- (c) to apologize to the Victim as an acknowledgement of violation of his rights, and ensure non-repetition of the actions and/or omissions;
- (d) adopt and implement procedural safeguards for the prevention of torture and other forms of ill-treatment as required under the Robben Island Guidelines;
- (e) train Security Officers on relevant standards concerning adherence to custodial safeguards and the prohibition of torture; and
- (f) inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure (2010), within one hundred and eighty days (180) of the notification of the present decision of the measures taken to implement the present decision.

Done at the 78th Ordinary Session, held virtually, from 23 February to 8 March 2024

